

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0123

Affirmed
Disqualification
Ineligible Weeks 47-14 through 51-14
Eligible Weeks 52-14 through 01-15

PROCEDURAL HISTORY: On December 16, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions, one concluding that claimant quit work without good cause (decision # 110927), and the other that she was not available for work from November 16 through December 13, 2014 (decision # 111456). Claimant filed timely requests for hearing. On January 16, 2015, ALJ M. Davis conducted hearings and issued Hearing Decision 15-UI-32008, affirming decision # 110927, and Hearing Decision 15-UI-32010, concluding that claimant was not available for work from November 16, 2014 through December 20, 2014, and available for work from December 21, 2014 through January 10, 2015. On February 2, 2015, claimant filed applications for review with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-32008 and 15-UI-32010. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0122 and 2015-EAB-0123).

In written argument, claimant asserted that at the hearing on her work separation, the employer offered two exhibits into the record, and that the ALJ excluded both exhibits, but then considered the second exhibit when reaching her decision. However, the record shows the employer offered one two-page exhibit into the hearing record, which the ALJ excluded, and did not consider when reaching her decision.¹ Nor did EAB consider the employer's exhibit. Claimant's remaining argument that she quit work with good cause contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

¹ See Audio Record at 3:00-4:45; Exhibit 1; Hearing Decision 15-UI-32008 at 1.

FINDINGS OF FACT: (1) Brookings Grocery Outlet employed claimant as a cashier from November 27, 2004 to November 17, 2014.

(2) During the last three years of claimant's employment, she worked the opening shift on weekdays, 7:30 a.m. to 4:30 p.m. During the first two hours of that shift, claimant was the only cashier on duty. Other cashiers worked from 9:30 a.m. to 6:30 p.m., or 10:30 a.m. to 7:30 p.m.

(3) In early 2014, the employer scheduled claimant to work one of the later shifts on Wednesdays. Claimant had two children under 13 years of age who attended school until 2:00 p.m. on Wednesdays, and 3:00 p.m. on other weekdays. Claimant discontinued working on Wednesdays due to a lack of child care in the evenings.

(4) Toward the end of her employment, claimant started missing work due to acid reflux and an ulcer. On November 6, 2014, claimant left work after one hour due to her health issues.

(5) On November 7, 2014, claimant missed work due to her health issues. The employer's owner told claimant he would not schedule her to work the following week to allow time for her condition to improve.

(6) On November 13, 2014, the owner telephoned claimant to determine whether to schedule her to work the following week. Claimant informed the employer that she might have to quit work. The owner offered to allow claimant to take a medical leave of absence from work.

(7) On November 17, 2014, claimant notified the owner that she was quitting work. The owner again offered to allow claimant to take a leave of absence. Claimant declined the offer and quit work.

(8) Claimant claimed benefits for the weeks from November 16, 2014 through January 10, 2015 (weeks 47-14 through 01-15).

(9) During weeks 47-14 through 01-15, claimant sought work as a retail cashier. In claimant's labor market, the usual hours and days of the week customary for retail cashier work were 5:00 a.m. to 11:00 p.m., all days of the week.

(10) During weeks 47-14 through 51-14, claimant only was willing to work on weekdays from 7:30 a.m. to 4:30 p.m. because of a lack of daycare for her children during other times and days of the week. Claimant resolved her child care issue and was willing to work during all of the usual hours and days of the week customary for the work she sought during weeks 52-14 through 01-15.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause. We also agree with the ALJ that claimant was not available for work during weeks 47-14 through 51-14, and available for work during weeks 52-14 through 01-15.

Work Separation. 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). 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.

At hearing, claimant testified that she did not quit work due to her health issues. Audio Record at 19:00. She instead asserted that she quit work because, on November 6, 2014, the employer's owner required her to start working a later shift, which she could not do because of a lack of child care in the evenings. Audio Record at 8:00. However, the owner testified that he merely warned claimant that he would require her to work a later shift if he could not rely on her to work the opening shift as scheduled. Audio Record at 20:45. We find the evidence on that issue equally balanced. Claimant testified that her health improved during her leave of absence, and that she was physically able to return to work after November 17, 2014. Audio Record at 30:25. Absent a preponderance of evidence showing that the employer was not going to allow claimant to work the opening shift when she returned, claimant failed to establish that she had no reasonable alternative but to quit work when she did. We therefore conclude that claimant quit work without good cause, and that she is disqualified from receiving benefits based on her work separation from the employer.

Availability. To be eligible to receive benefits, unemployed individuals must be available for 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) (February 23, 2014). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought. *Id.* However, an individual who is the parent of a child under 13 years of age, and who is not willing to or capable of working a particular shift because of a lack of care for that child acceptable to the individual, shall be considered available for work if the work the individual is seeking is customarily performed during other shifts in the individual's normal labor market area, and he individual is willing to and capable of working during such shift(s). OAR 471-030-0036(4).

During weeks 47-14 through 51-14, claimant was unwilling to work during all of the usual hours and days of the week customary for the work she sought because of a lack of child care for her children. However, claimant was unwilling to work weekends, or during early morning or evening shifts on weekdays, and not merely unwilling to work a particular shift. Claimant therefore was unavailable for work during weeks 47-14 through 51-14, and is ineligible for benefits for those weeks.

Claimant resolved her child care issue and was willing to work during all of the usual hours and days of the week customary for the work she sought during weeks 52-14 through 01-15. Claimant therefore was available for work, and is eligible for benefits, for those weeks.

DECISION: Hearing Decisions 15-UI-32008 and 15-UI-32010 are affirmed.

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

DATE of Service: March 13, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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.