

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1941

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 23, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75523). Claimant filed a timely request for hearing. On December 5, 2014, ALJ M. Davis conducted a hearing, and issued Hearing Decision 14-UI-29956, affirming the Department's decision. On December 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wildish Building Material Company employed claimant as a truck driver from June 1, 2009 until April 24, 2014. Claimant performed heavy haul truck driving for the employer's construction company.

(2) During the winter season, from approximately October through March, the employer's business was slow and claimant might work as few as 6 to 25 hours per week. From approximately April through September, the employer's busy summer season, claimant usually worked between 40 and 50 hours per week. Claimant earned a base or guaranteed wage of at least \$19.79 per hour.

(3) Sometime in early April 2014, claimant received an offer of truck driving work from MJ Asphalt. MJ offered to pay claimant a wage of \$22 per hour. MJ told claimant that he was going to be assigned between 10 and 25 hours of work per week when he began. The offer was not contingent on an acceptable background check or an acceptable drug test. Claimant expected the work with MJ to continue indefinitely. Claimant thought that the hours he worked for MJ might ultimately increase to between 40 and 60 hours per week. The job that MJ offered to claimant was scheduled to start on April 28, 2014.

(4) For the week ending April 4, 2014, claimant worked 42.5 hours for the employer and received gross pay of \$841. For the week ending April 11, 2014, claimant worked 16.5 hours for the employer and received gross pay of \$326. For the week ending April 18, 2014, claimant worked 20 hours for the

employer and received gross pay of \$395. For the week ending April 25, 2014, claimant worked 16 hours for the employer and received gross pay of \$316.

(5) Sometime in April 2014, claimant accepted the job offer from MJ. Sometime before April 24, 2014, claimant told the employer that he was resigning from work effective April 24, 2014.

(6) On April 24, 2014, claimant voluntarily left work to accept new work with MJ.

(7) Claimant's weekly benefit amount when he left work was \$538.<sup>1</sup>

**CONCLUSIONS AND REASONS:** 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). If a claimant leaves work to accept an offer of other work good cause exists only if, among other things, the offered work pays an amount at least equal to claimant's weekly benefit amount or an amount greater than the work that claimant left. OAR 471-030-0038(5)(a)(A)-(B) (August 3, 2011).

Although claimant initially contended that, at the time he left work, he was working on average approximately 6 to 25 hours per week for the employer, he ultimately agreed that the information supplied by the employer's witness about the hours of work he worked during his final month of employment was accurate. Audio at ~10:33, ~21:43. Based on the hourly wage that the employer paid to him and the average of the hours of work that the employer's witness provided for his last month of employment, claimant was receiving an average of \$469 per week when he left work. As to his anticipated pay from MJ, claimant was only able to provide the broad range of between 10 and 25 hours per week that he expected to work at the beginning of the new job. Audio at ~11:24. Because claimant did not, and perhaps could not, give a more precise estimate of his beginning hours, it appears most reasonable to take an average of the hours that he expected to work to determine his weekly pay from MJ. Using the average of 17.5 hours, claimant could reasonably expect to earn from MJ \$385 per week at the time he left his work with the employer. This amount is less than his weekly benefit amount of \$538 and less than the average of \$469 per week that he was earning from the employer at the time he left work. Alternatively, assuming the lowest estimate of claimant's expected work hours from MJ and the lowest weekly hours that claimant worked for the employer during his last month of employment, claimant would earn \$220 from MJ and \$316 from the employer. Adopting this approach, claimant's expected pay from MJ would still be less than what claimant received from the employer and less than his weekly benefit amount. Although it could be urged that we accept the highest of claimant's expected weekly work hours from MJ to compare against whether he would or would not earn more than from the employer or more than his weekly benefit amount, such an approach is unsound. It requires speculation beyond the evidence and the assumption that the scenario most favorable to claimant would actually be realized. Because the burden was on claimant to establish the existence of the facts needed to demonstrate good cause for leaving work, it is inappropriate to relieve claimant of that burden based

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<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party who 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.

only on conjecture and guesswork. On the available facts, most reasonable interpreted, claimant did not demonstrate, more likely than not, that the pay he would receive from MJ was greater than his weekly pay from the employer at the time he left work or equal to or greater than his weekly benefit amount. Accordingly, claimant did not show good cause for leaving work when he did.

Claimant did not have good cause for leaving work when he did. Claimant is disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 14-UI-29946 is affirmed.

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

**DATE of Service:** February 17, 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](http://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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