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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0391

Hearing Decision 15-UI-3518 - Affirmed
Disqualification
Hearing Decision 15-UI-35184 - Reversed
Eligible

PROCEDURAL HISTORY: On February 26, 2015, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant voluntarily left work without good cause (decision # 141722) and the second concluding claimant was not available for work during the weeks of January 4, 2015 through January 31, 2015 (decision # 143262). Claimant filed timely requests for hearing on both administrative decisions. On March 13, 2015, ALJ Vincent conducted hearings at 1:30 p.m. and 2:30 p.m., and on March 16, 2015 issued Hearing Decision 15-UI-35186, which affirmed administrative decision # 141722 and Hearing Decision 15-UI-35184, which affirmed administrative decision # 143262 and concluded that claimant was not available for work during the weeks of January 4, 2015 through March 7, 2015. On April 6, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Claimant submitted a written argument in support of each application for review filed with EAB. The written argument in support of claimant's application for review of Hearing Decision 15-UI-35186 presented new information that she did not offer into evidence at the hearing and contradicted the testimony that she provided at hearing. Because claimant did not explain why she did not present this new information at hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2), EAB did not consider that new information. EAB considered the written argument in support of claimant's application for review of Hearing Decision 15-UI-35185 when reaching its decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-35186 and 15-UI-35184. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0391 and 2015-EAB-0392).

FINDINGS OF FACT: (1) Tri County Metropolitan Transportation District of Oregon employed claimant as an operations assistant from July 11, 2011 until January 2, 2015. During her employment claimant lived in Oregon.

(2) Claimant's adult son lived with his partner in Hawaii. Beginning in 2009, the son began to experience serious effects from degenerative disc disease. Sometime after 2009, the son's degenerative disease worsened and he was intermittently unable to walk and was bedridden during episodes when the disease flared. The episodes when claimant's son was unable to walk or care for himself were unpredictable, but they occurred between three to six times per year and each episode lasted between approximately two to four weeks.

(3) By approximately 2014, the son's partner needed assistance in caring for the son during the times when his disease flared. At that time, the partner was working day shifts in Hawaii as a medical assistant and needed help during the day if his condition flared. Claimant's son and his partner did not have the financial resources to hire a private caregiver to assist the son when his condition worsened. Claimant's son was an only child and claimant was the only family member available to provide the needed assistance. After discussing the situation with her son and his partner, claimant decided it was necessary for her to relocate to Hawaii to be available, as needed, to provide care for her son.

(4) Before making the decision to move to Hawaii, claimant did not explore whether her son's health insurance would cover the cost of a private caregiver for her son when his condition flared. Audio at ~8:11. Although claimant was eligible for short-term, long-term and intermittent leaves under the Family Medical Leave Act (FMLA), she did not request those benefits from the employer to allow her to maintain her job while intermittently providing care for her son in Hawaii because she thought that a leave would not resolve the ongoing issues with her son's condition and she "knew [she] would not be coming back [from Hawaii]." Audio of 1:30 Hearing (Audio 1) at ~9:30, ~9:47, ~9:59, `10:33, ~11:05, ~11:42. Claimant also did not look into taking leaves from work because she thought that her position was integral to the employer's operations on a day-to-day basis and that the employer would be unable make available the number of leaves she might need and for the duration she might need. Audio 1 at ~9:59. However, claimant did not explore whether her employer could or would accommodate the days of intermittent leave that she anticipated she might to need to care for her son. Audio at 1 at ~12:00.

(5) Before claimant moved to Hawaii, she and her son's partner discussed her ability to locate new employment in Hawaii that allowed her to work evening or night shifts so she could care for her son during the day shift hours when the partner was working. If needed, the son's partner agreed to switch the shift that she worked to evenings or nights to allow claimant to work a day shift job.
Audio at 2:30 Hearing (Audio 2) at ~17:54, ~18:44, ~21:05, ~21:40, ~25:32, ~25:52. As a medical assistant in a populous area with many hospitals and medical centers and a military presence, claimant thought that if the partner needed to change jobs in order to work nights or evenings she would be able to do so in a short period of time. Audio 2 at ~21:48.

(6) On January 2, 2015, claimant quit working for the employer.

(7) On January 9, 2015, claimant filed an initial claim for unemployment benefits. The claim was determined valid. Claimant claimed benefits for the weeks of January 4, 2014 through March 7, 2015

(weeks 01-15 through 09-15), the weeks at issue. The Department did not pay those benefits to claimant.

(8) During the weeks at issue, claimant was seeking work as an administrative assistant as well as in the area of healthcare administration. Claimant's labor market was Mililani and Honolulu, Hawaii as well as all cities in between. The hours and days of the week usual and customary for work as an administrative assistant in claimant's labor market were day shifts, Mondays through Fridays.

(9) Sometime after January 9, 2015, a Department representative spoke with claimant about the jobs she was applying for. Claimant told the representative that she was primarily applying for work in the area of healthcare administration because she had worked in the field for over ten years before she started her last job as an administrative assistant and because there were many evening and night shift positions in that field due to the hours of operations of most medical facilities. Audio 2 at ~18:47. The representative told claimant that she needed to be actively seeking work as an administrative assistant, which was the position that she occupied in the eighteen months prior to applying for benefits, to ensure that she continued to receive benefits. Audio 2 at ~16:47, ~27:11.

(10) After claimant's conversation with the Department representative claimant looked for and applied for work as an administrative assistant. Claimant submitted two to three applications each week for administrative assistant jobs, as well as performed related work search and work networking activities. Audio 2 at ~20:06, ~20:12, 20:35. The administrative assistant jobs for which claimant applied were day shift jobs. For claimant to accept such jobs if they were offered, claimant's son's partner would need to change the shift that she was working to an evening or night shift. Audio 2 at ~22:43. As of the hearing date, claimant had no interviews with these potential employers, and no opportunity to state any preference about hours she wanted to or was willing to work. Audio 2 at ~19:19, ~22:43. If claimant were offered a day shift administrative assistant position in which she needed to start work immediately, she would accept that job and report to it, anticipating that she and her son's partner would be able to make arrangements for the partner to change the shift that she worked, and if claimant's son's condition flared, make arrangements to care for him during the days in the short-term before the partner was able to effect a shift change.

(11) Between January 2015 and mid-March 2015, claimant's son did not experience a disabling exacerbation of his health condition.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. Claimant was available for work during the weeks of January 4, 2015 through March 7, 2015.

Voluntary Leaving. 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.

It appears that the recurring flares of claimant's son's degenerative disc disease were debilitating. The reasons that claimant decided to quit work to move to Hawaii to be available to assist in providing the needed care for her son were understandable and seemed to be motivated exclusively by familial concerns. However, for claimant to meet her burden of showing good cause for leaving work to move to Hawaii to enable her to provide some of her son's care, it is not enough that she show her decision reasonable one, but that the situation was so objectively grave that she had *no reasonable alternative* to leaving work. This standard for showing good cause is a heighted one. It requires a showing that a claimant made reasonable efforts to keep his or her job in light of the exigency in his or her circumstances and it was not reasonably possible to do so. Here, claimant did not take reasonable steps to maintain her employment while still providing care for her son when he required it. Claimant neither explored the option of taking intermittent leaves from work, nor sought an authorization for one from the employer to see if the employer would permit it. While claimant might have thought that the nature of her work reasonably prevented the employer from authorizing intermittent leaves for her, it does not appear that she actually ever confirmed with the employer that it would refuse to allow her that alternative. Claimant did not show, based on objective evidence, that pursuing a leave *in lieu* of leaving work was futile. Claimant also did not show that there was some urgency in her son's condition, or that he was having a disabling episode which necessitated her immediate move to Hawaii when she did and which prevented her from exploring the feasibility of taking intermittent leaves. On this record, claimant did not show that a reasonable and prudent person, exercising ordinary common sense, would have concluded she had not reasonable alternative but to leave work when she did.

Claimant did not meet her burden to show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

Work Availability. 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) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

In Hearing Decision 15-UI-35184, the ALJ concluded that claimant was not available for work during the weeks at issue. The ALJ reasoned that while claimant and her son's partner might have agreed that the partner would change jobs if claimant were offered a job during the same shift that the partner worked, "the agreement is not unconditional and would not allow claimant to take immediate employment." Hearing Decision 15-UI-35184 at 2. We disagree.

It is not clear what the ALJ meant when he stated that the agreement between claimant and her son's partner was "not unconditional." As described by claimant, the partner had unconditionally agreed to arrange for work on another shift to allow claimant to accept a job with a shift that conflicted with the partner's. The issue for the ALJ appears to have been that claimant was unable to guarantee that the partner's ability to change shifts would be immediate, and that any possible delay in the partner's adjusting her shift necessarily precluded claimant from accepting any job that required her to start work immediately. The only evidence in the record on this issue was claimant's testimony that she would

accept and start a job which required her to begin immediately even if the shift for that work duplicated that of her son's partner, and that she and the partner would work out arrangements for the partner to promptly change shifts. Audio at ~22:43. Claimant's testimony at hearing appeared sincere and credible. Since the flares in the son's condition occur unpredictably, and he had no disabling episodes between January and mid-March 2015, it is quite possible that the son would not be experiencing a flare during a time that coincided with claimant's need to start a job immediately and the partner's need to change her work shifts. If this were the case, there would be no practical impediment to claimant starting a job immediately and the partner's need to change shifts would not be particularly urgent. There is also no evidence in the record which suggests that if claimant needed to start a job with a schedule that duplicated the schedule of the partner at the same time that her son was experiencing a flare, her son's partner would not be able to take a leave from her own work to care for the son while simultaneously seeking to change her work shift. Nor is there any evidence that claimant and the son's partner would not be able to pay a private caregiver during the short-term to enable claimant to work and the partner to seek to change shifts during a time when the son was experiencing a exacerbation of his condition. On this record, viewed as a whole, it appears that claimant was seeking work as an administrative assistant, was not limiting her willingness to work to particular shifts, and was reasonably able to accept an offer of employment that required her to work immediately.

Claimant was available for work during the weeks of January 4, 2015 through March 7, 2015. Claimant is not ineligible for benefits on the ground that she was not available for work during the weeks at issue.

DECISION: Hearing Decision 15-UI-35186 is affirmed.
Hearing Decision 15-UI-35184 is reversed as set out above.

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

DATE of Service: <u>May 27, 2015</u>

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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