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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

# EMPLOYMENT APPEALS BOARD DECISION

**2014-EAB-1716**

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On September 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 111554). Claimant filed a timely request for hearing. On October 15, 2014, ALJ Lohr conducted a hearing, and on October 16, 2014 issued Hearing Decision 14-UI-27003, affirming the Department's decision. On October 31, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on information in the hearing record.

**FINDINGS OF FACT:** (1) Portland General Electric employed claimant as a customer service representative in its contact center from July 11, 2011 until August 25, 2014.

(2) Claimant and her husband both worked. In approximately July 2013, claimant gave birth to a son. When claimant returned to work after maternity leave, she worked four days a week from 8:00 a.m. until 7:00 p.m. In approximately March 2014, claimant's husband started a new job and would be a probationary employee for the first six months. Initially, claimant's husband reliably worked at his new job from 5:30 a.m. until 5:30 p.m. At this time, claimant's sister provided child care for claimant's son. Claimant's husband was able to pick up the son at claimant's sister's house after he was off work, at approximately 5:45 p.m.

(3) Beginning sometime after March 2014, claimant's husband began to be scheduled for overtime work later than 5:30 p.m. By approximately July 2014, claimant's husband sometimes worked later than 8:00 p.m. and claimant was required to pick up the son at her sister's house after her shift was over. Because of the commute between the workplace and claimant's sister's house, claimant generally could not reach the sister's house earlier than 8:00 p.m. Claimant's husband was not notified that he needed to work overtime until the day of the required overtime or the day before. Initially, claimant's sister was willing

to provide care for the son on an ad hoc basis until the 8:00 p.m. time that claimant could pick up the son, if the work schedules of claimant and her husband required it.

(4) In approximately that middle of July 2014, claimant's sister notified claimant and her husband that she was not longer able to provide care for the son any later than 5:45 p.m. A short time later, claimant's sister told claimant she was going to stop providing any later child care for claimant's son "toward the end of August." Audio at ~ 10:00. Claimant tried to locate another daycare provider who was willing to care for her son after 5:45 p.m. and until as late as 8:00 p.m. Claimant contacted the daycare providers in her geographic area. All of them, except one, either had no room for an additional child or were unwilling to accommodate a child as young as claimant's son or were unwilling to provide that care for the length of time that claimant needed. Claimant did locate a child care provider in the neighboring town of St. Helens who was willing to provide care a child of her son's age, but the provider did not stay open after 6:00 p.m., which was not significantly later than the 5:45 p.m. that claimant's sister was willing to provide care. Because claimant was unable to arrange alternate care for her son when her husband was required to work overtime, claimant needed to stay at home from work to on some days to care for her son. As a result of claimant's lack of notice to the employer, claimant accrued unscheduled absences under the employer's attendance policy when she called in to report those absences. Under the attendance policy, disciplinary action would start when claimant accrued seven unscheduled absences, and if the unscheduled absences continued they would ultimately result in claimant's discharge.

(5) After the middle of July 2014, claimant spoke twice to her supervisor about her inability to locate childcare for her son that met the requirements of her own and her husband's work schedules. Claimant expressed concern about continuing to violate the employer's attendance policy and the disciplinary repercussions. The supervisor advised claimant that there were at that time no regular full-time positions at the contact center with shifts that ended earlier in the day and into which she might transfer because the employer was not holding "shift-bids" during summer 2014. Audio at ~14:19, ~23:56. The supervisor told claimant that she could work a "heartbeat shift," in which shifts were variable but, if claimant did not notify the employer of her scheduling needs at least two weeks in advance, her schedule was likely to include shifts ending later than 5:45 p.m. Claimant did not consider changing to the "heartbeat schedule" because that schedule would sometimes require her to work later than met her childcare needs and she was unable to give advance notice of the days when could not work later than 5:45 p.m. The supervisor also discussed with claimant that possibility of changing to part-time work, but told claimant that 20 hours was all that was available at that time for part-time work and, on a part-time schedule, claimant would be required to work five days per week rather than the four that she was currently working. Claimant examined the finances of working part-time for 20 hours per week. Claimant determined that, given the time it took her to commute from work to her son's day care provider, even if she worked only 4 hours per day, the time her son spent in day care would exceed the threshold time for a full day of daycare (the same rate she was being charged) and she would be required to have her son in daycare an additional day per week. Claimant determined that the costs she would incur in childcare and commuting would likely equal or exceed the income she earned from working part-time. Audio at ~15:51.

(6) As of early August 2014, claimant's husband was continuing to work overtime erratic overtime schedules without notice and his overtime was increasing. Claimant had not been able to locate a daycare provider who could provide care for her son later than 6:00 p.m. Claimant had already accrued four unscheduled absences under the employer's attendance policy because her husband was working

overtime and she needed to care for her son. Claimant thought that she had exhausted the feasible options for making an appropriate change in her schedule with the employer. On August 11, 2014, claimant gave the employer notice that she was resigning from work effective August 25, 2014. Claimant informed the employer that she was quitting because she was not able to make child care arrangements that met the needs of her work schedule.

(7) On August 25, 2014, claimant voluntarily left work.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with 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 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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-27003, the ALJ concluded that claimant was disqualified from benefits because she did not show good cause for leaving work when she did. The ALJ reasoned that claimant did not show that her husband's "random overtime was mandatory" and did not show that she "made a concerted effort to arrange for back up childcare that would allow her to work her scheduled shift." Hearing Decision 14-UI-27003. We disagree.

At the outset, it appears that the ALJ accepted claimant's testimony, with which the employer's witness agreed, that claimant exhausted all reasonable options with the employer to change her schedule to accommodate her childcare needs after her sister stopped providing care later than 5:45 p.m. Audio at ~14:59, ~15:51~21:57, ~22:47, ~23:52, ~26:00. We agree. We also agree with the ALJ's further implicit conclusion that claimant's childcare situation was a grave circumstance if she reasonably was unable to arrange care for her son that met the needs of her work schedule. The extent to which the ALJ intended to base her decision on claimant's failure to show that her husband's overtime work was mandatory is not completely clear to us. However, to the extent that the ALJ rested her decision on this ground, we disagree. We infer that, since claimant's testimony was that her husband was still a probationary employee at his new job, it was reasonable for claimant to think he would jeopardize that new employment if he declined to work the overtime hours he was assigned. Audio at ~6:36. Given claimant's sustained efforts to work out a scheduling resolution with the employer, it also appears unreasonable to us to conclude out of hand that claimant did not reasonably explore with her husband the option of his avoiding the overtime that his employer assigned to him before rejecting it as unfeasible. In addition, we are reluctant to conclude that the circumstances of some person other than the specific claimant in a particular case should control its outcome. It appears most appropriate in this case to assess the gravity of claimant's need for childcare based on claimant's particular work schedule without regard to that of her husband or whether it was mandatory.

The ALJ's conclusion that claimant did not demonstrate that she made reasonable efforts to arrange for a childcare that was open until she could pick up her son after her shift is against the weight of the evidence in the record. Claimant's testimony that she "scrambled" to find a provider that would care for her son was unrebutted. Audio at ~8:00, ~10:08. Claimant described in some detail exhaustive efforts in searching for a daycare provider in her geographic area who had room for her son, was willing to take a child as young as her son and stayed open late enough that she was able to pick up her son after her commute from the workplace. Audio at ~13:30. We cannot conclude that it was unreasonable for claimant to have limited her search for daycare providers to the geographic area surrounding her home since, although the workplace was some distance away, her husband worked near her home and a nearby daycare provider would have reduced the travel time for her son. While it appears that claimant's other sister informed claimant sometime in September 2014 that she had become available to provide care for claimant's son after 5:45 p.m., it was unrebutted that claimant was not aware of that sister's availability until after she had already quit work, and therefore that sister was not a feasible daycare option at the time claimant left work. Audio at ~13:00. Viewed in sum, the preponderance of the evidence shows that claimant faced a grave situation when she learned that her daycare provider was not willing to provide care for her son between 5:45 p.m. and 8:00 p.m., claimant made every reasonable effort to change her work schedule to accommodate her day care needs and, when she could not, claimant made extensive efforts to locate a daycare provider who was willing care for her son until she could pick him up after work. On the facts in this record, claimant showed that she reasonably determined that further efforts to locate a childcare provider with an appropriate schedule were futile before deciding to quit work. In claimant's situation, a reasonable and prudent employee, exercising ordinary common sense, would have concluded that she needed to leave work to provide care for her young son.

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

**DECISION:** Hearing Decision 14-UI-27003 is set aside, as outlined above.

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

**DATE of Service: <u>December 17, 2014</u>**

**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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