

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1116

Modified
Disqualification

PROCEDURAL HISTORY: On July 25, 2016, the Oregon Employment Department (the Department) served notice of an amended administrative decision (decision # 74245) concluding that claimant was not eligible for benefits during the recess period between academic years and denied her benefits for weeks 26-16 through 38-16 (June 26 through September 24, 2016). Claimant filed a timely request for hearing. On August 16, 2016, ALJ Shoemake conducted a hearing, and on August 22, 2016, issued Hearing Decision 16-UI-66067, affirming the administrative decision. On August 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

On September 2, 2016, EAB issued Appeals Board Decision 2016-EAB-1116, reversing Hearing Decision 16-UI-66067 and remanding the matter to the ALJ for further development of the record. On September 16, 2016,¹ ALJ Shoemake conducted a hearing in which claimant did not participate, and on September 23, 2016, issued Hearing Decision 16-UI-67959 in which she adopted Hearing Decision 16-UI-66067. On September 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From May 11, 2015 until January 15, 2016, Eastern Oregon University, (University) an institution of higher education located in LaGrande, Oregon, employed claimant as human resources director. Claimant's job was considered to be an administrative professional position. 9/16/16 Audio recording at 10:34. Her duties included hiring employees, administering benefits and payroll, and serving as Equal Opportunity officer. Claimant reported directly to the University's chief counsel. 9/16/16/ Audio recording at 14:44.

(2) On January 15, 2016, claimant voluntarily left her job for the University to accept a position with a company in Warrenton, Oregon. Claimant accepted the job in Warrenton because it allowed her to live closer to Portland, Oregon, where her husband was working. 8/16/16 Audio recording at 38:24.

¹ Hearing Decision 16-UI-67959 states that the hearing on remand was conducted on August 16, 2016. This is a scrivener's error, however, as the hearing was conducted on September 16, 2016.

(3) At the University, the recess period between academic years 2015-2016 and 2016-2017 began on June 13, 2016 and ended on September 23, 2016. Had claimant not quit her job, she would have had a reasonable assurance that she would continue her employment with the university for the 2016-2017 academic year. Audio recording at 31:13.

(4) On June 28, 2016, claimant filed an initial claim for unemployment benefits. Her claim was determined to be valid and a weekly benefit amount of \$567 was established. Claimant's base year for her claim was January 1 through December 31, 2015. Claimant's claim for unemployment benefits was based entirely on earnings from the University; she had no earnings from an employer other than the University during her base year.

(5) Claimant claimed benefits for weeks 26-16 through 32-16 (June 26 through August 13, 2016), the weeks at issue.

CONCLUSION AND REASONS: We modify the ALJ's decision in Hearing Decision 16-UI-67959 to include the entire school recess period. We conclude that Benefits are not payable to claimant for the entire period between academic years, June 13 through September 23, 2016 (weeks 24-16 through 38-16).

When a claim for benefits is based on base-year wages from an educational institution or institution of higher learning, ORS 657.167 or ORS 657.221 will apply and require a reduction of benefits under certain prescribed conditions. OAR 471-030-0074 (January 29, 2007). In Hearing Decision 16-UI-66067, the ALJ determined that ORS 657.167 applied to claimant's situation; that statute provides a reduction in benefits under certain conditions for employees who work in "an instructional, research or principal administrative capacity for an educational institution or institution of higher education." The ALJ failed consider the applicability of ORS 657.221 which, as amended by the 2016 Oregon legislature in SB 1534, applies to reduce benefits under certain conditions for employees who work in a capacity "other than an instructional, research or principal administrative capacity for an educational institution or institution of higher education." Although both ORS 657.167 and 657.221 deny unemployment benefits during school recess periods under certain conditions to employees of institutions and institutions of higher education, there is a crucial difference between the two statutes. Under ORS 657.221(5), the provisions of this statute regarding reduction of benefits during a school recess period do not apply if the individual claiming benefits worked in a capacity other than "an instructional, research or principal administrative capacity" and had good cause for voluntarily leaving work for the institution of higher education. We reversed Hearing Decision 16-UI-66067 and remanded the matter to the ALJ for further development of the record, directing the ALJ to conduct an inquiry sufficient to determine whether ORS 657.167 or 657.221 applied to claimant's situation.

On remand, claimant's failure to appear limited the ALJ's ability to conduct an adequate inquiry. After reviewing the record in both hearings, however, we find that the evidence established that claimant was an employee of the University, an institution of higher education and therefore subject to the provisions of either ORS 657.167 or 657.221. Under both statutes, the conditions for reduction of benefits during a recess period are identical; claimant's benefits must be therefore reduced if she meets these conditions, no matter what type of work she performed for the University. Claimant will only avoid application of ORS 657.221 if she demonstrated good cause for voluntarily leaving work for the University. We therefore begin our analysis by determining if claimant had good cause for quitting her job.

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.

After claimant had worked for the University for several months, she decided to accept a job that would allow her to live closer to the Portland area, where her husband had been working. OAR 471-030-0038(5)(a) states that if an individual leaves work to accept an offer of other work good cause exists only if the offer is definite, and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances, is reasonably expected to continue and pays an amount equal to or in excess of the weekly benefit amount or an amount greater than the work left. OAR 471-030-0038(5)(g) states that it is good cause to leave work if a claimant leaves due to “compelling family reasons,” and OAR 471-030-0038(1)(e) defines “compelling family reasons” to include leaving work to accompany a spouse when the location of the spouse’s work has changed to a location where it is not practicable for claimant to continue to commute to work. However, the record fails to establish that claimant quit work with good cause under OAR 471-030-0038(5)(a) or (g). Nor does the record otherwise demonstrate that claimant quit work with good cause under OAR 471-030-0038(4). We therefore conclude that claimant quit working for the employer without good cause.

Because claimant voluntarily left work for the University without good cause, she is subject to the conditions under which benefits may be paid under ORS 657.167 and 657.221. OAR 471-030-0074 (January 29, 2007), provides in relevant part:

(1) ORS 657.167 and 657.221 apply only when the individual claiming benefits was not unemployed as defined by ORS 657.100 in the period immediately preceding the holiday, vacation or recess period. . . . Where the week(s) claimed commenced during a customary recess period between academic terms or years, the relevant period is the academic year or term immediately prior to the recess period.

(2) The provisions of ORS 657.167 and 657.221 apply irrespective of whether or not the individual performed services only during an academic year or in a year-round position.

Because claimant claimed benefits for weeks 26-16 through 32-16 (June 26 through August 13, 2016), the relevant period under OAR 471-030-0074 is the University’s academic year.² Under ORS 657.100, an individual is unemployed in any week in which the individual earns less than her weekly benefit amount. Because claimant earned more than her weekly benefit amount of \$567 during at least one week of the 2015-2016 academic year, she is not exempted by OAR 471-030-0074 from the provisions of ORS 657.176 and 657.221.

² *Friedlander v. Employment Division*, 66 Or App 546, 676 P2d 314 (1984).

In order for ORS 657.176 or 657.221 to apply, three conditions must be met. The first condition is that the benefits sought must be for a week that commenced during a customary vacation period, holiday or summer recess observed by the institution of higher education for which the individual performed services during the base year.³ The University's summer recess period between the 2015-2016 and 2016-2017 academic years began on June 13, 2016 and ended on September 23, 2016. Claimant claimed benefits for the period from June 26 through August 13, 2016. Claimant therefore met the first condition for ORS 657.167 and 657.221 to apply.

The second condition that must be met is that claimant must have performed services for at least one institution of higher learning during the academic year immediately preceding the recess period. Claimant met this condition because she worked for the University during the 2015-2016 academic year.

The third condition that must be met is that claimant must have had "reasonable assurance" of continuing work in the 2016-2017 academic year.⁴ In order to establish "reasonable assurance" under ORS 657.221(2)(b), the work offered must be 1) in the same or similar capacity, and 2) on economic terms and conditions not "substantially less" than the economic terms and conditions of the work performed during the previous academic year. "Same or similar capacity" refers to the type of services provided, i.e., either a "professional" capacity as provided by ORS 657.167 or a "nonprofessional" capacity as provided by ORS 657.221.⁵ Economic terms and conditions are "substantially less" when the weekly wages or average number of hours are "substantially less."⁶ Whether the economic terms and conditions are "substantially less" is determined according to state law, and not subject to federal conformity requirements.⁷ The employer's testimony that had claimant not quit her job, she had "reasonable assurance" of continuing work for the University for the 2016-2017 academic year was not disputed.

Because claimant met the prescribed conditions for ORS 657.176 and 657.221 to apply, claimant's benefits are therefore subject to the reduction contemplated by these statutes. We agree with the ALJ and conclude that benefits are not payable to claimant those weeks that commenced during the summer recess period between the University's academic years – weeks 24-16 through 38-16 (June 12 through September 24, 2016). The ALJ, however, concluded that benefits were not payable only for the weeks 26-16 through 38-16 (June 26 through September 24, 2016). Because claimant's eligibility has been

³ ORS 657.167 and ORS 657.221.

⁴ See OAR 471-030-0075 (January 29, 2007).

⁵ OAR 471-030-0075(3). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁶ OAR 471-030-0075(2). For further discussion of these terms, see *Unemployment Insurance Program Letter* (UIPL) No. 04-87.

⁷ See UIPL No. 04-87; *Johnson v. Employment Division*, 59 Or App 626, 651 P2d 1365 (1982) (discussing *Mallon v. Employment Division*, 41 Or App 479, 599 P2d 1164 (1979)).

determined for the entire recess period, the hearing decision at issue is modified to state that claimant is not eligible for benefits for the entire recess period, weeks 24-16 through 38-16.

DECISION: Hearing Decision 16-UI-67959 is modified, as outlined above.

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

DATE of Service: October 10, 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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