

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0614

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93250). Claimant filed a timely request for hearing. On March 20, 2014, ALJ Shoemake conducted a hearing, and on March 24, 2014 issued Hearing Decision 14-UI-13334, reversing the Department's decision. On April 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FFINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant from February 27, 2009 until January 3, 2014, last as a bank teller.

(2) On September 1, 2013, claimant left his position as a management trainee and started working for the employer as a bank teller. As a teller, the employer agreed to pay claimant an hourly wage. The employer also agreed to pay claimant a particular monetary amount as an incentive for each customer he referred to the bankers for purposes of opening a checking account or purchasing certain other bank services. The employer kept track of the incentive pay that was owed to claimant and the other tellers by requiring the bankers to enter into the employer's electronic system the employee identification number of the teller who had referred the customer to the banker. After claimant started working as a teller, the bankers entered the necessary information into the electronic system to allow the employer to calculate claimant's incentive pay for the referrals he made.

(3) On September 15, 2013, when claimant received his first paycheck as a teller, claimant noticed that he did not receive any incentive pay for the referrals he had made during the pay period. Claimant spoke to one of the assistant branch managers about his failure to receive his incentive pay. The assistant manager told claimant she would make a research request to the employer's technical assistance department to determine what had happened. A few days later, the assistant manager told claimant the problem was a system error that would be corrected on his next paycheck, and that he would receive the

back incentive pay he was owed as well as the incentive pay he had earned during that current pay period on his next paycheck. On subsequent paychecks, claimant did not receive any incentive pay. Claimant notified this assistant manager and the other assistant manager at the branch "on a weekly basis" that he still was not receiving his incentive pay. Both assistant managers repeatedly assured claimant that the problem with his pay was a system error that it would soon be corrected and he was going to receive all the incentive pay that was owed to him on his next paycheck. By the end of October 2013, claimant still had not received any incentive pay.

(4) On November 1, 2013, claimant was assigned to a different bank branch with a different manager and assistant managers. In early November 2013, claimant discussed with his new assistant manager the problem he was having with receiving his incentive pay. This assistant manager told claimant she would research the problem. Claimant still did not receive any incentive pay on his November paychecks and did not receive the back incentive pay he was owed. Claimant began contacting the employer's payroll services department about the problem with his incentive pay. That department came concluded that there might be some error in the manner in which claimant's pay was coded in the employer's electronic system.

(5) In early December 2013, the assistant branch manager told claimant that she had learned that the problem preventing him from receiving incentive pay was that his employment code had not been changed in the employer's electronic system to reflect that he had become a teller in September 2013 and was entitled to receive incentive pay. The assistant manager told claimant that she would have the coding error in the employer's system changed. After this discussion, the assistant manager was unexpectedly away from work due to family circumstances. When claimant still did not receive any incentive pay, he contacted the business services section of the employer's human resources department for assistance. The human resources department told claimant that it would need to pursue the issue of claimant's back incentive pay with district level management.

(6) In early December 2013, when the assistant branch manager with whom claimant had been dealing was out of the office, claimant raised the problem with his incentive pay with his new branch manager. Claimant told the branch manager that he was owed incentive pay that had not been paid to him since September 2013 and that he estimated that he was owed approximately \$300, after taxes. The branch manager had already noticed when he was reviewing branch tracking sheets that certain incentive pay that had been credited to claimant in November 2013 had not carried over to claimant's November 2013 payroll records. The branch manager contacted the tracking department, and was told that the time had passed to make any pay adjustments that would enable claimant to receive the incentive pay owed to him for September and October 2013. The tracking department told the manager that it would correct claimant's incentive pay for November 2013 as an "exception." Transcript at 27.

(7) As of December 20, 2013, claimant still had not received any incentive pay owed to him. Claimant was concerned that he was never going to receive his incentive pay and that the underlying error that caused him not to receive that pay was never going to be corrected. Claimant also determined that he was no longer financially able to forego receiving the incentive pay. On December 20, 2013, claimant notified the branch manager that he was going to resign in two weeks because of his consistent failure to receive the incentive pay owed to him from referrals he had made in September, October, November and December 2013.

(8) On January 3, 2014, claimant quit work. As of the day that he quit, claimant had not received any referral pay and did not know what amount, if any, the employer was going to pay as the incentive pay which he was owed. Sometime in approximately February 2014, claimant received an \$18 pay check from the employer, which the bank manager assumed was intended to represent the back incentive pay that claimant was owed. However, sometime after claimant quit work, the employer's tracking department had determined that claimant was owed \$48, before taxes, for referral pay from November 2013 and \$27 for referral pay from December 2013.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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 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 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.

The employer's branch manager agreed that the employer was obligated to pay claimant a monetary incentive for referrals and that the employer did not pay claimant the incentive pay he was owed for September, October, November and December 2013. Transcript at 22, 23, 25, 26. The branch manager did not dispute that claimant had made numerous ongoing requests of management since September 2013 to obtain the incentive pay that was owed to him, and had independently tried to pursue this issue through the payroll department and the human resources department. The branch manager also agreed that claimant quit work because, by December 2013, claimant had not received three months of incentive pay owed to him. Transcript at 22. Although claimant appeared at one point to testify that he quit work because of a new job that was offered to him, claimant clarified that the new job was offered to him only after he notified the employer that he was going to quit. Transcript at 31, 32, 34. It appears, more likely than not, that claimant's decision to leave work was based on the employer's failure to pay him the incentive pay it owed to him.

ORS 652.120(1) requires an employer to pay all wages due and owing to an employee on each regularly established payday. The employer violated this state law when it did not pay claimant the incentive pay that it owed to him for September, October, November and December 2013. The court of appeals has previously held that it is good cause for a claimant to leave work when a wage dispute that claimant has with the employer remains ongoing and unresolved at the time of quitting. *See J. Clancy Bedspreads & Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute was ongoing); *Cavitt v. Employment Division*, 105 Or App 81, 83, 803 P2d 778 (1990) (an employer's repeated violations of ORS 652.120 by paying claimant with bad checks was good cause for claimant to leave work because "[n]o one should be expected to continue working for an employer who pays with bad checks"). EAB has consistently held that no reasonable and prudent person would continue working indefinitely for an employer who engaged in unlawful employment practices on an ongoing basis. *See Kaitlynn A. Amis* (Employment Appeals Board, 13-AB-0949, July 17, 2013) (claimant had good cause to leave work when, despite repeated promises, the employer did not provide

the rest and meal breaks required by state law); *Orville E. Baumgardner* (Employment Appeals Board, 12-AB-2132, August 30, 2012) (claimant had good cause to leave work when the employer did not pay him in accordance with state law on an ongoing basis); *Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012) (claimant had good cause to leave work when the employer did not pay him the state required minimum wage on an ongoing basis). In this case, despite claimant's repeated requests and efforts over three months, the employer did not pay to claimant the incentive pay it agreed at hearing that it had owed to him. Although around the time that claimant quit, the employer had finally taken the steps that would allow payment to claimant of some of the incentive pay amounts it owed, it appears that claimant was never going to receive the amounts he was owed from September and October 2013. Transcript at 23, 27. It also appears that, at the time that claimant quit, there remained an ongoing dispute between claimant and the employer about the total amount that claimant was owed in unpaid incentive pay. Transcript at 7, 8, 29. No reasonable and prudent person who was in claimant's circumstances, exercising ordinary common sense would have continued to work indefinitely for an employer who had not, at that time, paid him in accordance with state law, and who disputed the correct amount that it owed to claimant in unpaid compensation. Although the employer's representative contended at hearing that the employer was working to resolve the issues and claimant reasonably should have given it an opportunity to address them before he quit, the seriousness of these efforts is questionable since claimant never received any incentive pay before he left and there was no evidence in the record that claimant was ever told of these new efforts before he left work. Transcript at 37. A reasonable and prudent person, exercising ordinary common sense, would not have remained employed longer than the three months that claimant did to resolve the matter of the back incentive pay to which he was entitled.

Claimant demonstrated that he had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13334 is affirmed.

Susan Rossiter, Tony Corcoran and J.S. Cromwell, pro tempore;
D.E. Larson, not participating

DATE of Service: May 14, 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.