

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0714**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140457). Claimant filed a timely request for hearing. On June 19, 2018, ALJ S. Lee conducted a hearing, and on June 27, 2018 and issued Order No. 18-UI-112168, affirming the Department's decision. On July 16, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The Abernethy Center employed claimant as a part-time bartender/server from April 29, 2018 to May 2, 2018.

(2) The employer was an event venue, typically for weddings and corporate events. The employer catered the events and also offered alcoholic drinks. The drinks were served by bartenders and the food was served by banquet servers. Bartenders typically received tips of varying amounts, depending on the nature of the event and its guests, but did not receive the quantity of tips typically received by bartenders in full service bars in the local food and beverage industry. Banquet servers at the employer did not share in tips at all. To partially compensate for that, the employer paid bartenders and servers a wage greater than minimum wage, the wage typically paid by full service bars. Because the employer only operated for events, there were limited shifts for bartenders, so the employer also assigned bartenders to work shifts as servers to allow them to gain additional hours.

(3) Prior to working for the employer, claimant worked as a manager in food and beverage industry and made approximately \$60,000 per year. She saw an ad for a bartender position with the employer that paid an hourly wage plus tips. When claimant interviewed for the position, the employer's general manager clarified that the position was only part-time, paying an hourly wage plus gratuities, and told claimant the tips were "good" because she had never received a complaint from bartenders about the tips. She also told claimant that bartenders occasionally alternated as servers because there were not

sufficient hours for just bartending. Claimant did not ask, and the general manager did not elaborate, regarding the amount of tips. Claimant accepted the position based on their conversation.

(4) Claimant's first shift of work was as a server, and she learned servers did not share in tips and bartender tips were less than those generally received by bartenders in the food and beverage industry.

(5) On May 1, 2018, claimant notified the general manager that they had had a misunderstanding regarding who received tips and what they would be and that she could not continue to work at the position because her wages would not match the unemployment benefits she could be receiving. Claimant agreed to work her next assigned shift but informed the manager that she was quitting after that. On May 2, 2018, claimant quit work because she concluded she could not make enough in wages and tips to equal or exceed her unemployment benefits.

(6) If claimant had asked, the employer would have been willing to schedule claimant only for bartending work although that probably would have reduced claimant's overall hours.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. Claimant voluntarily left work without 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) (January 11, 2018). 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 the employer for an additional period of time.

Claimant quit work four days after being hired because she considered her job to be unsuitable based on the amount of tips she would receive compared to her customary occupation and the amount of unemployment benefits she would receive if she just continued to look for work in that occupation. In applying OAR 471-030-0038(4), leaving work without good cause includes leaving suitable work to seek other work. OAR 471-030-0038(5)(b)(A). In determining whether any work is suitable for an individual, the Department is required to consider, among other factors, the physical fitness, prior training, experience and prior earnings of the individual, and the length of unemployment and prospects for securing local work in the customary occupation of the individual. ORS 657.190.

In the present case, the compensation paid for the job claimant accepted was different than what she understood it would be at hire based on the employer's practice of not tipping servers and what she was reportedly told about the amount of bartender tips generally. However, claimant did not show by a preponderance of the evidence that the work was unsuitable according to the factors listed in ORS 657.190.

Although the record shows that claimant's prior annual earnings of \$60,000 as a manager in the food and beverage industry was significant, the record fails to show that claimant's projected remuneration as

a part-time bartender/server for the employer would have been substantially less favorable to her than that prevailing for similar work in the locality. First her work for the employer was not as a full time manager. Second, claimant's remuneration as a bartender/server would have involved both wages and tips and she didn't stay with the employer long enough to project what her hours and tips over even a short period of time would typically be. Third, the record shows that her hourly wage as a bartender/server was likely greater than that for a typical bartender in the food and beverage industry because it was the employer's intent to at least partly compensate for the uncertain amount of expected tips.

Finally, before quitting, claimant did not request that the general assign her only bartender work, the compensation for which would have included tips, which the manager asserted she would have considered if claimant had asked. Audio Record ~ 23:00 to 24:00. With regard to claimant's length of unemployment and her prospects for securing local work in her customary occupation, claimant asserted that at hearing that when she was hired, such jobs were "few and far between" and for that reason she sought part time work to at least do something until she found more customary work. Audio Record ~ 9:45 to 10:30. In general, the longer a person is out of work, job offers in other occupations become more suitable.<sup>1</sup> Here, for that additional reason, claimant's work as a part-time bartender likely was not unsuitable.

Therefore, under the factors and exceptions set forth in ORS 657.190, claimant failed to show that her job with the employer, even with the lower amount of tips, was not a suitable position. We therefore conclude that claimant quit suitable work to search for other work, which is quitting work without good cause under OAR 471-030-0038(5)(b)(A). Claimant is disqualified from the receipt of benefits until she requalifies for benefits by earning at least four times her weekly benefit amount from work in subject employment.

**DECISION:** Order No. 18-UI-112168 is affirmed.

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

**DATE of Service:** August 10, 2018

**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](http://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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<sup>1</sup> See, Oregon Employment Department, UI Benefit Manual §303 Suitable Work (Rev. 12/26/14)("The type of work a claimant must look for or accept depends on that claimant's prospects for work within his/her labor market in his/her customary occupation. Someone whose customary occupation does not exist or is in serious decline in his/her labor market may need to seek other kinds of work starting at the initial claim... In general, the longer a person is out of work, job offers in other occupations become more suitable.")

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