EO: 200
BYE: 201805

455
VQ 005.00

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

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0788

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85306). Claimant filed a timely request for hearing. On June 5, 2017, ALJ Lohr conducted a hearing, and on June 12, 2017 issued Hearing Decision 17-UI-85452, affirming the Department's decision. On July 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: During the June 5th hearing the ALJ stated that she admitted Exhibit 1, consisting of a copy of a pay stub and a February 2017 letter, into evidence, but did not mark the documents. Because the ALJ described the documents in sufficient detail, however, we were able to mark Exhibit 1 as a clerical matter.

FINDINGS OF FACT: (1) Affordable Care NW, LLC employed claimant as a caregiver from December 2013 to February 6, 2017. The employer provided caregiving services for clients in the Portland Metro area.

(2) When claimant began working for the employer she lived in the Portland Metro area. Soon after she began working, the employer assigned her to work as a live-in caregiver for a client in Southwest Portland. Claimant worked 24 hour shifts four days each week and had three days off. At some point the employer reduced her schedule to three days each week.

(3) In approximately April 2017, claimant moved to Tillamook, Oregon, located approximately 70 miles from the Portland Metro area, a distance that typically took approximately 90 minutes to drive.[1]

[1] We take notice of the distance between Tillamook and Portland, a generally cognizable fact. 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 noticed fact will remain in the record.

Claimant continued to work for the employer in the same assignment after she moved, driving a mini-van round-trip between Tillamook and SW Portland once each week to do so.

(4) Claimant last worked for the employer on February 6, 2017. Thereafter, the client for whom claimant provided live-in caregiving services canceled services because the employer had increased its rates. Claimant asked the employer if another live-in assignment was available but the employer only had hourly jobs available at the time.

(5) Claimant did not return to work for the employer after February 6, 2017.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

There is no dispute that claimant's live-in caregiving assignment in SW Portland ended through no fault of her own. The dispute is whether or not claimant could have continued to work for the employer after that assignment ended. The parties agreed that claimant asked about and was willing to continue working in any live-in assignments the employer had, and agreed that the employer had none. The employer alleged that claimant told the employer she was only available for live-in jobs and did not want hourly jobs. Audio recording at ~ 43:30. Claimant alleged that she asked the employer for hourly assignments, however, and that the employer had none for her then ignored her follow-up calls. Audio recording at ~ 37:20, ~ 40:00. Claimant further claimed she would have been willing to accept a one-hour per day assignment from the employer despite the length of her commute. Audio recording at ~ 39:30, ~ 40:30. Without expressing an opinion as to claimant's general credibility in this matter, we find the employer's claim that claimant was unwilling to work in hourly jobs more persuasive than claimant's assertions to the contrary because it is not plausible or logical that an employee would be willing to repeatedly drive 90-minutes in each direction to accept and work the hypothetical one-hour per day assignment claimant claimed she would have accepted. We find it likely that driving three hours in a mini-van each shift would cost more than claimant could earn from performing the work, and therefore conclude that it is unlikely that she would have done so even if such an assignment was explicitly made available to her. We therefore conclude that although the employer had ongoing hourly work available, and claimant could have continued to work for the employer for an additional period of time, it is more likely than not that claimant chose not to do so, thus voluntarily leaving work.

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). 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.

The ALJ concluded that claimant voluntarily left work without good cause because she "preferred a live-in position because she lives in Tillamook and would rather not commute for hourly work." Hearing Decision 17-UI-85452 at 2. The ALJ reasoned that there was no evidence showing claimant left work due to a reduction in hours, and since she had had commuted for several years from Tillamook to Tigard "without objection" and the employer "had ample hourly work available" to claimant after her live-in position ended she did not have good cause to quit. *Id.* We disagree.

At the time claimant left work, her residence was located 90 minutes away from the employer's service area. Although a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, might continue to make a three-hour round trip commute to a location outside of her labor market once each week in order to continue providing live-in caregiving services to a long-term client, it is unlikely she would do so to accept hourly work for new clients. While claimant did not expressly state that she left work because of the reduction in hours switching from a three-day per week live-in assignment to an hourly assignment would entail, and argued that she did not quit her job, the change in hours from live-in to hourly was, logically, a factor in this work separation. An individual who chooses to discontinue working for an employer due to a reduction in hours is generally considered to have left work with good cause if the cost of continuing to work would exceed the remuneration earned from performing the work. *See* OAR 471-030-0038(5)(e). As noted above, the cost of the commute would likely exceed the remuneration she might receive from performing hourly work.

Likewise, any hourly work the employer had available to claimant would not have been "suitable" for her because of the distance of the work from her residence. *See* ORS 657.190 (factors to consider when determining if work was "suitable" includes the distance of the work from the individual's residence). Although an individual's "labor market" is to be determined by the Department, that determination is based on 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). We find it unlikely that a determination of claimant's "labor market" based on her Tillamook residence would include the Portland Metro area, further establishing that hourly work in the Portland Metro area was unsuitable for claimant. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would, more likely than not, be unwilling to perform unsuitable work. The fact that claimant had previously been willing to commute outside her labor market once a week for approximately 10 months for live-in work with a long-term client did not make continued work outside the labor market suitable.

For those reasons, we conclude that claimant voluntarily left work with good cause. She is, therefore, not subject to disqualification from benefits because of her work separation.[2]

[2] In reaching this decision we note that the outcome of this case would have remained the same even if we had concluded that the employer discharged claimant from her employment because any discharge would not have been for misconduct. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The discharge would have been the result of claimant's unavailability for hourly work when her live-in assignment ended, and claimant's unwillingness or refusal to accept hourly work from an employer whose service area was located 90 minutes away from her residence would not have amounted to a willful or wantonly negligent violation of the standards of behavior an employer could reasonably expect of her.

DECISION: Hearing Decision 17-UI-85452 is set aside, as outlined above.[3]

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

DATE of Service: **July 27, 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.

Please help us improve our service by completing an online customer service survey. 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.

[3] 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.