

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0815

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 155539). Claimant filed a timely request for hearing. On April 22, 2014, ALJ Kirkwood conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16080, affirming the Department's decision. On May 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he presented new information about the employer's alleged failure to pay him properly for all hours worked and the amount of pay that the employer still owed to him, apparently as a reason for his decision to quit work. Claimant did not explain why he did not present this information at the hearing, and did not make any attempt to show, as required under OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from offering the information at hearing. Accordingly, under ORS 657.275(2) and OAR 471-041-0090, EAB considered only evidence received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Bryan Matthews Painting employed claimant as a laborer from October 7, 2013 until January 5, 2014.

(2) The employer issued paychecks twice each calendar month, on approximately the 1st and the 15th. The paycheck issued on the 1st paid the employee for hours worked between the 11th and the 24th of the previous month or the closest week end to the 24th. Exhibit 1 at 5.. The paycheck issued on the 15th paid the employee for the hours worked between the 25th of the previous month and the 10th of the

current month. Exhibit 1 at 5. The pay stubs that the employer issued to employees inaccurately stated that the pay period for the checks issued on the 1st of a month was for the period between the 16th and the end of the previous month and that the pay period for the checks issued on the 15th of a month was for the pay period between the 1st and the 15th of that month. The employer calculated overtime pay for employees based on working over 40 hours in any Monday through Sunday period during the pay period. Claimant thought that the employer calculated overtime on each check by dividing the actual pay period into seven day increment.

(3) Claimant's supervisor initially allocated a half-hour unpaid lunch break to claimant each work day. Because claimant often took a longer time for his lunch, the supervisor then allocated an hour unpaid lunch break to claimant. Sometime in early October 2013, claimant became aware that the employer's office was deducting one hour from the time he reported each day on his timesheets to account for an unpaid lunch break. When claimant discussed what he had learned with his supervisor, the supervisor told him that that he was correct that an hour was being deducted. Transcript at 29. Beginning the pay period of October 11, 2013, on the days when claimant did not take a lunch break, claimant added an extra hour to his each timesheets to adjust for the employer's deduction of an hour lunch break.

(4) On approximately October 15, 2013, claimant received a paycheck for the period of September 25, 2013 through October 10, 2013. The paycheck showed that claimant had worked 60 hours and had no overtime. Exhibit 1 at 56. Claimant sent a text message to his supervisor stating that he thought he had worked more hours during that period. The supervisor reviewed claimant's timesheets and told claimant the next day that his pay appeared to have been correctly calculated. Claimant did not continue to protest that he had not received all the pay that was due to him.

(5) Sometime in approximately December 2013, the Department was investigating claimant because, during a time when he was receiving unemployment insurance benefits, the income claimant had reported was inconsistent with the payroll records of what the employer had paid claimant. Claimant thought that errors in the employer's payroll records had caused this investigation.

(6) On December 21, 2013, claimant was performing work on a job with employees from another company. During a second lunch break at around 3:00 p.m., claimant brought up to the supervisor from the other company that he needed to leave work to go Christmas shopping and that he wanted his shift to end so he could leave. The supervisor tried to persuade claimant to remain working. Claimant became upset. The supervisor stated to claimant, "What the fuck is your problem?" Transcript at 61. Claimant responded, "Fuck you. I only make \$6,000 a year." Transcript at 54. Claimant then left the job site that day before his work was completed.

(7) On December 22, 2013, claimant did not report for work. On that day, the employer completed its work on the job. The employer expected that its next job was going to start on approximately January 5, 2014. Transcript at 43. Claimant thought this new job would start sometime between January 1 and January 15, 2014. Transcript at 11. The employer did not call claimant to ask him to report for the new job. Claimant never contacted the employer about the new job.

(8) On approximately January 5, 2014, claimant mailed a letter of resignation to the employer, quitting work immediately. The reasons the letter stated that claimant was quitting were that the employer had been deducting an hour from claimant's timesheets for lunch breaks when he had not taken a lunch and

that claimant thought that the employer had submitted inaccurate payroll information to the Department when it was investigating claimant's unemployment claim. Exhibit 1 at 4.

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

The first issue this case presents is the nature of claimant's work separation.

If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

At hearing, claimant appeared to contend that he was discharged despite the undisputed fact that he submitted a resignation letter on January 5, 2014. Transcript at 5; Exhibit 1 at 4. Claimant pointed to nothing the employer had done before January 5, 2014 to make him think that he was discharged other than that the employer had not yet called him to report for work on its next job. Transcript at 11. By claimant's own testimony, he did not know precisely when the new job was going to start, and he submitted the resignation letter well before the latest date, January 14, 2014, on which he expected that job to start. *See* Transcript at 11. Given this fact, the employer's failure to call claimant about the new job before January 5, 2014 was, at best, a highly ambiguous and uncertain expression of its intentions. The first objective manifestation of any intention to end the employment relationship was claimant's act in sending his resignation letter to the employer on January 5, 2014. Claimant's work separation was a voluntary leaving on January 5, 2014.

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 P3d 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.

At hearing, claimant presented a long and disjointed list of complaints against the employer which did not clearly indicate which, if any of them, might have caused claimant to quit work. At one point, claimant appeared to contend that he quit because the employer had sent inaccurate payroll records to the Department and because the employer did not provide to him some payroll records for use in an upcoming unemployment insurance hearing. Transcript at 5, 14, 15, 23. Claimant then appeared to contend that he might have quit because he thought that the employer was not correctly calculating his work hours for purposes of his paychecks, and also deducting an hour each day from his paid time for a lunch break. Transcript at 15-23; Written Argument at 1-4. On this record, it cannot be determined why claimant actually quit and we will address, in turn, each of these possibilities.

It appears, most plainly, that claimant did not quit work due to any improper deduction of an hour for his lunches. Although claimant's supervisor disputed claimant's contention that the supervisor had required

claimant to deduct an hour of paid time each day whether or not claimant took a lunch and another one of the employer's witness disputed that claimant did not receive breaks while working, we will accept claimant's contentions for purposes of this discussion. Transcript at 11, 20, 46, 59. From our review of claimant's timesheets, it appears that someone was regularly deducting time from claimant's timesheets to account for a lunch break, although it is not clear whom. *See e.g.*, Exhibit 1 at 48-55, 56-80, 82-86, 95-100. Claimant's own testimony establishes that, beginning on October 11, 2013, he added an hour that he did not work to his timesheets to adjust for the employer's alleged deductions and "everything after October 11th is pretty much correct." Transcript at 21; *see also* Transcript at 20, 22. Since, by his own admission, claimant had remedied this problem two months before he left work, it is not plausible that any alleged deductions of lunch breaks from his timesheets belatedly caused claimant to quit. More likely than not, claimant did not leave work due to any lunch deductions from his paychecks.

With respect to any contention that claimant left work due to the employer's chronic errors in calculating claimant's paid time, our review of a sample of claimant's paystubs did not disclose such errors after taking into account the employer's testimony that, for purposes of calculating overtime, the employer used a week of Monday through Sunday. Transcript at 50. For the paychecks issued beginning November 1, 2013, claimant presumably had made his own adjustments to take account of the employer's alleged deduction of an hour for lunch and any remaining discrepancies would be attributable to the employer's errors. For the check paycheck issued on November 1, 2013 (pay period October 11, 2013 through October 25, 2013), the check indicated 86.5 hours at a regular pay rate and 8.0 hours at an overtime rate, for a total of 94.5 hours. Exhibit 1 at 56. Claimant interlineated that paystub with the handwritten notation that he was actually entitled to receive pay for 80 hours at a regular rate and 18 hours at an overtime rate, also for a total of 94.5 hours. *Id.* A review of claimant's timesheets indicated that he worked 94.5 total hours during this pay period. Exhibit 1 at 67-80. Using the employer's calculation of overtime based on a Monday through Sunday week, the relevant weeks for purposes of calculating the overtime to which claimant was entitled was October 7, 2013 through October 13, 2013 (19.25 hours worked), October 14, 2013 through October 20, 2013 (48 hours worked or 40 regular hours and 8 overtime hours) and October 21, 2013 through October 27, 2013 (19.25 hours worked). Summing these totals, claimant was entitled to 86.5 hours at a regular rate and 8 hours at an overtime rate, which is identical to the hours shown on the paystub issued to claimant. For the paystubs issued on November 15, 2013 and November 29, 2013, claimant had no objection to the hours. Exhibit 1 at 81.¹ For the paycheck issued on January 2, 2014 (pay period December 11, 2013 through December 24, 2013), the check indicated 49.75 hours at a regular pay rate and 2.5 hours at an overtime pay rate, for a total of 52.25 hours. Exhibit 1 at 94. Claimant interlineated that paystub with a handwritten notation that he was actually entitled to receive pay for 46.25 hours at a regular rate and 4 hours at an overtime rate, for a total of 50.25 hours. *Id.* Our review of claimant's timesheets shows he worked a total of 50.25 hours during this period. Exhibit 1 at 95-100. Applying the employer's method of calculating overtime on a Monday through Sunday basis, the relevant weeks are December 8, 2013 through December 15, 2013

¹ Claimant noted in handwriting on the paystub issued on November 29, 2013 that he also worked on November 30, 2013 for which he was never paid. Exhibit 1 at 81. Claimant should have received any pay for work on November 30, 2013 in a paycheck issued on about December 15, 2013. There was no such paystub in Exhibit 2 and no testimony at hearing about claimant not receiving pay for any days worked. It is impossible to determine if claimant received a paycheck on December 15, 2013 or whether he turned a timesheet to the employer that encompassed November 30, 2013. Given the uncertain state of this evidence, claimant did not meet his burden to establish that he did not receive pay for time that he worked on November 30, 2013.

(5.25 regular hours), December 16, 2013 through December 22, 2013 (42.5 hour or 40 hours at a regular rate and 2.5 hours at an overtime rate) and December 23, 2014 through December 30, 2013 (no hours worked). Our calculation disagrees with both the employer and claimant's calculations and results in 47.25 hours at a regular rate and 2.5 hours at an overtime rate. It appears that the employer overpaid claimant for this pay period. Viewing this evidence as a whole, based on our review of a sample of these paystubs, claimant did not meet his burden to establish, more likely than not, that the employer regularly underpaid him, or that underpayment of wages was an objectively good cause for him to leave work.

Claimant's final contention for leaving work was that the employer did not give him its payroll records for an administrative hearing with the Department and that the employer initially submitted inaccurate payroll records to the Department. Transcript at 5, 10, 14, 23. Claimant did not rebut the employer's statements at hearing that the employer did not submit any payroll records to the Department because the employer was a subcontractor and the general contractor, not the employer, was responsible for such submissions and any errors in them. Transcript at 34. Claimant further testified that he repeatedly requested payroll records from his supervisor before he mailed his resignation letter on January 5, 2014 and quit when he did not receive them. Transcript at 27. The supervisor testified that claimant had never requested this information from him or the employer. Transcript at 44. In light of this dispute, the evidence on the issue is evenly balanced. When the evidence on a contested fact is of equal weight and there is no reason to believe or disbelieve the evidence of either party, the uncertainty must be resolved against claimant, because he carried the burden of persuasion in this quit case. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). More likely than not, claimant did not request any payroll information from the employer before he left work. If he did not, it was not objectively reasonable for him to leave work over them. Moreover, even if claimant had requested these records and the employer did not provide them, such a failure was not an objectively reasonable ground for claimant to leave work. A reasonable and prudent person involved in a Department investigation of his reported income would not have quit work if the employer did not give him payroll records before trying to explain to the Department the errors that he thought were in them to determine if he actually needed to obtain the records from the employer. If the Department was not satisfied with his explanation and he still thought he needed to obtain those payroll records, a reasonable and prudent person would not have quit when the records were not provided, but would have asked the Department or OAH to obtain these records for him or to assist him in obtaining them. As a matter of common sense, it is likely that the Department or OAH would have referred claimant to the appropriate source to obtain an administrative subpoena. Because claimant did not take the actions of a reasonable and prudent person, he did not show that his failure to receive these documents was good cause to leave work.

On this record, claimant did not show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-16080 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 23, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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