

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0377

Hearing Decision 16-UI-55158 Affirmed – Disqualification
Hearing Decision 16-UI-53876 Reversed and Remanded

PROCEDURAL HISTORY: On December 23, 2015, the Oregon Employment Department (the Department) served notice of two administrative decisions: decision # 111440 concluded that claimant voluntarily left work without good cause, and decision # 112216 denied claimant's request to backdate an initial claim for benefits to November 28, 2015. Claimant filed timely requests for hearing. On February 26, 2016, ALJ Frank issued Hearing Decision 16-UI-53876, dismissing claimant's request for hearing on decision # 112216 on the grounds that claimant had withdrawn his request. On March 5, 2016, claimant filed an application for review of Hearing Decision 16-UI-53876 with the Employment Appeals Board (EAB).

On March 8, 2016, ALJ Frank conducted a hearing on claimant's request for hearing on decision # 111440, and on March 16, 2016, issued Hearing Decision 16-UI-55158, affirming the administrative decision and concluding that claimant voluntarily left work without good cause. On April 4, 2016, claimant filed an application for review of Hearing Decision 16-UI-55158 with the EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-55158 and 16-UI-53876. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0377 and 2016-EAB-0258).

On his application for review of Hearing Decision 16-UI-55158, claimant provided new information regarding the reasons for his work separation that was not part of the hearing record. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information when the party presenting the information demonstrates that factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. Because claimant provided no explanation why he did not offer the information on his application for review at the hearing, we considered only information received at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Wright Business Graphics employed claimant as a press operator from November 19, 2001 until July 26, 2015.

(2) Claimant's work schedule, which his supervisor prepared, required that he work every Friday, Saturday and Sunday; on Sunday, he worked from 5 a.m. until 5 p.m. In approximately 2013, claimant began asking his supervisor for Sunday off because the hours he was required to work prevented him from attending church. Although claimant repeatedly asked that his supervisor change the schedule so he could have Sunday off, his supervisor refused claimant's request.

(3) Claimant never contacted the employer's human resources department to express his concern that his work schedule prevented him from attending church on Sunday. Had he done so, the employer's human resources director would have attempted to arrange a change in claimant's schedule so he would be able to take Sunday off.

(4) By letter dated July 17, 2016, claimant notified his immediate supervisor and the employer's human resources director that he was quitting his job and that his final day of work for the employer would be July 26, 2015. Claimant did not work for the employer after July 26.

(5) Approximately one week after claimant quit his job with the employer, he began working with his domestic partner as an employee and partner in a business that provided crating services. Claimant was not paid for the first four months he worked for this business, and his domestic partner, with whom claimant had been living, eventually obtained a restraining order against claimant.

CONCLUSION AND REASONS: Hearing Decision 16-UI-55158, the hearing decision concluding that claimant voluntarily left work without good cause, is **affirmed**.

Hearing Decision 16-UI-53876, the hearing decision concluding that claimant withdrew his request for a hearing, is **reversed** as unsupported by the record, and the matter **remanded**.

Voluntary Leaving

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). 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 his employer for an additional period of time.

Claimant testified that although he repeatedly asked for a work schedule that allowed him to have weekends off so he could spend more time with his son and attend church, his supervisor denied these requests. The ALJ found that although claimant was understandably concerned about the effects of his work schedule on his personal life, "claimant's testimony on these points is somewhat questionable." Hearing Decision 16-UI-55158 at 2. The ALJ concluded that claimant quit his job to pursue self-employment, basing his conclusion on the Department's finding that claimant left work for a self-employment venture, and the "implausibility of claimant's having worked voluntarily for four months after his resignation without ever being paid wages." Hearing Decision 16-UI-55158 at 3 and 3. We

disagree with the ALJ's reasoning, although we agree with his conclusion that claimant did not have good cause for voluntarily leaving his job with the employer.

Contrary to the ALJ's assertion, claimant testified that his work with his domestic partner in a crating business had nothing to do with his resignation, and that the crating business was not a self-employment venture. Audio recording at 10:18 and 13:38. We find nothing in the record to doubt claimant's credibility on these points. The finding of fact in the administrative decision – that claimant was self-employed when he worked for the crating business – is not in evidence. The ALJ's conclusion – that claimant was self-employed because he received no pay for the months he worked for the crating business – is not supported by the record. When the ALJ asked claimant why he worked for the crating business for no pay for four months, claimant responded that he was in a relationship with his domestic partner with whom he lived, but that problems apparently developed and his partner filed a restraining order against him. Audio Recording at 13:52. Although the ALJ did not inquire further, it is reasonable to infer from this record that claimant's failure to receive pay for his work for the crating business resulted from a difficult personal situation, and not necessarily because claimant was self-employed. For these reasons, we find that claimant left his work for the employer because he wanted weekends off, and not because he wanted to pursue self-employment.

The refusal of claimant's supervisor to provide him with a schedule that would give him time off to attend church and more effectively fulfill his parental obligations constituted a grave situation. Claimant had the reasonable alternative of pursuing his request for a different schedule with the employer's human resources department, however. Had he done so, the human resources director would have attempted to change claimant's schedule. A reasonable and prudent person would have contacted the employer's human resources director about a change in his schedule before deciding to quit a job he had held for 15 years because his supervisor refused to give him time off on the weekends. Claimant therefore failed to demonstrate good cause for voluntarily leaving work for the employer and is disqualified from the receipt of unemployment benefits on the basis of this work separation.

Withdrawal of Hearing Request

ORS 657.270(7)(a)(A) and OAR 471-040-0035 allow an ALJ to dismiss a request for hearing when the request is withdrawn by the requesting party. When a party files an application for review of an ALJ's decision, EAB is required by statute to "perform de novo review on the record." ORS 657.275. The standard of review in unemployment insurance matters is the preponderance standard; for EAB to affirm an ALJ's decision to allow a request for withdrawal, the record on review must therefore show that, more likely than not, the requesting party withdrew his or her request for hearing.

The only indication in this case that claimant might have knowingly and voluntarily withdrawn his request for hearing on the administrative decision concerning his request to backdate his unemployment claim is a document dated February 25, 2016, and entitled "Memo To File / Telephone Record." This document, prepared by an employee of the Office of Administrative Hearings, stated "From: Jason P. Mowdy" and "RE: Withdrawal Granted" for the hearing scheduled on March 8. The document was not marked as an OAH business record or authenticated as such, and was not admitted into the record as an exhibit. The document does not indicate what telephone number claimant supposedly called, what he said when he called, and what the person with whom he spoke told him. The preponderance of evidence therefore fails to show that claimant withdrew his hearing request. This matter must therefore be

remanded to OAH for development of a record of claimant's withdrawal. If the record shows that claimant did not withdraw his request for a hearing, then the ALJ should conduct a hearing on the merits of the decision under review.¹

DECISION: Hearing Decision 16-UI-55158 is affirmed. Hearing Decision 16-UI-53876 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 6, 2016

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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¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-53876 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.