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

683
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0939

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90529). Claimant filed a timely request for hearing. On June 19, 2018, ALJ Murdock conducted a hearing, and on June 22, 2018 issued Order No. 18-UI-111924, affirming the Department's decision. On July 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On August 10, 2018, EAB issued Appeals Board Decision 2018-EAB-0696, reversing this matter and remanding it for further development of the record. On August 29, 2018, ALJ Murdock conducted a hearing at which the employer did not appear, and on September 6, 2018 issued Order No. 18-UI-116181, again affirming the Department's decision. On September 22, 2018, claimant filed an application for review with EAB.

Claimant submitted a written argument, which included evidence that she did not offer during the initial hearing or at the hearing on remand. Claimant did not explain why she did not present this new evidence at either hearing, and did not otherwise show as required by OAR 471-041-0090 (October 29, 2006) that she was prevented from doing so by factors or circumstances beyond her reasonable control. For this reason, EAB considered only information received into evidence at the hearings when reaching this decision.

EVIDENTIARY MATTER: In Order No. 18-UI-116181, the ALJ stated that no exhibits were admitted into hearing record, either at the initial hearing or on remand. However, EAB admitted EAB Exhibit 1 into evidence on its review of Order No. 18-UI-111924 and at the hearing on remand, the ALJ admitted into evidence documents that claimant offered as Exhibit 2. Audio of August 29, 2018 hearing at ~6:30. Order No. 18-UI-116181 is hereby corrected to reflect that both exhibits were received into evidence. Because the ALJ failed to mark Exhibit 2 after it was received, but the documents comprising it were readily identifiable from the record, EAB has corrected the ALJ's oversight and marked those documents as Exhibit 2.

FINDINGS OF FACT: (1) One to One Services employed claimant as a live-in manager from September 23, 2016 until May 11, 2018. The employer provided residential foster care for disabled women.

(2) The employer required claimant to live in the residence that she managed. Although claimant was expected to actively provide services from 7:30 a.m. until 7:30 p.m., she was also required, unless it was otherwise arranged, to be available 24 hours per day, seven days per week on the premises of the residence, as the residents might need her. Claimant and the employer entered into a contract in November 2016 that set forth the terms of claimant's employment. In part, the contract stated that claimant's time off was "negotiable per Lynette [the employer's owner]." Audio of July 13, 2018 hearing at ~15:25. The contract provided nothing else about claimant's time off. However, in oral discussions between claimant and the owner, the owner agreed that claimant would have every Friday off unless otherwise agreed. Claimant thought this term meant that she would have Fridays off from 7:30 a.m. on Friday until 7:30 a.m. Saturday. The owner thought this term meant claimant would have Fridays off from 7:30 a.m. until 7:30 p.m. Claimant did not take off time that exceeded what the owner expected because claimant would not leave the residents alone without supervision.

(3) After November 2016, the owner sometimes allowed claimant to be off work after 7:30 p.m. on Fridays if she was available to cover during claimant's absence. The owner occasionally allowed claimant to be off from work overnight on Fridays and to be away from the premises for more than one night. However, on many occasions, the owner abruptly cancelled claimant's Friday day off without notice because the owner was not available to provide coverage for her on that day. On other occasions, the owner would arrive without notice to provide coverage for claimant that began on Friday afternoon, rather than on Friday morning and that was not for 12 hours, or would begin providing coverage on Friday mornings but that also was not for 12 hours. As a result, claimant was not able to schedule appointments since the time she had off was fluid and she was not able to keep many appointments that she had previously scheduled for what she thought was going to be a Friday day off. In approximately 2017, claimant's personal physician refused to continue providing treatment services to claimant because claimant canceled three appointments without notice due to the owner not showing up to provide coverage for claimant on Fridays, without reasonable advance notice to claimant. Although claimant began to inform the owner that she had made medical appointments for particular Fridays, the owner would on occasion still not provide coverage for claimant on that Friday. The owner was the only person who provided coverage for claimant, and if the owner did not arrive to do so, claimant was forced to cancel any appointments she might have made in anticipation of having that coverage.

(4) After November 2016, claimant tried unsuccessfully to negotiate a schedule under which she would have 24 hours off, rather than 12 hours. Claimant also tried unsuccessfully to negotiate a schedule in which her hours off were fixed rather than being dependent on the owner's availability to provide coverage for her. Claimant's time off continued to remain contingent on whether the owner was willing and able to provide coverage.

(5) On May 1, 2018, claimant met with the employer's owner and her daughter to discuss changing the employment contract to allow her fixed times off from work; 24 hours off rather than 12 hours off; and occasional weekends off. The owner told claimant she would think about revising the contract and that she was giving claimant May 2, 3 and 4 off from work because she was able to provide coverage for claimant on those days and to make up for not being able to cover for claimant on some Fridays. On

May 2, 2018, claimant asked the owner what she had decided about changing the contract and the owner told claimant that if she did not like the hours she had off, she could quit her job. On approximately May 4, 2018, claimant contacted the owner about the paycheck she would receive on May 10, 2018. In that conversation, the owner told claimant that she had not intended to discharge claimant on May 2. Claimant told the owner that she would report for work as scheduled on May 5, 2018. Claimant reported for work on May 5.

(6) After May 5, claimant thought about remaining at work given the owner's refusal to renegotiate the terms of the employment contract with respect to claimant's time off. For many reasons, claimant notified the employer on May 11, 2018 that he had quit work, including the owner's refusal to renegotiate the time off terms in the employment contract.

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) (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 her employer for an additional period of time.

In Order No. 18-UI-116181, the ALJ concluded that claimant voluntarily let work without good cause. The ALJ reasoned that claimant did not establish that that her lack of fixed times off constituted grave circumstances since in the "final months" she was at work, the employer had allowed her on a few occasions to have "leave from work of more than 24 hours to take trips or engage in other personal activities" and "many employees face occasions that they [must] agree to cancel or reschedule their medical appointments in order to avoid work conflicts or meet work obligations." Order No 18-UI-116181 at 3-4. We disagree.

At the outset, the employer did not appear at the hearing on remand and the evidence that claimant presented at it was uncontroverted. While claimant agreed that the owner had tried during claimant's final months at work to give her on a few occasions some overnights away from work, it appears that such accommodation was uncommon and infrequent when viewed against the backdrop of the employment relationship. Claimant testified persuasively that whether she would have a day off, and the length of the time she would have off on that day, was contingent on the availability of the owner to provide coverage for her, which was not reliably available. Claimant testified persuasively that without fixed hours she reliably had off, it was not feasible for her to organize and meet personal obligations, particularly given that she was able to attend to those needs only during the 12 hours each week that she was supposed to have off, but often did not have off. Although the ALJ suggested that claimant did not show that any grave consequences arose from having to cancel personal or medical appointments due to the vagaries of her scheduled time off, it appears to us, as matter of common sense, that the inability to predictably structure one's personal commitments and needs around a reliably set work schedule may be in and of itself a situation of gravity without a more particularized showing. Order No. 18-UI-116181.

On this record, after the owner refused on May 2 to renegotiate the employment contract to guarantee claimant dependable, consistent and predictable times off, a reasonable and prudent person in claimant's position, would have concluded that her situation was grave and she had no reasonable alternative other than to leave work.

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

DECISION: Order No. 18-UI-116181 is set aside, as outlined above.

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

DATE of Service: October 26, 2018

NOTE: This decision reverses an order 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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