

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0952

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work for good cause (decision # 142955). The employer filed a timely request for hearing. On May 28, 2014, ALJ Murdock conducted a hearing, and on May 30, 2014 issued Hearing Decision 14-UI-18710, reversing the Department's decision. On June 3, 2014, both claimant and the Department filed separate applications for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that offered new details about the financial reasons that motivated claimant's spouse to take a new job. Claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the new information at the hearing as required under OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information but only the information received into evidence when reaching this decision. The Department submitted a written argument and EAB considered it when reaching this decision.

FINDINGS OF FACT: (1) The Berry Company, LLC employed claimant as an inside phone sales representative from October 21, 2013 until February 26, 2014.

(2) The employer's workplace was located in Honolulu, Hawaii on the island of Oahu. During claimant's employment, claimant and her wife lived together in Honolulu. The cost of living was high in Honolulu and claimant and her wife had financial difficulties meeting their living expenses on their joint incomes. Sometime before February 17, 2014, claimant's wife accepted a better paying job on a ranch located in a remote area of the Hawaiian island of Maui, where the cost of living was significantly lower than on Oahu. Claimant's wife agreed to start her new job on March 4, 2014. Because the island of

Maui is located approximately 116 miles from the island of Oahu,¹ and traversing the distance between the two islands requires ocean travel or air travel, it was not feasible for claimant's wife to commute to her new job from Oahu or for claimant to commute from Maui to the employer's workplace in Oahu. Claimant and her wife decided for financial reasons to move together to the island of Maui.

(3) The employer did not have a business location in Maui. On February 17, 2014, claimant notified her supervisor that she was quitting work on February 26, 2014 to relocate to Maui with her wife. When claimant informed her supervisor, the supervisor offered to allow her to work remotely from Maui as an independent contractor for the employer. Claimant initially agreed to this arrangement and signed a contract to start work as an independent contractor effective March 5, 2014. The employer would not allow claimant to continue to work for it as an employee after she moved to Maui because she could no longer physically report to the employer's workplace on Oahu. Audio at ~11:55.

(4) Effective February 26, 2014, the employer entered in its records that claimant had ceased being classified as an employee and, on that day, claimant quit work as an employee. Shortly thereafter, claimant and her wife moved to Maui and arranged for housing on or near the remotely located ranch where the wife was going to work. On March 4, 2014, claimant's wife started her new job on Maui. Although claimant tried to work for the employer as an independent contractor from Maui, the lack of landline phone services, cable service and cell phone service at her new residence on Maui prevented her from doing so. On approximately April 8, 2014, claimant terminated her independent contractor agreement with the employer.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she 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). Leaving work with good cause includes leaving work for compelling family reasons. OAR 471-030-0038(5)(g). "Compelling family reasons" includes leaving work to accompany a spouse or domestic partner to a place from which it is impractical for a claimant to commute to work when the spouse's need to relocate is due to a change in the location of the spouse's or domestic partner's employment. OAR 471-030-0038(1)(e)(C).

In Hearing Decision 14-UI-18710, the ALJ concluded that claimant did not show good cause for leaving work and was disqualified from benefits. The ALJ reasoned that claimant's decision to accompany her wife to Maui was a "personal choice and not a grave situation." Hearing Decision 14-UI-18710 at 2. The ALJ further reasoned that claimant did not leave work for compelling family reasons and OAR 471-030-0038(5)(g) was inapplicable to supply good cause because "the [need for claimant's] relocation was

¹ See <https://www.google.com/#q=distance+between+maui+and+oahu>. We take notice of this generally cognizable fact found in a reliable reference source. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

for a new job that claimant's spouse could choose to accept or not accept, and not for the continuation of the job her spouse held in Oahu." Hearing Decision 14-UI-18710 at 2-3. We disagree.

It was not disputed at hearing that the person claimant called her "wife" was her same-sex spouse. Nor was it disputed that claimant's wife had accepted a new job in Maui, that claimant left work to accompany her wife to Maui and that it was impracticable for claimant to commute to the employer's workplace in Oahu after moving to Maui. The principal issue on review is whether the ALJ correctly interpreted OAR 471-030-0038(1)(e)(C) to require that, before a spouse's relocation is a compelling family reason, that relocation (and a claimant's need to move) must be in the context of a continuation of the employment that the spouse held immediately prior to the relocation. Nothing in the plain language of OAR 471-030-0038(1)(e)(C) requires this result. That regulatory provision requires only that a claimant's relocation must be "due to a change in location of the spouse's or domestic partner's employment," and it is not qualified by any requirement that the spouse's change in employment location must be to continue the spouse's prior employment and not as a result of a change in where the spouse works. In view of the otherwise clear language of the regulation, the ALJ should not have interpreted it to engraft the exception that she did. On the undisputed facts in the record, claimant demonstrated, more likely than not, that she was required to move to accompany her spouse to a new location for purposes of the spouse's employment, and it was impractical for claimant to commute to work from the new location. Claimant showed good cause for leaving work under the plain language of OAR 471-030-0038(1)(e)(C) and OAR 471-030-0038(5)(g).

The employer argued at hearing that, regardless of claimant's reasons for moving to Maui, she should be denied benefits because the employer tried to preserve a work relationship by offering claimant an agreement to work as an independent contractor. Audio at ~11:48. Although we do not disbelieve the employer's intentions, the fact remains that the employer processed a work separation for claimant on February 26, 2014, claimant stopped working at the Oahu workplace on February 26, 2014 and thereafter the employer did not consider claimant an employee but an independent contractor. Audio at ~11:55, ~12:26. Since claimant was obviously separated from employment in the capacity as an employee on February 26, 2014, it was proper for the ALJ to adjudicate the circumstances of that separation.

Claimant demonstrated good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-18710 is set aside, as outlined above.

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

DATE of Service: July 14, 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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