

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0356

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed without good cause to accept suitable work (decision # 140444). Claimant filed a timely request for hearing. On March 11, 2015, ALJ Murdock conducted a hearing at which the employer did not appear, and on March 20, 2015 issued Hearing Decision 15-UI-35502, affirming the Department's decision. On March 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he set out certain new information that was not offered into evidence during the hearing. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information at 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* ORS 657.275(2).

FINDINGS OF FACT: (1) In 2010, Bon Appetit Management Company laid claimant off after he had worked for it for four years as a cook.

(2) After 2010, claimant applied many times for work for Bon Appetit. Bon Appetit rejected all of claimant's applications. Claimant finally arranged for a friend to call Bon Appetit and masquerade as a potential employer of claimant. When the friend asked a representative of Bon Appetit to give a reference for claimant, that representative stated that Bon Appetit would not re-hire claimant. Based on these factors, claimant concluded that Bon Appetit had blackballed him from further work.

(3) Sometime before November 2014, claimant registered for work as a cook with several employee staffing agencies, including The Personnel Department. Among other things, The Personnel Department supplied temporary food service workers and cooks to its clients, one of which was Bon Appetit.

Around this time, Bon Appetit contacted The Personnel Department seeking a cook to work at its OMSI location in Portland, Oregon on one day, December 17, 2014, from 3:00 p.m. until 11:00 p.m. The work paid \$12:50 per hour. Claimant lived in Hillsboro, Oregon and his commute to Bon Appetit's OMSI location was approximately 21 miles.¹

(4) On November 6, 2014, The Personnel Department offered the December 17, 2014 work at Bon Appetit to claimant. Claimant accepted this assignment. Claimant did not know that the assignment was at Bon Appetit.

(5) Around December 16, 2014, claimant learned that the December 17, 2014 assignment he had accepted was to work at a Bon Appetit food service location. On December 16, 2014, claimant contacted The Personnel Department and told a representative that "something had come up" that prevented him from working at Bon Appetit's job site on December 17, 2014. Audio at ~6:24, ~20:09. Claimant also told the representative that he had worked before at Bon Appetit and he did not think that Bon Appetit would let him work if he reported for the assignment. Audio at ~6:40, ~13:52. Claimant turned down the job assignment at Bon Appetit, because he was convinced that, if he showed up on December 17, 2014, Bon Appetit would turn him away and not allow him to work even for one day.

(6) On February 10, 2015, a Department representative called claimant to inquire about why he turned down the assignment to work at Bon Appetit. Claimant explained his history of applying for work with Bon Appetit after he was laid off and having his applications rejected and told the representative that he was "not hireable" by Bon Appetit. Audio at ~6:57.

CONCLUSIONS AND REASONS: Claimant did not fail to accept suitable work without good cause.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. Factors to consider in determining whether work is suitable for an individual include, among other things, the risk to the morals of the individual, the prior training and experience of the individual, the length of unemployment and the distance of the work from the residence of the individual. ORS 657.190. Work is considered not suitable for an individual if the remuneration, hours and conditions of the offered work are substantially less favorable than those prevailing for other similar work in the locality. ORS 657.195(1)(b). Good cause to refuse to accept suitable work is such that a reasonable and prudent person, exercising ordinary common sense, would refuse to accept that work. OAR 471-030-0038(6) (August 3, 2011).

In Hearing Decision 15-UI-35502, the ALJ concluded that claimant had failed to accept suitable work and was disqualified from benefits. The ALJ reasoned that a reasonable and prudent person in claimant's position "would not refuse work based on an unconfirmed assumption that [Bon Appetit] would not allow him to perform a temporary assignment." Hearing Decision 15-UI-35502 at 3. We disagree.

¹<http://www.google.com/#q=distance+between=hillsboro+and+portland>. EAB takes notice of this fact, which is contained in the records of a reference source generally recognized as accurate. Any party that 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 at EAB.

Claimant's testimony setting out the bases for his conclusion that Bon Appetit had blackballed him from working at its worksites was not disputed. Given claimant's long history of applying for work with Bon Appetit, the consistent rejections of his applications, and his friend's pretextual call to Bon Appetit, in which its representative stated that Bon Appetit would not re-hire claimant, his conclusion that Bon Appetit would not allow him to work on its premises for even a one-day temporary assignment was not unreasonable. Although the ALJ concluded that claimant's belief was "unconfirmed," this objective evidence in the record tends to corroborate claimant's conclusion, even though Bon Appetit never stated outright that it would not allow claimant to work for it on a temporary assignment. Hearing Decision 15-UI-35502 at 3. In addition, there was no evidence in the record that, while Bon Appetit would not allow claimant to work directly for it, Bon Appetit, for some reason, was likely to consider claimant differently and allow him to work on temporary assignment to it through The Personnel Department. On the facts in the record, a reasonable and prudent person, exercising ordinary common sense, would have concluded that it was unlikely that Bon Appetit would allow him to perform any work on its behalf. Given this unlikelihood, combined with the fact that claimant would incur commuting costs to travel to Bon Appetit's job site, where he likely was not going to be allowed to work, the costs to claimant of accepting the job assignment would exceed the remuneration (or lack of it) from the work. Viewing the record as a whole, a reasonable and prudent person, exercising ordinary common sense, would not have accepted the eight hours of work on December 17, 2014 that The Personnel Department offered to claimant at Bon Appetit .

Claimant had good cause to fail to accept the work that The Personnel offered for December 17, 2014. Claimant is not disqualified from benefits based on his failure to accept this work.

DECISION: Hearing Decision 15-UI-35502 is set aside, as outlined above.

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

DATE of Service: May 18, 2015

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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