

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1937

Hearing Decision 14-UI-30024 Affirmed – Disqualification
Hearing Decision 14-UI-30033 Affirmed - Ineligible

PROCEDURAL HISTORY: On November 5, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding that claimant quit work without good cause (decision # 131640), the other concluding that claimant was not available for work from November 10, 2013 through January 4, 2014, February 23 through March 22, 2014 and April 13 through August 2, 2014 (decision # 130214). Claimant filed timely requests for hearings on both decisions. On December 2, 2014, ALJ R. Davis conducted separate hearings, and on December 8, 2014, issued Hearing Decisions 14-UI-30024, affirming decision # 131640, and 14-UI-30033, affirming decision # 130214. On December 22, 2014, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-30024 and 14-UI-30033. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-1937 and 2014-EAB-1938).

Claimant failed to certify that he provided a copy of his written 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 claimant's reasonable control prevented him from offering the information during the hearing, as required by OAR 471-041-0090. Accordingly, we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Allied Systems Co. employed claimant as a machinist from August 27, 2012 to December 17, 2013.

(2) At hire, claimant received an assurance from the employer's day shift foreman that claimant would first obtain necessary training on the employer's swing shift, from 2:30 p.m. to 11:00 p.m., and would then be assigned to work the employer's day shift, from 6:00 a.m. to 2:30 p.m. After working for five

months on the employer's swing shift, the foreman assigned claimant to the day shift where he remained until November 2013.

(3) On or about November 11, 2013, the machine claimant operated on the day shift broke down. A new foreman told claimant he was being assigned to operate an available machine on the swing shift until the broken down machine was repaired or replaced. Claimant refused to work on the swing shift because the original foreman had assured him he would remain on the day shift, and because of his "preference" to work days and belief that he was inefficient when working shifts other than days. Audio Record, December 2, 2014, 9:30 a.m. hearing ~ 9:00 to 10:30. The employer did not terminate claimant's employment based on his refusal because it valued his skill set and hoped he would eventually agree to work the swing shift until it could return him to the day shift. Claimant did not accept available swing shift work from November 11 through December 17, 2013; he quit on December 17 because he did not want to work swing shift.

(4) Claimant filed an initial claim for unemployment benefits on November 11, 2013. When claimant filed his initial claim, "he indicated [to the Department] he was not available to accept swing or night shift jobs." Transcript at 5. When questioned about that comment by a Department employee on November 21, 2013, claimant responded that he "would" accept swing or night shift jobs but "preferred" to work days. Transcript at 5. However, claimant did not disclose to the Department employee that he was refusing available swing shift work for the employer at that time. Transcript at 5. When he filed his weekly benefit claim for the week including December 17, claimant did not disclose to the Department that he quit his job that week; instead, he reported he had been terminated. Claimant claimed and was paid benefits for the weeks including November 10, 2013 through January 4, 2014, February 23 through March 22, 2014 and April 13 through August 2, 2014 (weeks 46-13 through 01-14, 09-14 through 12-14 and 16-14 through 31-14), the weeks at issue.

(5) During the weeks claimed, claimant sought work as a machinist. Claimant's labor market area was the Portland, Aloha and Hillsboro area. The customary days and hours for work as a machinist in claimant's labor market were Monday through Friday, day and swing shift.

(6) During the weeks at issue, claimant advised at least one staffing agency that he was only willing to work during the day. Transcript at 23-24. Claimant was not willing to accept work if a prospective employer only offered work during a shift other than day shift.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. Claimant was not available for work during the weeks at issue.

Voluntary Quit. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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.

Claimant quit work because he did not want to work during the employer's swing shift. When asked by the ALJ if there was any reason why he would not have been able to work during the swing shift, which claimant referred to as the "night shift", claimant responded, "It wasn't that I couldn't work night shift. It was my preference to work day shift." Audio Record, December 2, 2014 9:30 a.m. hearing ~ 9:00 to 10:15. Although claimant's refusal to work the swing shift may have been what he considered to be in his best interests, he failed to show that no reasonable and prudent person in his circumstances, interested in maintaining their employment despite a preference to work days, would have continued to work for the employer by accepting swing shift work, at least until the broken down machine had been repaired or replaced.

Claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

Availability for Work. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (January 8, 2006). Among those requirements are that the individual be willing to work full time, part time and accept temporary work opportunities during all of the usual hours and days of the week customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* Where, as here, the Department initially paid benefits to an individual, the Department bears the burden to establish by a preponderance of the evidence that the individual was not eligible to receive those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The Department met its burden of persuasion that claimant was not available for work. Claimant admitted that he quit his job with the employer during a week at issue because he was unwilling to accept available swing shift work. Moreover, claimant did not dispute that when he filed his initial claim, he told the Department he "was not available to accept swing or night shift jobs" and that when questioned about that comment by a Department employee on November 21, he responded by stating he "would" accept swing shift jobs if offered, despite refusing offered swing shift work with the employer during that week at issue. Consequently, claimant's assertion at hearing that he would have accepted swing shift work if it had been offered during the weeks at issue was not credible. Transcript at 19. More likely than not, claimant was not willing to accept swing shift work from prospective employers and his insistence on working days imposed a condition that substantially limited his opportunities to return to work at the earliest possible time.

Claimant was not available for work during the weeks in issue and is ineligible for benefits for the weeks including November 10, 2013 through January 4, 2014, February 23 through March 22, 2014 and April 13 through August 2, 2014 (weeks 46-13 through 01-14, 09-14 through 12-14 and 16-14 through 31-14).

DECISION: Hearing Decisions 14-UI-30024 and 14-UI-30033 are affirmed.

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

DATE of Service: February 6, 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.

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