

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0833

Hearing Decision 16-UI-62790 Reversed – No Disqualification
Hearing Decision 16-UI-62792 Affirmed – Ineligible April 3, 2016 to April 30, 2016

PROCEDURAL HISTORY: On May 24, 2016, the Oregon Employment Department (the Department) served two notices of two administrative decision, one concluding claimant voluntarily left work without good cause (decision # 144539) and the second concluding claimant was not available for work from April 3, 2016 to May 7, 2016 (decision # 143033). Claimant filed timely requests for hearing. On June 21, 2016, ALJ Vincent conducted two hearings, and on June 29, 2016 issued Hearing Decision 16-UI-62790, affirming decision # 144539, and Hearing Decision 16-UI-62792, concluding claimant was not available for work from April 3, 2016 to April 30, 2016, but was available for work from May 1, 2016 to May 7, 2016. On July 13, 2016, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-62790 and 16-UI-62792. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0832 and 2016-EAB-0833).

No adversely affected party requested review of the portion of Hearing Decision 16-UI-62792 concluding claimant was available for work from May 1, 2016 to May 7, 2016. We therefore confine our review to the remaining issues.

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2). Even if we had considered claimant's argument, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Re/Max Integrity employed claimant as a loan officer from October 17, 2014 to April 4, 2016.

(2) On February 19, 2016, claimant's domestic partner was hospitalized in intensive care in Corvallis. Claimant lived and worked in Eugene. She continued working but left work early and traveled to Corvallis every day to be with her partner.

(3) Claimant's work performance was inadequate during that period. On April 4, 2016, claimant met with the employer's owner, who suggested claimant quit work.

(4) Claimant's partner's prognosis was uncertain. Claimant did not know how long her partner would be hospitalized, and, if her partner survived, how long she would need to care for her partner. Claimant was not aware of any protected leave options the employer had to offer under the circumstances, and the owner did not offer her a leave of absence. Claimant agreed to resign, and signed a separation agreement ending her employment effective April 4, 2016.

(5) On April 7, 2016, claimant filed an initial claim for unemployment insurance benefits. She claimed weekly benefits throughout the period at issue, April 3, 2016 to April 30, 2016.

(6) Between April 3, 2016 and April 30, 2016, claimant traveled from her labor market to Corvallis every day to visit her domestic partner in the hospital. During the last week of April, claimant's domestic partner was released from intensive care and claimant stopped traveling to Corvallis every day.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause, but was not available to work from April 3, 2016 to April 30, 2016.

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.

In Hearing Decision 16-UI-62790, the ALJ concluded claimant quit work without good cause because claimant "had FMLA/OFLA protected leave time available to her that would have allowed her to take leave from work while continuing to provide caregiving to her partner," and "[w]aiting to see how her partner progressed while on a protected leave would have been a reasonable alternative to quitting when she did." Hearing Decision 16-UI-62790 at 2. We disagree.

Claimant quit work at the owner's suggestion. At the time of the events at issue, however, claimant did not know whether or not her partner would survive, whether her partner would recover, what it would take for her partner to recover, how long it would take, how long her partner would be in intensive care, or how long she would need to travel to Corvallis every day to be with her partner in intensive care. It was reasonable for claimant not to ask for time off work given that she did not know how much time she would need. Claimant did not know she could request a federal- or state-law protected leave of absence due to her partner's situation, nor did the employer offer protected leave to her, instead simply

suggesting that claimant quit work and, apparently, presenting her with a separation agreement. The Court of Appeals has recently held, albeit on different facts, that an employer's failure to offer remedies short of quitting, when the employer knew why claimant was quitting, was an implicit suggestion that there were no alternatives to quitting. *See Early v. Employment Dep't.*, 274 Or. App. 321, 360 P.3d 725 (2015) (claimant experienced depression, stress, anxiety and suicidal thoughts stemming from her contentious relationship with a coworker and quit after protracted attempts to resolve the issue failed; the employer's failure to offer any alternatives short of quitting "implicitly suggest[ed] that there was none," so further attempts to resolve the issue "would have appeared futile" to a reasonable and prudent person under the circumstances). It appears in this case that the employer was aware of claimant's situation, and, rather than suggesting claimant apply for a leave of absence suggested instead that she quit work, thereby implicitly suggesting to claimant that no leave options were available, rendering that alternative futile. Claimant's domestic partner's situation was grave, and similarly situated reasonable and prudent person would, as claimant did, conclude that she had no reasonable alternatives to quitting work given the circumstances. We therefore conclude that claimant quit work with good cause, and is not disqualified from receiving unemployment insurance benefits because of her work separation from the employer.

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). OAR 471-030-0036(3) defines "available for work," in pertinent part, as being willing to work during all of the usual hours and days of the week customary for the work being sought, capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, not imposing conditions that substantially reduce the individual's opportunities to return to work at the earliest possible time, and physically present in the labor market area every day of the week unless only infrequently absent or seeking work outside of it.

Between April 3, 2016 and the week ending April 30, 2016, claimant left her labor market every day to be with her domestic partner in intensive care in Corvallis. Claimant understandably prioritized being with her partner over working, to the extent she quit a job she had held for approximately one and one-half years because she was unable to do her job because of her personal circumstances. However, claimant's decision demonstrated that she was not willing to work all of the usual hours and days of the week, was not capable of reporting to work in her labor market, imposed conditions on her availability for work, and was not physically present in her labor market for reasons related to her work search. Claimant was not, therefore, available for work from April 3, 2016 to April 30, 2016. Notably, claimant's domestic partner was released from intensive care during the week ending April 30, 2016, and, thereafter, claimant was again available for work.

In sum, we conclude that claimant quit work with good cause and is not disqualified for benefits. She was, however, unavailable for work from April 3, 2016 to April 30, 2016, and is ineligible for benefits for that period.

DECISION: Hearing Decision 16-UI-62790 is set aside, as outlined above.¹ Hearing Decision 16-UI-62792 is affirmed.

¹ 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.

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

DATE of Service: August 9, 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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