

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1814

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 153712). Claimant filed a timely request for hearing. On November 3, 2014, ALJ Vincent conducted a hearing, and on November 10, 2014 issued Hearing Decision 14-UI-28467, affirming the Department's decision. On November 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the 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) Stitch N Embroidery Inc. employed claimant from December 15, 2006 to May 1, 2014.

(2) Claimant was a full time salaried employee. Prior to May 1, 2014, the employer paid him \$40,000 per year plus a \$70 monthly stipend for his cell phone, provided him health insurance benefits, and allowed him three weeks of paid vacation per year.

(3) On May 1, 2014, the employer's new owner told claimant that to continue working for the employer, he would have to accept a reduction in pay. The employer was not going to continue paying claimant a monthly stipend for his cell phone. The employer was going to continue providing claimant health care insurance benefits.

(4) Claimant declined to accept the new conditions of employment, turned in his work keys, left work and did not return.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant quit work without good cause.

At hearing, claimant asserted he was discharged for refusing to accept the employer's new conditions of employment. Audio Record at 5:00. However, a work separation is a discharge only if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer. OAR 471-030-0038(2)(b) (August 3, 2011). If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a).¹ Here, it is undisputed that claimant could have continued to work for the employer under new conditions of employment, but was unwilling to do so, and therefore turned in his keys, left work and did not return. The work separation therefore is a voluntary leaving, and not a discharge.

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). In this case, claimant quit work, in part, due to a reduction in pay. OAR 471-030-0038(5)(d) states that if an individual leaves work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area.² The median rate of pay in the individual's labor market shall be determined by employees of the Department adjudicating office using available research data compiled by the Department. *Id.* However, where, as here there is no evidence from the Department regarding the median rate of pay, the provisions of OAR 471-030-0038(4) apply. *See* OAR 471-030-0038(5)(d)(D).

OAR 471-030-0038(4) defines "good cause," 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. The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Under OAR 471-030-0038(4), 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 testified that the employer's new owner told him that to continue working for the employer, he would have to sign a non-compete agreement and accept a reduction in pay to \$14 per hour

¹ "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011).

² OAR 471-030-0038(5)(d) applies only when the employer reduces the rate of pay for the position the individual holds. OAR 471-030-0038(5)(d)(A). It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment. *Id.* An employer does not reduce the rate of pay for an employee by changing or eliminating guaranteed minimum earnings, by reducing the percentage paid on commission, or by altering the calculation method of the commission. OAR 471-030-0038(5)(d)(B). An employer does not reduce the rate of pay by loss or reduction of fringe benefits. OAR 471-030-0038(5)(d)(C).

with no paid vacation time. Audio Record at 5:00-19:00. However, the owner testified that that she did not require claimant to sign a non-compete agreement, and told him he would have to accept a reduction in pay to \$16 per hour with one week paid vacation. Audio Record at 24:30-32:00. We find the evidence equally balanced on those issues. Claimant therefore failed to show by a preponderance of evidence that the employer required him to sign a non-compete agreement, was going to pay him less than \$16 per hour, which amounts to approximately \$33,280 per year,³ or allow him less than one week paid vacation per year. It is undisputed that although the employer was going to discontinue paying claimant a \$70 monthly stipend for his cell phone, it was going to continue providing health insurance benefits.

Although the reduction in claimant's pay was significant, claimant did not assert or show that the cost continuing to work for the employer would have exceeded the remuneration he received. Nor did he otherwise show that no reasonable and prudent would have continued to work for approximately \$33,280 per year with one week paid vacation and health insurance benefits, rather than become unemployed. Absent such showings, claimant failed to establish to establish that he quit work with good cause. Claimant therefore is disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-28467 is affirmed.

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

DATE of Service: January 6, 2015

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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³ \$16/hour x 40 hours/week x 52 weeks/year = \$33,280/year.