

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1191**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82955). Claimant filed a timely request for hearing. On July 1, 2014, ALJ Clink conducted a hearing, and on June 8, 2014 issued Hearing Decision 14-UI-21008, reversing the Department's decision. On July 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

Without an accompanying explanation, the employer submitted to EAB copies of invoices it received for some charges it apparently incurred in March and early April 2014. The relevance of these invoices to the issue of claimant's work separation is not clear. *See* OAR 471-041-0090(2)(a) (October 29, 2006). Although the employer appears to be presenting the invoices to EAB to consider as new information, the employer did not show that factors or circumstances beyond its reasonable control prevented it from offering them into evidence as required under OAR 471-041-0090 (2)(b). Because the employer did not meet the threshold requirements necessary for EAB to consider the invoices as new information, EAB did not consider them when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Allstar Animal Removal/The Swanson employed claimant from November 5, 2013 until approximately April 9, 2014. The employer was located in Florida and operated a multi-state business which removed unwanted animals and pests from residential and commercial properties. Claimant worked in Oregon. Claimant was responsible for trapping animals and arranging for their disposal. The employer sold its services and informed claimant of the property locations where he was expected to perform his work.

(2) At hire, the employer told claimant that he was going to be compensated on a commission basis, and that he would receive between ten and twenty-five percent of the gross amount that the customers paid

for the services that he performed. The employer's regular paydays were the first and the fifteenth of each month.

(3) Until March 15, 2014, the employer usually paid claimant approximately \$750 on each payday, which was approximately minimum wage for 80 hours of work. On March 15, 2014, the employer did not pay claimant for his work. Claimant told his supervisor that he had not been paid. The supervisor told claimant to contact the employer's payroll person because the supervisor could do nothing to facilitate payment. The supervisor assured claimant that he would receive his pay on April 1, 2014. Claimant called and sent text and email messages to the payroll person inquiring about why he had not received any pay for the pay period ending on March 15, 2014. The payroll person did not respond to claimant's attempts to contact her. As the month of March 2014 progressed, claimant did not have sufficient personal money to pay his rent, his cell phone bill or his other living expenses. Since claimant used his cell phone for work contacts and to upload information to the employer's electronic system and to receive information from the employer, it was important that he continue to pay the \$200 per month to maintain service. During March 2014, claimant uploaded to the employer's electronic system invoices in the amount of \$8,277 for work he had performed, which should have resulted in claimant's receipt of between \$827.70 and \$2,069.25 in commissions during April 2014.

(4) On April 1, 2014, the employer still did not pay claimant for his work. Realizing he was again not paid, claimant again called and sent email and text messages to the employer's payroll person inquiring about his pay. Sometime around April 3 or 4, 2014, claimant reached the payroll person. After some contacts, the payroll person told claimant she had not received from him during March 2014 invoices in sufficient amounts to require the employer to pay him. Claimant told the payroll person that her calculation of his commissions was "way off" and explained what he thought he was owed based on the invoices he had uploaded to the employer's electronic system. Transcript at 35. Claimant told the payroll person that he had submitted all of his invoices for March 2014, but that, if she would confirm which invoices she had received, he would send the missing invoices to her again by email or text message since the employer's electronic system would not allow him to upload the same invoices more than one time. The payroll person never contacted claimant to provide this information. Shortly after this point, claimant spoke with his supervisor and told the supervisor that his April 2014 phone and rent bills were due and he had no funds to pay them. Claimant told his supervisor that he was going to drive down to California to borrow money from his cousin to pay these expenses and that he would not be able to perform work for a few days. Around this time, claimant learned that he was locked out of the employer's electronic system and could not access it or use it for to communicate with the employer and the payroll person. Sometime after April 3 or 4, 2014, claimant departed for California to secure funds from his cousin. At the point that claimant left, the payroll person still had not contacted him to inform him of the invoices that were missing.

(5) Sometime before April 9, 2014, claimant's cell phone was shut off for non-payment of his bill. At that point, claimant stopped trying to contact the payroll person, stopped communicating with the employer and did not perform any more work for the employer. On approximately April 9, 2014, claimant voluntarily quit work due to his financial circumstances and the employer's failure to pay him on March 15, 2014 and April 1, 2014.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work with good cause.

The first issue that 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 was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). As can best be determined on this record, claimant severed the employment relationship when he ceased trying to maintain contact with the employer during his trip to California. At that time, although claimant's cell phone was shut off and he could not access the employer's electronic system, he still reasonably could have maintained contact with his supervisor or the employer through alternate means, such as using his girlfriend's cell phone as he had done before when his cell phone was not working. Transcript at 21. By not maintaining contact and ceasing to perform work for the employer for an unreasonable length of time, claimant evidenced that he was unwilling to continue to work for the employer. By April 9, 2014, a reasonable time to remain incommunicado due to his need to travel to California had lapsed. Claimant's work separation was a voluntary leaving on approximately April 9, 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.

It appears that claimant ceased maintaining contact with the employer, and thereby voluntarily left work, because of financial hardships that he testified were directly attributable to the employer's failure to pay him on his two most recently scheduled paydays, March 15, 2014 and April 1, 2014. Transcript at 15, 21, 22, 38. The employer's witnesses testified that, in fact, claimant was paid on March 15, 2014 and was not paid on April 1, 2014 because he had failed to submit any invoices supporting that he was entitled to be paid. Transcript at 10, 28, 29. Claimant disputed that he did not submit the invoices to the employer. Transcript at 32, 34. To attempt to resolve this conflict in the testimony, the ALJ held open the hearing record to receive copies of the employer's payroll records to support its contentions, and its witnesses assured the ALJ that they would submit those records and they would establish the accuracy of their testimony. Transcript at 10-11, 37. By so firmly and definitely asserting that claimant was paid on March 15, 2014 and then failing the promised corroborating documents, serious doubt is cast on the reliability of this particular assertion as well as the reliability of the remainder of the evidence presented by the employer's witnesses. On this record, it appears, more likely than not, the employer did not pay claimant on the scheduled paydays of March 15, 2014 and April 1, 2014 and, more likely than not, that claimant had submitted the invoices entitling him to receive pay on April 1, 2014.

The employer did not dispute at hearing that it was required to pay claimant on each payday an amount that, when combined with the commissions owed to him, provided an amount at least equal to the state minimum wage for each hour that he worked. Transcript at 7, 27; *see also* ORS 653.025 (employer must pay employees an amount at least equal to minimum wage for the hours worked in each pay period); OAR 839-020-0010(2) (October 8, 1996) (minimum wage calculation may include

commissions paid during the pay period). Oregon law is also clear that, having established regular paydays, the employer was required to pay claimant promptly on each payday all wages due and owing to him unless the employer had a contrary written agreement with claimant. ORS 652.120(1). There was no evidence in the record about any written agreement that varied the employer's responsibility to pay claimant on each payday. By failing to pay claimant on March 15, 2014 and April 1, 2014 all amounts owed to him for his work, the employer engaged in unlawful acts.

Claimant reasonably undertook efforts to secure the employer's compliance with Oregon law when he contacted his supervisor and communicated his concerns to the employer's payroll person before he quit work. The employer's representative did not act to resolve the issue of claimant's pay within a reasonable period of time, leaving him few alternatives given his financial circumstances. A reasonable and prudent employee, exercising ordinary common sense, would not have continued working for an employer who failed to pay him in accordance with state law after the employer had reasonable notice of its default. *See Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012) (claimant had good cause to leave work when the employer failed to pay him minimum wage as required by state law). On the facts in this record, claimant showed that the employer's failure to pay him on his two most recent paydays was a grave reason to leave work.

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

**DECISION:** Hearing Decision 14-UI-21008 is affirmed.

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

**DATE of Service:**

**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](http://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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