

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0896-R

*Reversed
Disqualification*

PROCEDURAL HISTORY: On April 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with good cause (decision # 85825). The employer filed a timely request for hearing. On April 29, 2014, ALJ Vincent conducted a hearing, and on May 2, 2014, issued Hearing Decision 14-UI-16741, affirming the administrative decision. On May 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB). On June 6, 2014, EAB issued Appeals Board Decision 2014-EAB-0896, reversing Hearing Decision 14-UI-16741, and remanding the matter back to the Office of Administrative Hearings (OAH) for incomplete record. On June 23, 2014, OAH provided EAB with a complete record.

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Azure Standard employed claimant from May 1, 2013 to January 21, 2014, last as a freezer invoice puller.

(2) Claimant and other employees worked Monday through Friday, from 6 a.m. until the "run" of orders was completed. The length of the employees' shifts averaged 8 to 14 hours.

(3) Claimant was paid every two weeks. From the pay period ending on May 25, 2013 through the pay period ending on January 18, 2014, claimant worked an average of 107.25 hours per pay period, and an average 53.62 hours per week. During this period, claimant worked overtime hours every pay period. The most overtime hours claimant worked were 55.73 (for the pay period ending June 22, 2013); the

fewest overtime hours claimant worked were 13 (for the pay period ending December 7, 2013). (Audio at 29:57 to 32:39).

(4) The distance between claimant's home in Goldendale, Washington and his workplace in Morrow, Oregon was approximately 50 miles; it took claimant approximately one hour and 15 minutes to one and one-half hours to travel this distance. Claimant found the drive very tiring after he had worked a long shift. On December 13, 2013, claimant began work at 6 a.m. and ended his shift at approximately 1 a.m. on December 14, 2013. On his drive home, claimant fell asleep and ran his car into the side of a guard rail.

(5) Soon after his accident, claimant spoke to the warehouse manager and expressed concern about the number of hours he and other employees were required to work. The warehouse manager told claimant he was doing the best he could in regard to employees' work assignments.

(6) On January 21, 2014, claimant quit his job because of the long hours he was required to work and his lengthy commute to work. Claimant believed he was not getting enough sleep, was not eating properly, and also believed that he posed a hazard on the road when he drove home after a long and tiring shift.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

The ALJ found that

The claimant left work for the employer because the employer required him to work hours that did not allow him to commute safely to and from his residence. While the employer had continued work available to him, the claimant did not feel comfortable continuing to commute for up to 90 minutes after receiving as little as 3 hours of sleep between shifts.

The ALJ concluded that "[a] reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave their work when the commute to the workplace and hours of work conflicted in such a way as to make traveling to work unsafe," and further concluded that claimant had no reasonable alternative but to quit his job. We disagree.

In regard to his work hours, claimant asserted that he regularly worked Monday through Thursday, from 6 a.m. to 10 p.m., and on Friday, worked from 6 a.m. until the "run" of orders was completed. The

employer's warehouse manager, however, testified that employees worked from 6 a.m. until the "run" was completed, and the length of the shift averaged 8 to 14 hours. The evidence regarding the length of the shifts claimant was required to work and the frequency of lengthy shifts was, at best, equally balanced. Claimant therefore failed to show by a preponderance of evidence that the employer regularly required him to work excessively long hours.

The evidence regarding one lengthy shift claimant worked was uncontroverted, however. On December 13 and 14, 2013, claimant worked for 19 hours and was so tired from the long shift that he fell asleep on his drive home and had an accident. Assuming that this incident constituted a grave situation, claimant failed to establish that he pursued the reasonable alternative of asking that his work hours be reduced. Claimant testified that he repeatedly asked the employer's warehouse manager to reduce his hours, and that the manager never responded to his request. The employer's warehouse manager testified that claimant spoke to him once in December 2013 about work hours. According to the manager, claimant expressed only a general concern about all employees' work hours during this conversation and never asked that his (claimant's) hours be reduced. Because the evidence on this issue is equally balanced, claimant has failed to prove by a preponderance of evidence that he sought a reduction in work hours and that the employer never responded to his request.

Claimant failed to prove, by a preponderance of evidence, that his long work hours constituted a situation so grave that a reasonable and prudent person, of normal sensitivity, was left with no alternative other than leaving work. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-16741 is set aside, as outlined above.

Susan Rossiter and J.S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: July 16, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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