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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0151

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily quit work with good cause (decision # 75344). The employer filed a timely request for hearing. On January 24, 2017, ALJ Meerdink conducted a hearing, and on January 25, 2017 issued Hearing Decision 17-UI-75375, concluding claimant had quit work without good cause and was disqualified from benefits. On February 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

EVIDENTIARY MATTER: As a preliminary matter, we take notice of the following generally cognizable information published by the Oregon Employment Department: in Oregon's mid-valley region the median annual salary for teacher assistants in 2016 was $30,644; the applicable median hourly wage for substitute teachers in 2016 was $21.89.[1] Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the referenced generally cognizable information will remain in the record.

FINDINGS OF FACT: (1) Dallas School District No. 2 employed claimant as either a substitute teacher or an instructional assistant from November 1, 2016 to November 2, 2016.[2]

[1] *See* https://www.qualityinfo.org/, occupation profiles.

[2] The evidence fails to clearly establish whether claimant worked for the employer as a substitute teacher or as an instructional assistant. Ordinarily, the failure of the ALJ to inquire sufficiently on that issue would require remand. Here, however, remand is unnecessary because, regardless which position claimant held, the outcome of this case remains the same.

(2) The position for which claimant applied advertised a wage scale of $11.25 to approximately $15.00 per hour, with the actual wage the employer would offer the successful applicant dependent upon his or her experience, educational qualifications and background. Claimant had a master's degree, 16 years of experience and was a licensed teacher. He expected the wage the employer would offer him, if hired, would be toward the top end of the advertised wage scale.

(3) The employer ultimately offered claimant the position and asked him to begin working on November 1st even though the executive assistant who handled the employer's human resources and personnel matters would not be available to discuss claimant's pay rate or complete his new hire paperwork until November 2nd. Claimant agreed and worked full days on November 1st and November 2nd.

(4) After claimant's shift on November 2nd he met with the executive assistant, who informed claimant that the employer was offering to pay claimant $11.25 per hour, the bottom of the advertised wage scale. Claimant suggested that his education, experience and license should place him at the higher end of the wage scale. The executive assistant suggested that if she could verify his years of experience she might instead be able to start him at $12.04 per hour.

(5) Claimant was dissatisfied with both pay rates, and thought he would not be able to make employment with the employer work at that wage because of the distance of his commute, impact of the job and commute on his ability to seek higher paying work, and his ability to meet his financial obligations. Claimant and the executive assistant agreed that claimant could take some time to think about the employer's offer before finishing the new hire paperwork; claimant ultimately declined the employer's offer of employment and did not return to work after November 2, 2016.

(6) The median hourly wage for substitute teachers in the mid-valley in 2016 was $21.89. The applicable median hourly wage for teacher's assistants is $17.71.[3]

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant and the employer had an employment relationship and that claimant voluntarily left his job; however, we disagree with the ALJ and conclude that claimant had good cause for voluntarily leaving his job.

ORS 657.030(1) generally defines employment as "service for an employer . . . performed for remuneration." "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). "If the employee could have continued to work for the same employer for an additional period of time the separation is a voluntary leaving of work." OAR 471-030-0038(2)(a). In this case, claimant performed service for remuneration for the employer, and they had a continuing relationship until such time as claimant chose to leave at a time when he could have continued to work for the same employer for an additional period of time. Claimant therefore was employed by the employer until he voluntarily left work, effective November 2, 2016.

[3] The Department's research figures do not include a median wage or salary for teacher's assistants in the mid-valley region; therefore, we used the median wage applicable to Oregon. We calculated the $17.71 hourly rate by taking the annual salary ($30,644) and dividing it by 1730 hours (full time hours prorated for a ten-month employment period typical of school employment).

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). 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.

The ALJ concluded that claimant voluntarily left work without good cause, reasoning that his dissatisfaction with the offered wage was not grave and he "did not establish that he could not have continued working and receiving wages while he sought other better paying work, nor did he establish that there was some other reason that he could no longer work for the district." Hearing Decision 17-UI-75375 at 2. We disagree. As a preliminary matter, it is immaterial that claimant could have continued to work an additional time for the same employer, or that he could have sought work elsewhere before quitting. Not only is that true in every case in which an individual voluntarily leaves work, it is beside the point.[4] The issue that must be decided in every quit case is not whether or not the individual could have continued working, but whether the individual had good cause for leaving work.

Claimant did not merely leave work because he was dissatisfied with the offered wage, he also quit because he thought accepting underpaying work for the employer would unduly interfere with his ability to seek other, higher paying work. In essence, then, claimant quit working for the employer to seek other work. OAR 471-030-0038(5)(b)(A) specifically states that "[l]eaving suitable work to seek other work" is a disqualifying reason for quitting a job. The deciding factor in this case is, therefore, whether the work claimant quit was "suitable." ORS 657.190 provides that, "[i]n determining whether any work is suitable for an individual . . . consider, among other factors . . . the . . . prior training, experience and prior earnings of the individual . . ." ORS 657.195(1)(b) states, "no work is deemed suitable . . . [i]f the remuneration . . . [is] substantially less favorable to the individual than those prevailing for similar work in the locality."[5]

The work offered to claimant paid $11.25 per hour. $11.25 per hour is only 51% percent of the median hourly wage for substitute teachers and 63% of the median hourly wage for teacher's assistants. Assuming the executive assistant was able to verify claimant's employment experience and bump his hourly pay from $11.25 to $12.04, $12.04 per hour is only still only 55% of the median hourly wage for substitute teachers and still only 68% of the median hourly wage for teacher's assistants. We find that an hourly wage that, at most, pays 32% less than the median wage prevailing in the locality is, without question, a "substantially less favorable" wage. Work that pays a "substantially less favorable" wage is, as a matter of law, unsuitable. Because the work claimant left was unsuitable, his work separation was not disqualifying.

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[4] *See accord Warkentin v. Employment Department*, 245 Or App 128, 261 P3d 72 (2011); *Campbell v. Employment Department (Campbell I)*, 245 Or App 573, 263 P3d 1122 (2011); *Strutz v. Employment Department*, 247 Or App 439, 270 P3d 357 (2011); *Campbell v. Employment Department (Campbell II)*, 256 Or App 682, 303 P3d 957 (2013).

[5] The Department has defined the term "substantially less favorable," but only for cases in which an individual has failed to apply for or accept suitable work. *See* OAR 471-030-0037. As the definition is inapplicable to voluntary leaving cases, we apply the plain meaning of the phrase with consideration to the text and context of the relevant statutes and rules.

DECISION: Hearing Decision 17-UI-75375 is set aside, as outlined above.[6]

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

DATE of Service: <u>February 23, 2017</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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

[6] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.