

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0623

Hearing Decision 15-UI-38405 Affirmed
Ineligible Week 08-15

Hearing Decisions 15-UI-38404 and 15-UI-38402 Reversed
Eligible Week 10-15, No Disqualification

Hearing Decision 15-UI-38746 Reversed and Remanded

PROCEDURAL HISTORY: On April 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 143812). On April 13, 2015, the Department served notice of three administrative decisions concluding that claimant was not available for work from February 22 through 28, 2015 (decision # 94026), March 8 through 14, 2015 (decision # 93428) and March 15 through 21, 2015 (decision # 94507). Claimant filed timely requests for hearing on the four decisions. On May 5, 2015, ALJ Vincent conducted hearings, and on May 13, 2015 issued Hearing Decisions 15-UI-38402, 15-UI-38405, 15-UI-38404 and 15-UI-38437, affirming the Department's decisions. On May 19, 2015, ALJ Vincent issued Hearing Decision 15-UI-38746, amending Hearing Decision 15-UI-38437, and again affirming decision # 94507. On May 27, 2015, claimant filed applications for review of Hearing Decisions 15-UI-38402, 15-UI-38405, 15-UI-38404 and 15-UI-38746 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-38402, 15-UI-38405, 15-UI-38404 and 15-UI-38746. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2015-EAB-0622, 2015-EAB-0625, 2015-EAB-0623 and 2015-EAB-0626). EAB considered the entire hearing records and claimant's written arguments to the extent the arguments were based on information offered into evidence at the hearings. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Seven Star Stores II, LLC employed claimant as a cashier from September 30, 2014 to March 19, 2015.

(2) When claimant initially was employed, she worked five 3.25 hour shifts per week, Wednesday through Sunday. The employer paid claimant wages of \$9.25 per hour. To work each shift, claimant had to expend “at least” \$6 for gasoline and \$20 for childcare. Audio Record ~ 16:00 to 16:30.

(3) In January 2015, the employer’s owner eliminated claimant’s Friday, Saturday and Sunday shifts after explaining he “could not afford [her].” Audio Record ~ 18:00 to 18:45. Claimant eventually concluded that her expenses of working exceeded her income and on March 19, 2015, quit work, in part, for that reason.

(4) Claimant filed an initial claim for unemployment benefits March 22, 2014 (BYE 10-15). Claimant filed a second initial claim for unemployment benefits March 17, 2015 (BYE 10 -16). She claimed benefits for the weeks including February 22 through February 28 and March 8 through 14, 2015 (weeks 08-15 and 10-15) under BYE 10-15 and for the week including March 15 through 21, 2015 (week 11-15) under BYE 10-16. These are the weeks at issue.

(5) During the weeks claimed, claimant sought work as a cashier. Claimant’s labor market area was Dorena and Cottage Grove. The customary days and hours for work as a cashier in claimant’s labor market were all days, day and swing shifts.

(6) During the week including February 22 through 28, 2015, claimant requested and received authorization to miss her assigned shifts on February 25 and 26, was out of town on those days and missed work.

(7) During the week including March 8 through 14, 2015, claimant worked her shift on Wednesday March 11 but did not work on Thursday March 12 because the employer previously had cancelled that shift for claimant.

(8) On March 18, 2015, prior to her shift, claimant notified the employer that she would be 30 minutes late because her babysitter was going to be late. The employer told her not to report for her shift for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during week 08-15. However, we disagree with the ALJ and conclude that claimant was available for work during week 10-15, and quit work with good cause. Hearing Decision 15-UI-38746, which concluded that claimant was not available for work during the week of 11-15, is reversed, and this remanded to OAH for additional proceedings.

Available for Work. 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 accept work opportunities during the usual days and hours customary for the work being sought, be capable of accepting and reporting for suitable work opportunities within their labor market, and refrain from imposing conditions that limit the individual’s opportunities to return to work at the earliest possible time. *Id.*

At issue is claimant's availability for work during weeks 08-15, 10-15 and 11-15. We agree with the ALJ that claimant was not available for work during the week including February 22 through February 28, 2015 (week 08-15). Hearing Decision 15-UI-38405 at 1, 2. Claimant did not dispute that she requested and received authorization to take February 25 and 26 off and was out of town on those days rather than at work. Because claimant declined those work opportunities during the week at issue, she was not available for work.

We disagree with the ALJ that claimant was not available for work during the week including March 8 through 14, 2015 (week 10-15). Because the Department initially paid claimant unemployment insurance benefits for that week, the Department had the burden of persuasion to show that the claimant was not eligible to receive the benefits in question. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976). In Hearing Decision 15-UI-38404, the ALJ accepted the testimony of a Department witness, found that claimant did not work an assigned shift on March 12 because "she did not have a babysitter" and concluded that claimant was not available for work. However, the witness presented only hearsay evidence that claimant declined the work opportunity on March 12. Audio Record ~ 7:45 to 8:30. Claimant testified that she was not even scheduled to work on March 12 because the employer previously had cancelled her shift for that day and offered testimony from her husband to corroborate her assertion, which the ALJ declined. Audio Record ~ 22:30 to 24:30. Because the evidence on that issue was no more than equally balanced, the Department failed to meet its burden that claimant was not available for work. Accordingly, claimant was available for work during the week at issue and is eligible to receive benefits for that week.

We also disagree with the ALJ that claimant was not available for work during the week including March 15 through 22, 2015 (week 11-15). After claimant testified that on March 18 she called her manager and told her she would be 30 minutes late for her shift due to a childcare problem, after which the manager cancelled her assignment, the ALJ concluded claimant was not available for work during that week "due to a temporary lack of childcare." Hearing Decision 15-UI-38746 at 1, 2. Although there was no dispute that claimant was not willing to work during the first 30 minutes of her assigned shift "due to a temporary lack of childcare", OAR 471-030-0036 (4) provides that a parent of a child under 13 years of age who is not willing or capable of working a particular shift because of a lack of child care shall still be considered available for work if "the work the individual is seeking is customarily performed during other shift(s) in the individual's normal labor marked area...and...the individual is willing to work and capable of working during such shift(s)." The Department's witness testified that in claimant's labor market, cashier work was customarily performed on all days, day and swing shift. Audio Record ~ 10:45 to 11:30. However, the ALJ did not ask, and the record fails to show, whether claimant was willing and capable of working as a cashier during another shift that day.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was available for work on another shift on March 18, Hearing Decision 15-UI-38746 is reversed, and this matter is remanded for development of the record.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she (or he) 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 the employer for an additional period of time. If an individual leaves work due to a reduction in hours, the individual has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration. OAR 471-030-0038(5)(e). Where the gravity of the situation experienced by a claimant results from her (or his) own deliberate actions, to determine whether good cause exists, the actions of the claimant in creating the grave situation must be examined in accordance with the good cause standards of OAR 471-030-0038(4). OAR 471-030-0038(5)(f).

In Hearing Decision 15-UI-38402, the ALJ found that claimant “earned more working for the employer than the expenses associated with working” and because “claimant’s hours had been reduced at her request so that she could continue to qualify for benefits”, she created the gravity of her situation by her own deliberate actions. Hearing Decision 15-UI-38402 at 2. We disagree.

Addressing the latter issue first, claimant and the employer’s owner disagreed on who was responsible the reduction in her weekly shifts from five to two. The owner asserted that claimant requested a reduction to six hours per week so she would not lose “government help.” Audio Record ~ 23:00 to 23:40. However, claimant denied the owner’s assertion and asserted the owner eliminated her Friday, Saturday and Sunday shifts in January after telling her that he “could not afford [her].” Audio Record ~ 18:00 to 18:45. Although claimant asserted that she lost some government benefits, she explained that the loss occurred before she was even hired. We also note that under ORS 657.150(1)¹, claimant could have earned 10 times the minimum wage of \$9.25, or worked 10 hours per week, rather than six, with the employer without having her weekly benefit amount reduced. Finally, it makes little sense that claimant would request reduced hours, as the owner asserted, and then quit because her hours were reduced. On balance, we conclude that claimant was more credible than the owner on this issue and that the owner, rather than claimant, initiated the reduction in her weekly work hours.

Claimant quit work, in part, because she believed the reduction in her work hours from 5 weekly shifts of 3.25 hours to 2 such shifts would not provide enough income to cover her costs of working. Audio ~ 14:00 to 19:00. The ALJ found that claimant had “total pay” of \$30.06 per shift (3.25hrs. x \$9.25) and gas and babysitting expenses per shift totaling \$26. Hearing Decision 15-UI-38402 at 1. However, the ALJ failed to consider the deductions to claimant’s gross income from state and federal income tax and FICA tax withholdings² and did not arrive at an income figure that showed the money she would

¹Under ORS 657.170, an eligible individual who has employment in any week claimed shall have his (or her) weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of her weekly benefit amount.

actually have in hand from working to apply to her costs. Nor did claimant's description of her commuting costs include inevitable vehicle maintenance costs. Claimant's net disposable income per shift after deducting her estimated gasoline and childcare costs and not including FICA, federal and state income tax and vehicle maintenance costs, was \$4.06. We infer that, after deducting tax and vehicle maintenance costs, claimant's costs of working would exceed her net income for same period and conclude, more likely than not, no reasonable and prudent person in her circumstances would continue to work for the employer for an additional period of time. Under OAR 471-030-0038(4) and (5)(e), claimant had good cause to leave work when she did and is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-38405 is affirmed. Hearing Decisions 15-UI-38404 and 15-UI-38402 are set aside, as outlined above.³ Hearing Decision 15-UI-38746 is set aside, and that matter remanded for further proceedings consistent with this order.⁴

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: July 22, 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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² Social security taxes on claimant's gross income would be 6.2 percent, Medicare taxes would be 1.45 percent and federal and state income tax withholdings from gross income would vary based on her family income. *See* IRS Publication No. 15 (Circular 15) Employer's Tax Guide for 2015 at 1.

³ These decisions reverse hearing decisions that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-38746 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.