EO: 990
BYE: 201832

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
2018-EAB-0064

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114235). Claimant filed a timely request for hearing. On January 9, 2017, ALJ M. Davis conducted a hearing, and on January 10, 2018 issued Hearing Decision 18-UI-100635, affirming the Department's decision. On January 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based upon the hearing record. Claimant also submitted new information that was not part of the hearing record. EAB may consider additional evidence that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). We have reviewed the materials claimant submitted and found that only the May 15, 2017 email establishing claimant's start date is relevant, material and necessary to complete the record. The ALJ's failure to inquire with claimant about what he meant by having a "kind of loose" start date amounted to a factor beyond claimant's reasonable control that prevented him from offering the information at the hearing. Audio recording at ~ 12:45; ORS 657.270(3). The May 15, 2017 email is therefore marked as EAB Exhibit 1 and admitted into the record. 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. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record. The remaining materials claimant submitted, to the extent they are comprised of additional evidence that was not part of the hearing record, are excluded from evidence and were not considered by EAB in reaching this decision.

FINDINGS OF FACT: (1) Andrew S. Mathers, PC employed claimant as owner and president of his law practice in Bend, Oregon from June 15, 2010 to May 16, 2017.

(2) Claimant paid himself $1,500 per month plus shareholder distributions when he settled cases. Claimant's business was slow, he had no support staff, and handled all functions of his business himself.

In 2015, claimant sold his home because he did not have sufficient income to continue paying the mortgage. In January 2016, claimant determined that his practice was neither financially nor personally sustainable and decided to close his practice once he obtained a new job.

(3) In January 2017, claimant made contact with Consumer Litigation Law Center/Pacific Wealth Legal Advisors about a paralegal position located in Anaheim, California. That month, Consumer informed claimant that the position was permanent or long-term. On April 24, 2017, Consumer offered claimant a law clerk position. The new position paid $80,000 yearly plus benefits. Claimant accepted the position and, on May 15, 2017, claimant and Consumer agreed that his start date would be June 12, 2017.

(4) On May 16, 2017, claimant closed his practice and stopped working for the employer. On approximately May 23, 2017, claimant and his spouse began moving their residence, including two children, from Bend to Anaheim.

(5) At all relevant times claimant's weekly unemployment insurance benefit amount was $604.[1]

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).

Claimant both owned the employer's business and worked for it as its sole employee. In that dual role he decided to close the business once he found a new job. In so doing, "claimant and his professional corporation agreed to a mutually acceptable date of termination," at which time claimant essentially "fired himself." *See accord Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998) (internal quotations omitted). Like the claimant in *Shurin*, the work separation in this case was caused by claimant's own voluntary act; because the decision to end the employment relationship rested exclusively with claimant, and he could have continued to work for the same employer for an additional period of time had he wanted to do so, the work separation was a voluntary leaving.

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.

[1] We take notice of this fact, which is contained in Employment Department records. 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.

OAR 471-030-0038(5)(a) further provides,

> 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. Furthermore, the offered work must reasonably be expected to continue, and must pay:
>
> (A) An amount equal to or in excess of the weekly benefit amount; or
>
> (B) An amount greater than the work left.

The ALJ concluded that claimant did not have good cause to voluntarily quit his job with the employer to accept an offer of work under OAR 471-030-0038(5)(a) because "the offer was not definite" based upon the ALJ's understanding that claimant "did not have a specific start date." Hearing Decision 18-UI-100635 at 2. We disagree.

In this case, the offer was definite. Claimant and Consumer both understood as of May 15th that claimant would begin work at Consumer's Anaheim location on June 12, 2017 and work as law clerk for $80,000. *See* EAB Exhibit 1. At the time of the offer, there were no contingencies or elements of a job offer that appear to be missing from the parties' agreement.[2]

The work was to begin in the shortest length of time reasonable under the circumstances. There was a significant gap between the date of claimant's separation on May 16, 2017 and his start date on June 12, 2017, and a gap stretching several weeks between jobs in most cases would likely not be considered a reasonably short length of time. In this case, however, between those dates claimant had to close a law practice, secure housing in Anaheim, pack a household that included two children, move 844 miles, and set up a new household. Given those circumstances, it appears more likely than not that the length of time between his separation and planned start date was the shortest reasonable under the circumstances.

The work in this case was reasonably expected to continue. Claimant confirmed with Consumer during the application and hiring process that Consumer "would intend on the position being a permanent, long term position." Exhibit 1. On this record, there was nothing in the offer of work from Consumer that would have led claimant or any reasonable and prudent person to believe that the position was a short term position or was of finite duration.[3] We therefore conclude that the preponderance of the evidence suggests the offered work was reasonably expected to continue.

The record is not clear what claimant earned working for the employer, since he received periodic shareholder distributions from settlements in addition to his minimal monthly salary. However, there is

[2] We note that claimant's offer of "employment" ultimately turned into an offer to work as an independent contractor. At the time of the offer, however, and at the time claimant left work with the employer to accept Consumer's offer, the offer was for "employment," not "self-employment," and, in a determination under OAR 471-030-0038(5)(a) it is the nature of the offer that determines an individual's qualification or disqualification from benefits.

[3] On June 13, 2017, Consumer informed claimant that he would work as a contractor rather than an employee; the *offer*, however, as described on this record, appears to have been for permanent or long-term employment.

no dispute that the offered work, which paid claimant a minimum of $1,538.46 per week, far exceeded claimant's $604 weekly benefit amount.[4]

Although the job claimant accepted with Consumer ultimately was not the same job or on the same terms as Consumer's offer of work to claimant, it appears on this record that, more likely than not, claimant voluntarily left his job with the employer to accept a definite offer of work from Consumer, and that the offer was for work that started in the shortest time reasonable under his circumstances, was reasonably expected to continue, and paid more than his weekly benefit amount. Claimant therefore left work with the employer with good cause, and is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-100635 is set aside, as outlined above.[5]

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

DATE of Service: <u>February 16, 2018</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.

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[4] The record established that Consumer offered claimant work at $80,000 per year plus tangible benefits. Although the amount of the benefits and whether they should be considered part of claimant's wages was not developed at the hearing, $80,000 divided by 52 weeks totals $1,538.46 per week. Because that amount exceeds claimant's weekly benefit amount, and therefore meets the minimum requirements of OAR 471-030-0038(5)(a)(B), we need not remand this matter for development of the record as to the value and nature of the other benefits Consumer offered to claimant.

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