

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0227

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant had good cause for refusing an offer of work from the employer (decision # 81700). The employer filed a timely request for hearing. On February 6, 2017, ALJ Seideman conducted a hearing, and on February 9, 2017 issued Hearing Decision 17-UI-76564, affirming the Department’s decision. On February 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer’s written argument when reaching this decision. At the hearing and in its written argument, the employer repeatedly argued that claimant “voluntarily quit due to job abandonment and the employer should not be chargeable for any benefits paid to the claimant.” The only issue EAB has jurisdiction to decide is the job refusal issue decided in decision # 81700 and Hearing Decision 17-UI-76564. Our decision is confined to that issue and will *not* address any work separation that might have occurred between claimant and the employer and will not directly address the chargeability issue.

In addition to the job refusal issue this decision will address, however, Department records also show that the same day the Department issued decision # 81700 it also issued a separate decision, # 75934, allowing claimant benefits based on a work separation from LGC Associates. Although the employer’s January 10, 2017 “appeal” letter to OAH stated “[w]e disagree with the decision allowing claimant benefits because the claimant voluntarily quit by job abandonment,” the same letter also stated that the employer was appealing “the attached” decision. “[T]he attached” decision, however, was decision # 81700, which allowed claimant benefits based upon her job refusal, and was *not* decision # 75934, which allowed claimant benefits based upon her work separation. The employer also attached to the “appeal” letter and decision # 81700 a form request for hearing that stated “**REQUEST FOR HEARING ON DECISION # 81700 ONLY**”. (Emphasis in original.)

It appears on our review of this matter that, although the employer’s “appeal” letter specifically disputed the conclusion in the Department’s decision # 75934, claimed the work separation occurred because

claimant voluntarily quit her job by abandoning it, and specifically requested a hearing be held, the employer's references to documents confining the appeal to decision # 81700 likely resulted in the employer's request not being construed as applying to decision # 75934. As of the date of this decision, we note that Department and OAH records do not contain any indication that a request for hearing on decision # 75934 has been or is being processed. Should the employer wish to request a hearing on decision # 75934, which, again, is the Department's decision concluding that LGC Associates discharged claimant but not for misconduct, the employer should request (or re-request) that hearing and be prepared to explain why that request (or re-request) is occurring so many months after decision # 75934 was issued.

FINDINGS OF FACT: (1) On October 18, 2016, a branch manager for LGC Associates, Inc., a temporary agency, contacted claimant by phone. During the call, the branch manager offered claimant a one-day assignment the following day to work up to 8 hours at a rate of \$10.00 per hour as a temporary housekeeper at a hotel in Lake Oswego.

(2) Claimant had previously worked at, and quit, one of the employer's assignments located in Tualatin because it was too far away for claimant to commute to work. Claimant did not want the Lake Oswego job because it was further away than the Tualatin job had been and she thought it would take her three hours to commute to the job by public transportation. Claimant was also in the process of packing her belongings in anticipating of moving her residence on October 20th and did not have the time to accept such an assignment. The branch manager concluded after her phone call and a subsequent text message, however, that claimant had accepted the October 19th assignment.

(3) At all relevant times, the Department considered Lake Oswego as falling outside claimant's labor market. The Department considered a three-hour commute for a temporary job paying \$10.00 per hour to be an unreasonable distance for claimant to commute.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant refused an offer of work from the employer with good cause.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. OAR 471-030-0038(6)(a) (August 3, 2011) defines "good cause" as "such that a reasonable and prudent person, exercising ordinary common sense, would refuse to * * * accept suitable work when offered by the employer." Factors to consider when determining whether work is "suitable" include, in pertinent part, "the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual."

In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work was not suitable, or that she had good cause to refuse the offer.¹ The employer, however, has the burden to

¹ See *accord Marella v. Employment Dept.*, 223 Or. App. 121, 194 P.3d 849 (2008) (so stating).

prove that claimant is not entitled to benefits.² In other words, the employer must first establish that it made claimant a valid offer of suitable work and that she refused it, thus making a *prima facie* showing that claimant was not entitled to benefits; if, and only if, the employer meets that burden does it then shift to claimant to show the offer of work was not valid, or show she had good cause for refusing it.

It appears in this case that the employer's offer of work was valid. The employer made the offer prior to the date the work was to occur and provided sufficient detail about the time, place, location, hours and wages. The employer's witness testified, however, that claimant accepted the offer of work.³ Assuming the employer's witness's testimony is true and accurate, by establishing that claimant accepted the employer's offer of work the employer failed to establish by a preponderance of the evidence that claimant actually refused that offer. The fact that claimant might later have abandoned the assignment, failed to appear for the scheduled shift, or abandoned her relationship with the employer does not alter that conclusion.

Even if we concluded that, as claimant argued, she refused the offer of work, the outcome of this decision would remain the same because the assignment the employer offered her was not suitable. Work is not suitable for an individual if it is located so far from the individual's residence that it is impracticable for the individual to commute to the location of the work. The Department generally only requires individual to seek and be available for work within the area of their "labor market," which is established by Department employees and includes the "geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage." OAR 471-030-0036(6)(a). In this case, the Department employee testified that the October 19th job assignment was outside of claimant's labor market. We conclude that the Department's conclusion is reasonable, as we find it highly unlikely that workers experiencing similar circumstances, that is, the prospect of commuting over three hours for eight hours of work at a rate of \$10.00, would seek or accept that type of work.

Because the employer did not establish that claimant refused an offer of work, and because even if it had the distance of the work from claimant's residence made the work unsuitable, she is not disqualified from receiving benefits because she refused the employer's offer of work. Having so concluded, we need not and do not address whether claimant's reasons for refusing the work amounted to "good cause" under the applicable rule.

DECISION: Hearing Decision 17-UI-76564 is affirmed.

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

² *Alaska Tanker Co. v. Employment Dept.*, 185 Or. App. 687, 61 P.3d 276 (2003) (the Court held, in a vacation pay case, that because the "employer is the party arguing that claimant's benefits should be reduced, employer bears the burden of proof on that issue"); *citing Johnson v. Employment Dept.*, 177 Or. App. 464, 34 P.3d 716 (2001) (the employer has the burden to show misconduct in a discharge case under ORS 657.176(2)).

³ We note that the ALJ found facts in accordance with claimant's testimony on the basis that claimant was more credible than the employer. Hearing Decision 17-UI-76574 at 2. The ALJ did not cite to any facts or evidence in support of his conclusion, however, nor have we found any. We need not give weight or deference to any credibility determination unless it is explicit and based upon identified facts in the record. *See* ORS 657.275(2). We disagree with the ALJ's implied determination and found the evidence offered by the parties to be equally credible.

DATE of Service: March 17, 2017

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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