

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1795

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 73731). The employer filed a timely request for hearing. On October 23, 2014, ALJ Hoyer conducted a hearing, and on November 4, 2014 issued Hearing Decision 14-UI-28175, reversing the Department's decision. On November 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that, in part, attempted to introduce new information about her qualifications and fitness for a sales representative job, apparently to show that it was not feasible for her to have sought that position as an alternative to leaving her job as center manager. Hearing Decision 14-UI-28175 at 5. Claimant's argued that her failure to introduce this new information at hearing was a result of the ALJ's failure to inquire about it directly. Claimant's Written Argument at 1, 6. However, at hearing, the ALJ asked claimant several questions about the possibility that she could have taken a demoted position with the employer in preference to quitting, and, although claimant mentioned a sales representative job in response, she did not bring up or even suggest that she lacked the qualifications for that position in her direct testimony or in rebuttal to the employer's testimony that claimant would have been considered for that position. Transcript at 39-41, 51, 64. Because claimant reasonably should have understood that her responses to ALJ's questions and the employer's testimony were expected to include all relevant information that prevented her from seeking a different position with the employer, claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that new information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision. *See* OAR 657.275(2).

Claimant's written argument also presented several equitable reasons why she should not be disqualified from benefits based on the employer's alleged misrepresentations to her about the requirements of the position for which she was hired. Claimant's Written Argument at 1, 2, 6. However, the issue before

EAB in a case involving a voluntary leaving is whether such alleged misrepresentations gave rise to grave circumstances that compelled claimant to quit and not merely whether the employer was or was not completely transparent during its interview process. In other words, to avoid a disqualification from benefits, beyond demonstrating that the employer made false statements to her, claimant must show in addition that those statements, or some other aspects of the employment relationship, resulted in an objectively grave situation for which claimant had no reasonable alternative other than to leave work.

FINDINGS OF FACT: (1) Lincare, Inc. employed claimant as a center manager from March 4, 2014 until August 8, 2014. The employer provided durable medical equipment to patients in the homes, including oxygen, breathing apparatuses, breathing medicines, hospital beds, wheelchairs and walkers.

(2) As center manager, claimant was responsible for the day-to-day operations of the center, including hiring, firing, disciplining and supervising five staff members, directing the activities of that staff and handling their questions, controlling inventory, ensuring that sales goals were met, and dealing with various other management responsibilities. Claimant's activities in the center were not closely supervised on a day-to-day basis. Claimant reported to the employer's area manager, who visited the center approximately once every one to three weeks. The area manager reported to the employer's regional manager, with whom claimant was acquainted. The regional manager was not regularly at the center. As center manager, claimant earned approximately \$51,000 per year in salary and received, after taxes and retirement plan deductions, approximately \$3,000 per month. Transcript at 55.

(3) In claimant last employment before March 4, 2014, claimant was chief operating officer of an in-home health care company for four years. Claimant was experienced in the demands of health care management positions.

(4) Sometime before March 4, 2014, claimant interviewed with the employer's area manager for the position as manager of the employer's center in Salem, Oregon. Claimant understood that the center manager position was a salaried position, not an hourly position, and that her pay would be the same regardless of the number of hours that she worked. During claimant's pre-hiring interview, claimant told the area manager that she did not want to work hours as long hours as those had worked in her previous employment because those hours had "consumed [her] life." Transcript at 10. The area manager told claimant that the center had "smooth operations" and that he thought she would need to work "approximately 40 hours per week" or "basically 40 hours a week." Transcript at 8, 9. Despite the area manager's estimate, "having been [previously] in professional positions, [claimant] underst[ood] that certain weeks might require more [hours]" than forty. Transcript at 43. Claimant also understood the area manager to state to her that she would not be required to be on-call after hours to handle staff questions or patient or health care provider's questions that the staff was not able to answer. Transcript at 8, 9. Claimant accepted the position as center manager.

(5) Shortly after March 4, 2014, when claimant began working as center manager, she discovered that the previous manager had "poorly" managed the center." Transcript at 14. The center also had two or three open staff positions and a backlog of "held accounts," for which the center needed to gather additional information before a patient's bill could be submitted to an insurance carrier for payment. Principally as a result of these factors, claimant was required to work between 50 and 60 hours per week to manage the needs of the center. Transcript at 17. Claimant thought that the hours she was working were "excessive." Exhibit 1 at 1.

(6) Starting on March 4, 2014 and continuing throughout claimant's employment, claimant discovered that the center would contact her after work hours and on weekends to handle questions from the drivers delivering the durable medical equipment, other staff who were working, patients and health care providers. Claimant typically received approximately five such calls every day of the week. Transcript at 10, 13. Once, the area manager sent claimant an email on a Saturday inquiring about what she was working on that day. Exhibit 4 at 1. On some occasions, the area manager sent claimant and other managers "mass" text messages on weekends about sales or the activities of one of the employer's centers. Transcript at 13. Claimant thought that these after-hours contacts interfered with her family time.

(7) After March 4, 2014, claimant discovered that, when she sought reimbursement from the employer for business expenses she had incurred on a credit card issued in her name, the employer took approximately one and one half months to reimburse her, which was after she needed to pay the credit card bill to avoid late fees or negative impacts on her credit history. Claimant also believed that the employer's mileage reimbursement policy was unfair and did not fully compensate her for the costs of gasoline and wear and tear on her vehicle that she incurred when using her personal vehicle on business. Four times during her employment, the employer required claimant to travel to training sessions and stay out-of-town overnight. Claimant thought that the employer did not clearly disclose to her that she would be required to travel on business before she was hired.

(8) By approximately mid-May 2014, claimant had not yet arranged to hire new employees for the open positions at the center, which would relieve some of her workload and reduce her work hours. Claimant had asked the area manager to help her in hiring to obtain a full staff at the center, but he had not provided assistance to her. Transcript at 30. Claimant had also complained to the area manager that her hours were exceeding those she had understood she would be required to work. The area manager told claimant that "it'll get better" when she had more experience managing the center and asked her to "just stay the course." Transcript at 15.

(9) In approximately mid-May 2014, claimant attended a training seminar in Spokane, Washington that the regional manager was also attending. At that seminar, claimant approached the regional manager who was at that time in the presence of several other attendees. At that time, claimant mentioned to the regional manager that she thought the staff at the center should receive more training. Transcript at 34. Claimant also commented to the regional manager that she was having a "difficult time" in hiring new employees for the center's open positions and that she was feeling "overwhelmed" with the demands of her new position as center manager. Transcript at 34, 58, 63. Given the setting in which claimant made these comments, and the brevity of the encounter, the regional manager thought that claimant was expressing the insecurities of a new center manager who was just learning her position, and did not understand claimant to be making complaints about the job or about the area manager's responsiveness to her. Transcript at 63, 70. Claimant did not ever again communicate any concerns to the regional manager about her job and never communicated any concerns about the area manager. Transcript at 34, 58.

(10) Sometime during claimant's employment, claimant contacted the Oregon Bureau of Labor and Industries (BOLI) and asked a BOLI representative if she had any recourse for the long hours she was

working, and the fact that she was on-call during her off-hours. The BOLI representative told claimant that, since she was a salaried employee, there was no action that BOLI was willing to take on her behalf.

(11) Sometime before July 18, 2014, claimant learned that a manager for one of the employer's nearby centers had quit work and at least some of those manager's duties were going to be temporarily assigned to her until a new manager was hired for that center. Transcript at 18. At some later point, claimant learned that the area manager and the regional manager were jointly evaluating whether to hire a new manager for that center. Transcript at 64-65. Claimant became concerned that, unless a new manager was hired for that center, her workload would increase further because she had not yet managed to hire new employees for the open positions at her center.

(12) On July 18, 2014, claimant sent an email to the area manager informing him that she continued to feel "overwhelmed" by her workload, that he had not assisted her in hiring new employees for her center, that the employer's goals for her center were "not smart" and were contributing to her excessive workload, and she asked what he and the regional manager were doing to find a replacement manager for the nearby center. Transcript at 30. When she sent this email to the area manager, claimant was aware that he did not respond to emails "a lot of the time," and that his responses were often delayed. Transcript at 32.

(13) On July 21, 2014, claimant temporarily took over management responsibilities for the nearby center. Afterward, claimant needed to perform some duties for that center in addition to those for the center that she was hired to manage. Claimant believed that, even if a replacement manager for the nearby center were hired and she finally hired new employees for her center, her workload would not decrease and she would still be required to work 50 to 60 hours per week and at least one weekend day. Claimant based this belief on the fact that when she had mentioned to the person who had previously managed her center, whom she had replaced, that she was under the impression that her position was only going to require 40 hours of work per week, he "laughed and he said, yeah, well, you know [t]hat's just not really doable [and not] what we are expected to do." Transcript at 20.

(14) Based on claimant's work experience as a managerial employee before she began working for the employer, she was aware that if she had concerns with her workload, the conditions of her employment or with the area manager's responsiveness to her requests for assistance, and the area manager did not resolve those concerns, her appropriate course was to raise those concerns and attempt to resolve them with the area manager's supervisor, the regional manager. Transcript at 68. Aside from her conversation with the regional manager at the training in mid-May 2014, claimant did not raise any concerns with the regional manager. As center manager, claimant was aware of the functions of the employer's human resources department in resolving employee concerns and how to invoke the processes of that department. In the past, claimant had referred certain staff she managed to the employer's human resources department and was aware of an employee who had made a complaint to human resources before he or she decided to quit. Transcript at 69. At no time, did claimant raise any concerns about her workload, the conditions of her employment or the responsiveness of the area manager with the employer's human resources department. Transcript at 69. Although claimant was aware that the employer had certain positions which might require her to work lesser hours than the position as center manager, such as sales representative or customer service representative, claimant did not request a transfer into either of those positions before deciding to quit.

(15) On July 29, 2014, claimant sent an email to the area manager, with a copy to the regional secretary, stating that she was leaving work effective August 12, 2014. As her reasons for quitting, claimant's email cited the hours she was working and that she was on-call after work hours, the time lags between when she incurred work related expenses and when she was reimbursed for them, the temporary transfer to her of management duties for the nearby center, the area manager's failure to respond to her July 18, 2014 email, and the "negative impact on my personal life and incurred stress" caused by these factors. Exhibit 1 at 4-5.

(16) Sometime after July 29, 2014, claimant notified the employer that she was moving her last day up to August 8, 2014. On August 8, 2014, claimant voluntarily left work and did not return afterward return to the workplace.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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(3)(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.

Claimant raised a variety of reasons for her decision to quit work, most of them centering on the area manager's alleged misrepresentation to her about the hours that she was expected to work and his alleged misrepresentation that she was not going to need to be on-call after hours. It appears that claimant at least understood that she was a salaried employee, in a managerial position responsible for the day-to-day functioning of one of the employer's centers, and might, on occasion, be required to work more than forty hours per week. Transcript at 43. It is unlikely that the area manager unconditionally represented to claimant that she would *never* need to work more than forty hours per week when she was a center manager or that claimant reasonably understood the area manager to have made this commitment.¹ It is more plausible that the area manager stated his opinion to claimant that, when the center's operations were running smoothly, she might not need to work much time in excess of forty hours per week. In addition, it is unlikely that, given her responsibility for the center's operations and the nature of the medical equipment that the employer supplied for in-home patient use, claimant reasonably believed that she would not be contacted after her regular work hours if problems arose that the staff were unable to address or were beyond their expertise. *See* Transcript at 6, 11, 12. Claimant also contended that she left work because the manner in which the employer reimbursed her for various business-related expenses, and the timeliness with which it did so, were unfair and caused financial hardships to her.

¹ Claimant also raised her pay statement to support her position that the employer misrepresented her hours, since, although the statement clearly indicated that claimant was a salaried employee and her hours were "salaried hours," it listed eight hours of work per day when it detailed her work during the pay period. Transcript at 31; Exhibit 3. Such pay statements showing eight hours per day for salaried employees regardless of the hours actually worked are not uncommon, and it cannot reasonably be construed as a representation that claimant would never work more than forty hours per week without additional pay beyond her salary.

Transcript at 23, 24. The issues, for purposes of an analysis of whether claimant had good cause to leave work are whether the number of hours claimant worked each week in excess of forty, the approximately five after-hours calls per day that claimant received, and the financial burdens that claimant incurred as a result of the employer's reimbursement practices caused objectively grave harms to claimant for which she had no reasonable option other than to leave work.

With respect to the employer's reimbursement practices, claimant did not contend that she incurred any expenses for which the employer did not ultimately reimburse her. Aside from contending that it was inadequate, claimant did not present any evidence showing that the employer's mileage reimbursement policy for her use of her personal vehicle for business actually fell short of reimbursing her for her actual costs, and how much it did so. Although claimant testified that there was a time lag of approximately one and one-half months between when she incurred a non-mileage business expense and when she received reimbursement, aside from generally contending that this time lag placed a burden on her family's finances, she did not show why, if she was earning \$51,000 per year, she could not reasonably afford to wait a short period to receive reimbursement. Nor did she show why, after the first one and one-half month delay in reimbursement, the reimbursements she received from the prior time she submitted her expenses would not generally offset the expenses she was currently incurring and for which she had yet to receive reimbursement. Absent this or a similar showing, claimant did not meet her burden show that the employer's expense and mileage reimbursement policies were a grave reason to leave employment.

With respect to the employer's alleged misrepresentations of the hours that she was expected to work, claimant presented little evidence to show that the alleged misrepresentations caused grave circumstances. Although claimant stated that the allegedly excessive hours she was working were principally attributable to the past inefficient management of the center, the center's lack of a full staff and certain "held accounts," she agreed that she was involved in hiring replacement employees and did not show that the impacts of this circumstance, or those of the "held accounts" and the past inefficient management were other than temporary difficulties that would be rectified when she corrected those problems. Transcript at 17. Nor did claimant show that the transfer to her of some of the duties from the nearby center where the manager had quit were other than temporary until a new manager was hired for that center, and claimant stated that she knew at around the time she decided to quit that the area manager and the regional manager were discussing what to do about the management of that nearby center. Transcript at 64-65, *see also* Transcript at 18. While claimant asked the area manager in her July 18, 2014 email what steps he and the regional manager intended to take with the nearby center and he did not respond to her by the time she submitted her resignation on July 29, 2014, claimant noted that the area manager often failed to respond to emails. Transcript at 32. That the area manager did not respond to claimant's email as promptly as she might have liked does not demonstrate that he or the regional manager intended to assign the management duties of the nearby center to claimant for either an indefinite period or a lengthy period, or that those duties were going to place a grave burden on claimant. Claimant also contended that even if the circumstances giving rise to the number of hours she needed to work were temporary, once they were rectified she had concluded that the employer would continue to require her to work a similar period hours. As can best be determined from this record, claimant based this surmise principally on a brief statement and laughter from the person she had replaced as manager at the center in response to a statement that she had thought the job would require only forty hours per week, and the number of hours that the prior manager had worked to manage the center. Transcript at 20. Since claimant stated that the center had been poorly and inefficiently run by

that manager, his off-hand statement is, at best, problematic evidence of the time required to manage the center when its prior operational and staffing problems were corrected. Transcript at 14. Although claimant contended that certain statements she submitted from other center manager showed that the employer customarily required center managers to work in excess of forty hours per week, and was likely to require her to do so, she failed to show that, before she quit work, she was aware of the hours that the other center managers were working and that the alleged hours they were working even entered into her decision to leave work. Exhibit 7 at 1; Exhibit 7 at 1.

Assuming that the lengthy hours that claimant was working at the center were not temporary, claimant mentioned that the harms to her caused by the lengthy hours were that they "exhausted" her, disrupted her family life and made difficult to pick up her children after school until 6:00 p.m. or 6:30 p.m. Transcript at 24, 25. Claimant's desire to have uninterrupted time with her family and to ensure an appropriate schedule for her children was understandable. However, claimant did not show that she was not reasonably able to make arrangements to pick up her children at an earlier time, or have someone else do so, whether there was any after-school care available for the children, how often she had to pick up her children late from school, what alternatives she pursued to try to keep her job while avoiding having her children wait after school and what harms the children sustained from this circumstance. In addition, we note that there are often competing demands on managerial employees, like claimant, who are attempting to achieve a balance among professional demands and obligations, the needs of their families and self-care, including avoid fatigue. Without an additional showing of harm, however, there is no basis to conclude that some conflict among the spheres is, in and of itself, a sufficiently grave reason to leave work as a manager.

Even if claimant subjectively believed that her circumstances were grave, claimant did not take the steps of a reasonable and prudent person to objectively confirm that gravity and to determine that the employer would not take reasonable steps to eliminate it. While claimant contended that she raised all of her concerns with her supervisor, the area manager, and he did not resolve them, she agreed she was aware that her next step was to take her concerns to the regional manager for resolution. Transcript at 68. Although claimant asserted that she did so when she spoke with the regional manager at the training in Spokane, the context of her brief conversation with the regional manager and the substance of what she told him were not sufficient to demonstrate that she made him reasonably aware of the level of her concerns or that she was asking him to intervene and to correct the conditions of her employment. Notably, neither claimant nor the regional manager testified that she told him that she believed the hours she was required to work had been misrepresented to her and were excessive, that she was reasonably unable to continue to work those hours, that the area manager was not responsive to her requests for assistance or to alleviate her workload, that the situation had reached a grave level and that she was asking for his assistance to resolve the situation. Transcript at 33, 34, 43, 57, 58, 63. Based on the evidence in the record, claimant did not demonstrate that by this short conversation, the regional manager was put on notice of the seriousness of her concerns, or that his failure to act in response to that conversation demonstrated, more likely than not, that the employer did not intend to take any steps to alleviate those concerns. Nor did claimant raise her concerns with the employer's human resources department before deciding to quit, although she was aware of the functions of that department and had previously referred employees whom she supervised to that department when they had unresolved, employment-related concerns. Transcript at 67, 68. Although claimant contended in her written argument that the employer did not affirmatively suggest to her that she take this step, and the employer did not present any evidence that seeking assistance from the human resources department, or clearly

requesting assistance from the regional manager, would have changed her working circumstances and alleviated the perceived gravity of her situation, the burden of proof is on claimant and not the employer in a voluntarily leaving case. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000); Claimant's Written Argument at 3, 6. Where, as here, a reasonable and prudent person would have taken additional steps to resolve her work concerns, beyond requests to her immediate supervisor, before deciding to quit, the burden to on claimant to show, more likely than not and based on non-speculative evidence, that taking such steps would have been futile and would not have had any beneficial effects under the circumstances. Claimant did not present evidence that, based on what she knew when she decided to quit, such efforts would have been futile in resolving her concerns.

In her written argument, claimant contended that she should not be disqualified from benefits because her circumstances did not fall within any of the situations identified in OAR 471-030-0038(5)(b) as not constituting good cause for leaving work and that, by analogy, the facts of her situation most close align with OAR 471-030-0038(5)(e), which states that it may be good cause to leave work if a person's work hours have been reduced to the extent that the costs of continuing to work exceeds the amount of remuneration received. Claimant's Written Argument at 4, 5. That claimant's situation is not within the circumstances listed in OAR 471-030-0038(5)(e), does not mean that claimant's situation automatically constitutes good cause under OAR 471-030-0038(4). As well, OAR 471-030-0038(5)(e) is limited to the particular circumstance of a claimant leaving work because his or her work hours have been reduced, which is not directly applicable to claimant's situation. Moreover, although it may under certain circumstances be good cause to leave work when the costs of working exceed the remuneration received even when it is not occasioned by a reduction in work hours, claimant did not show that the actual costs she incurred in working were, in fact, greater than the salary that she received. Claimant's Written Argument at 5. While claimant's argument asserted that she did not receive pay for approximately one-third of the hours that she actually worked, it was not disputed at hearing that she was hired as a salaried employee who received the same pay regardless of the number of hours worked and that, for this reason, BOLI would not take action on her behalf. Claimant's Written Argument at 5; Transcript at 9, 31, 39. Even if claimant's understanding that, despite being a salaried, managerial employee, she would never be required to work more than forty hours per week was reasonable, she still did not demonstrate that, before leaving work, she took the steps of a reasonable and prudent person to resolve the gap between the hours for which she was paid and the hours she was required to work, by seeking redress from the area manager, the regional manager or the employer's human resources department.

Claimant did not show that, before she left work, she took the actions of a reasonable and prudent person, exercising ordinary common sense and who wanted to remain employed, to resolve her employment-related concerns with, at least, the regional manager and the employer's human resources department. Because claimant did not demonstrate that such actions would have been futile, claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-28175 is affirmed.

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

DATE of Service: January 12, 2015

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.