EO: 200
BYE: 201849

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-0169

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 134813). Claimant filed a timely request for hearing. On February 5, 2018, ALJ Seideman conducted a hearing, and on February 9, 2018 issued Hearing Decision 18-UI-102929, affirming the Department's decision. On February 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Elwood Staffing Services, Inc. employed claimant from sometime in February 2017 until September 11, 2017. The employer was a staffing agency. The employer assigned claimant to work at OIA Global, one of the employer's clients. The shift that claimant worked at OIA was from 8:00 a.m. until 4:30 p.m., although sometimes OIA ended the shift earlier or had workers stay later depending on the workload. The employer paid claimant $11.00 per hour for her work at OIA.

(2) Claimant lived in Estacada, Oregon. OIA Global was located in the St. Johns neighborhood of north Portland, Oregon. The distance between Estacada and St. Johns was approximately 42 miles.[1]

(3) When the employer hired claimant and assigned her to work at OIA, the employer knew that claimant's driver's license was suspended and claimant could not lawfully drive. Claimant's friend, who also lived in Estacada, was hired by the employer and assigned to work at OIA at the same time as was claimant. Claimant and the friend carpooled to and from OIA's workplace, with the friend driving. It took an hour to an hour and twenty minutes for claimant to commute between Estacada and OIA. Claimant would not have accepted the work assignment at OIA absent transportation from the friend.

[1] EAB takes notice of this generally cognizable fact, which was found in a reference source generally accepted as accurate. https://www.google/search?ei=h0....1.1.64psy-ab....0KvSGzRjk1gY. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, 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 at EAB.

(4) In May 2017, the friend with whom claimant carpooled stopped working at OIA. When the friend quit work, the earliest bus that left Estacada and connected with a bus that claimant could take to the St. Johns workplace of OIA was at 5:30 a.m. Starting at 5:30 a.m. and making the necessary transfers using public transportation, claimant was not able to arrive at the OIA workplace by the 8:00 a.m. start of her shift. Claimant spoke with the employer about the distance and difficulty she had travelling to work, but the employer could do nothing for her. Consequently, claimant started driving herself to OIA after the friend stopped working there even though her driver's license was still suspended and it was unlawful for her to drive.

(5) In September 2017, claimant was stopped by law enforcement while driving a vehicle. It was discovered that claimant did not have a valid license and her car was towed.

(6) After having been stopped by law enforcement, claimant learned that a bus now left Estacada at 4:36 a.m. which, if she took it, would allow her to arrive at the OIA workplace by 8:00 a.m. However, if claimant used public transportation to commute to work, she would be away from her home for a total of 15 ½ hours, or have a total round trip commute time of approximately 7 hours per day or a one-way trip time of 3 ½ hours, after taking into account a workday of 8 hours and adding a 30 minute lunch break. In this commute, claimant would need to take 9 buses and also walk one mile. Claimant spoke to her coworkers at OIA and her friends, and none of them was willing to drive her to work. Exhibit 1 at 2.

(7) On September 11, 2017 at 12:02 a.m., claimant sent an email to the employer informing it that, although she had tried all day, she had been unable to find anyone who was willing to give her ride to OIA for her shift on Monday, September 11, 2017. That day, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

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.

In Hearing Decision 18-UI-102929, the ALJ concluded claimant did not show good cause for leaving work when she did. While the ALJ's decision did not discount claimant's testimony about the distance and difficulty she had commuting to work at the time she quit, he reasoned that claimant did not show she had no reasonable alternative other than to leave work since "[s]he could have looked for other work" before leaving and "[s]he could have looked for [a ride with] some other carpooler." Hearing Decision 18-UI-102929 at 2. We disagree.

At the outset, the Court of Appeals has repeatedly held that continuing to work until new work is found is never considered a reasonable alternative in lieu of quitting. *See Campbell v. Employment Department*, 256 Or App 682, 303 P3d 957 (2013); *Strutz v. Employment Department*, 247 Or App 439,

270 P3d 357 (2011); *Campbell v. Employment Department*, 245 Or App 573, 263 P3d 1122 (2011); *Warkentin v. Employment Department*, 245 Or App 128, 261 P3d 72 (2011); *Hill v. Employment Department*, 238 Or App 330, 243 P3d 78 (2010). Accordingly, the ALJ erred in concluding that looking for other work while she continued to work was a reasonable alternative to claimant's quitting work when she did.

In addition, it was not disputed that after claimant's coworker quit and after claimant was pulled over in September 2017 and it was no longer feasible for her to continue driving herself unlawfully to work, claimant tried to find a ride to work but could not. Exhibit 1 at 2. The ALJ's contention that claimant should have looked for another coworker to carpool with to work as a reasonable alternative to quitting was not supported by any evidence in the record, such as evidence that any of claimant's coworkers at the time lived in Estacada or, if such a coworker existed, he or she had the same work schedule as claimant. As well, it appears as matter of common sense that it would have been futile for claimant to search for a non-coworker who would drive her to work since it is unreasonable to think and highly unlikely that anyone would be willing to devote the time needed to transport claimant twice a day between Estacada and St. Johns. The ALL also erred in concluding that, on this record, the alternative of locating another person to carpool with to work was available to claimant or that it was reasonable.

It appears that as of the time claimant quit, the available options that would have allowed her to continue working were limited to drive illegally to work or suffering a commute of seven hours on public transportation and being away from her home on work days from approximately 4:30 a.m. until 8:00 p.m. A commute of the length and type described by claimant, covering 42 miles and taking 3.5 hours one way, would as a matter of common sense constitute grave circumstances. Furthermore, the other option would also give rise to grave circumstances since it necessitated that claimant engage in illegal behavior to continue working. Under these circumstances, a reasonable and prudent person would have left work when claimant did.

Claimant showed good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-102929 is set aside, as outlined above.

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

DATE of Service: <u>March 14, 2018</u>

NOTE: 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.

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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