

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0298

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 160632). The administrative decision stated that a timely request for hearing must be filed on or before December 16, 2014. On December 19, 2014, claimant filed an untimely request for hearing. On January 6, 2015, ALJ Kangas considered claimant's late request for hearing and issued Decision 15-UI-31377, dismissing the request as untimely subject to claimant's right to renew that request by completing the "Appellant Questionnaire" attached to the hearing decision and submitting it to the Office of Administrative Hearings (OAH) within ten days after the date the decision was mailed. On January 13, 2015, OAH received a completed Appellant Questionnaire from claimant. On February 13, 2015, OAH issued a letter ruling vacating Decision 15-UI-31377 and scheduling a hearing on claimant's late request for hearing and, if appropriate, the merits of claimant's work separation. On March 2, 2015, ALJ Shoemake conducted a hearing, and on March 9, 2014 issued Hearing Decision 15-UI-34811, allowing claimant's late request for hearing and affirming administrative decision # 160632. On March 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but did not certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained new information and documents that were not part of the hearing record, but he did not explain why he did not present this information at the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument when reaching this decision. *See* OAR 657.275(2). EAB relied only on information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Xico employed claimant as an assistant manager in its restaurant from June 24, 2013 until October 13, 2014.

(2) On September 1, 2014, claimant gave the employer notice that he was resigning from work effective October 13, 2014. By October 13, 2014, claimant intended to have secured a new position in a different restaurant or to have become self-employed in his own restaurant.

(3) On September 29, 2014, Bushwacker Cider Company offered claimant a position as head chef at a new restaurant it intended to open. Bushwacker told claimant that it expected to "be in the [new restaurant's] building by October 25th [2014]" and that it expected to be "ready to open [the new restaurant] by November 1st [2014]." Audio at ~19:19, ~23:57, ~24:47. Bushwacker did not give claimant a specific date when his new employment would definitely start. Audio at ~25:18, ~25:38. Claimant understood that his job with Bushwacker would begin "as soon as we were able to get me into the building and as soon as my responsibilities started." Audio at ~24:47. It was also claimant's understanding that Bushwacker wanted him to handle hiring of the kitchen staff for the new restaurant as well as to perform various other tasks in advance of the restaurant's opening. Audio at ~25:58. Claimant accepted Bushwacker's offer of new employment.

(4) Shortly after September 29, 2014, claimant told the employer's general manager and its head chef that he had accepted work with Bushwacker. Because he already given notice to the employer on September 1, 2013 that he was leaving work on October 13, 2014, claimant told the general manager and the head chef that he still planned to leave on that date.

(5) On October 13, 2014, claimant quit work with the employer. Bushwacker was unable to obtain access to its new building on October 25, 2014 and did not open its new restaurant on November 1, 2014 because of "extreme construction delays." Audio at ~28:09. Bushwacker had claimant perform his first work for it at a one day special event in late December 2014 or early January 2015, over two months after he left work with the employer. On January 19, 2015, claimant started working regularly for Bushwacker.

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 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). It is not good cause to leave work to pursue self-employment. OAR 471-030-0028(5)(b)(G). If a claimant leaves existing work to accept an offer of new work, good cause exists only if, among other things, the offer is "definite." OAR 471-030-0038(5)(a). The standard for showing good cause 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.

It was not clear from the record that claimant's acceptance of work with Bushwacker superseded his initial plan to leave work on October 13, 2014, whether or not he had a job offer outstanding at that

time. There was no evidence that claimant ever retracted his September 1, 2014 notice of leaving before Bushwacker made its job offer to him or indicated in any way to the employer that he was not going to leave employment as planned on October 13, 2014. There also was no evidence that, if claimant had attempted to rescind his initial resignation, the employer would have agreed and been willing to allow him to continue working after October 13, 2014. Assuming Bushwacker's supervening offer of other work did not supplant the reasons underlying claimant's September 1, 2014 initial notice of resignation, those reasons were not good cause for claimant to leave work. Leaving work to pursue self-employment opportunities, which was one of the reasons that claimant provided for his initial notice that he was leaving work on October 13, 2014, cannot, by the literal terms of OAR 471-030-0038(5)(b)(G), supply good cause to quit work. The other reason that claimant gave for his initial decision to leave work, that he wanted to try to locate suitable work with other employers, also does not supply good cause for that decision, since claimant did not present any evidence either that grave reasons required him to locate new work in lieu of continuing the work for the employer or that there was any certainty, definiteness or specificity to his plans. OAR 471-030-0038(4); OAR 471-030-0038(5)(a). Claimant did not have good cause to leave work when he gave his September 1, 2014 notice of resignation.

Assuming Bushwacker's September 29, 2014 offer of other work supplied the reason that claimant followed through on his initial plan to resign, that reason also was not good cause for claimant to leave work. Bushwacker's offer of work to claimant did not constitute the type of "definite" offer needed to supply good cause under OAR 471-030-0038(5)(a). The Department has issued guidelines stating that, to be "definite," a job offer should include "an expected start date" to ensure that a claimant does not "[leave] the old job too soon." Oregon Department of Employment, Benefit Manual (rev. April 1, 2010), Ch 400 §442(B). The Department's instructions on the interpretation of OAR 471-030-0038(5)(a) also state that a "definite" job offer, "must not be contingent on anything." *Id.* In this case, Bushwacker did not commit to claimant that his new work would start on any certain or definite date or that he would receive pay by any guaranteed date. Audio at ~25:18, ~25:38. Rather, according to claimant, Bushwacker provided the date on which it hoped to be able to obtain access to the new restaurant's building and when it "expected" the new restaurant to open as its best information about when claimant might start work. Audio at ~19:19, ~24:47. The starting date that Bushwacker provided to claimant is best characterized as tentative and contingent on the happening of two events that might or might not occur on the "expected" or hoped for dates – obtaining access to the building and otherwise being able to open the restaurant for service. On these facts, the new work that Bushwacker offered claimant was not sufficiently definite as to its start date to supply good cause for claimant to leave work. At the time claimant left work, the occurrence of the two contingencies that would trigger his start date remained uncertain. While claimant might have hoped that both contingencies would be satisfied by particular dates, nothing in his description of Bushwacker's offer could reasonably be interpreted as a firm assurance that they would happen by those dates.

Claimant did not establish that there was good cause for him to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-34811 is affirmed.

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

DATE of Service: May 5, 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.

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