

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0001

*Affirmed  
Disqualification*

**PROCEDURAL HISTORY:** On September 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 84002). Claimant filed a timely request for hearing. On November 13, 2013, ALJ Lohr conducted a hearing, and on December 13, 2013 issued Hearing Decision 13-UI-06937, affirming the Department's decision. On December 13, 2013, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he restated his hearing testimony and provided new information that he did not present at the hearing. In his argument, claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision

**FINDINGS OF FACT:** (1) Anderson Towing & Recovery employed claimant as a tow truck driver from August 8, 2013 until August 19, 2013.

(2) Claimant applied for the job with the employer in response to a posting on Craigslist that stated "some on-call and overnights hours will be required." Transcript at 9. Claimant accepted the job and was told he would be paid \$13 per hour when he was scheduled for work as well as a 25 percent commission on all tow jobs he performed. Claimant earned as a base rate \$520 per week.

(3) After a training period of approximately one week, claimant was scheduled to work ten hours per day on Mondays, Tuesdays, Thursdays and Fridays from 8:00 a.m. until 7:00 p.m. for which he was paid the \$13 per hour. From 7:00 p.m. on each of these days until 8:00 a.m. the following morning, the employer expected claimant to remain on-call. On Wednesdays from 8:00 a.m. until 8:00 a.m. on Thursdays, the employer also expected claimant to remain on-call. Claimant was not paid for the hours

he was on-call unless he was called to a job, and he was paid for the time on those jobs at \$13 per hour plus commission. At all times claimant was on-call, he was expected to be at a location where he could respond to any calls he received by being at any tow site in a particular zone within 20 minutes. Claimant had Saturdays and Sundays off from work.

(4) In the second week he worked, claimant became dissatisfied with the geographic constraints imposed by the on-call hours, and the fact he was not paid for the on-call time he spent waiting for calls from the employer. Claimant believed the employer's practice of not paying for on-call time was unlawful. Claimant did not complain to the employer, ask the employer to reduce or eliminate his on-call time or tell the employer he thought its pay practices for on-call time were unlawful.

(5) On August 19, 2013, claimant informed the employer he was quitting. He still did not tell the employer he thought its practices for on-call time were unlawful.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work without good cause.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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.

Claimant quit work because the employer was not paying him for the time he waited for a call when he was assigned to on-call duty. Transcript at 5, 8. It is possible that the employer's practice in connection with not paying claimant or its other employees for time spent waiting while on-call was unlawful because it might have resulted in claimant receiving less than minimum wage for all of his hours of work during a pay period. See ORS 653.025(1) (an employer shall not pay an employee less than minimum wage); ORS 653.035(2) (an employer may include commission payments as part of the applicable minimum wage for any pay period); OAR 839-020-0041(3) (on call time must be compensated as work time if the constraints the employer imposes are such that "the employee cannot use the time effectively for the employee's on purposes"); [http://www.oregon.gov/boli/whd/docs/oregonminimum\\_wage\\_eng\\_2013.pdf](http://www.oregon.gov/boli/whd/docs/oregonminimum_wage_eng_2013.pdf) (Oregon minimum wage between January 1, 2013 and December 31, 2013 was \$8.95 per hour). We have consistently held that a claimant who is subject to ongoing unlawful employment practices has good cause to leave work without filing a claim with the Bureau of Labor and Industries (BOLI) and need not work for an indefinite period under unlawful conditions while awaiting the resolution of that complaint. See e.g. *Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012); *Kaitlynn Amis* (Employment Appeals Board, 13-AB-0949, July 17, 2013); see also *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998). However in each of these cases, the particular claimants notified their employers before they quit either that they objected to the practices or that they thought the practices were illegal. Here, claimant did not so notify the employer before he quit.

On the facts as presented, although a reasonable and prudent employee would not have continued to work indefinitely under unlawful conditions, a reasonable and prudent employee would have at a minimum notified the employer on at least one occasion of his objections to the employer's on-call practices or sought a work schedule which avoided some or all on-call time. Assuming the employer's practices of not paying for on-call time was illegal, a reasonable and prudent employee would not have quit until he reasonably determined that, after the employer was put on notice, the employer did not intend to rectify the allegedly unlawful practices or give him a different schedule. On these facts, without taking the step of notifying the employer, claimant could not reasonably know that his situation was objectively grave. Because claimant did not take the steps of a reasonable and prudent employee before quitting, he did not show good cause for leaving work.

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

**DECISION:** Hearing Decision 13-UI-06397 is affirmed.

Tony Corcoran and D. E. Larson;  
Susan Rossiter, not participating.

**DATE of Service:** January 29, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.