

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0343

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 113219). Claimant filed timely a request for hearing. On March 9, 2015, ALJ Clink conducted a hearing and on March 17, 2015, issued Hearing Decision 15-UI-35247, concluding claimant voluntarily left work with good cause. On March 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods employed claimant as a deli clerk from September 6, 2007 to December 5, 2014.

(2) In addition to wages, the employer offered its employees fringe benefits such as vacation pay, sick pay and short term disability benefits. On each employee's employment anniversary date, the employer awarded each employee the vacation hours and sick leave hours the employee was entitled use during the upcoming year. If an employee qualified for short term disability benefits, the employee was obligated to use accrued vacation and sick leave before receiving disability payments.

(3) In July 2014, claimant experienced a severe stomach condition and ulcers that qualified as a serious health condition under the Family and Medical Leave Act (FMLA). The employer placed claimant on FMLA leave beginning on July 27, 2014 and ending on September 8, 2014, and notified her that her accrued vacation and sick pay benefits would be exhausted on August 25, 2014, when it would begin paying her short term disability benefits.

(4) Between July 27 and August 25, 2014, the employer did not pay claimant all of the vacation (80 hours) and sick pay (104 hours) benefits she had accrued. On claimant's anniversary date of September 7, 2014, the employer granted her an additional 120 hours of vacation leave and an additional 32 hours of sick leave. On September 8, 2014, claimant's physician extended her leave period to October 27, 2014. Shortly thereafter, claimant contacted the Oregon Bureau of Labor and Industries (BOLI) which agreed to pursue her claim for nonpayment of vacation and sick pay in return for her assignment of those benefits. BOLI staff advised her that pursuit of her claim would take several months and for that reason claimant declined.

(5) After the employer learned of claimant's contact with BOLI, it paid claimant the accrued vacation benefits it owed her but did not pay her the accrued sick benefits (136 hours). On or about October 27, 2014, claimant's physician requested that claimant's disability leave be extended to December 1, 2014. The employer denied that request although it received supporting documentation and did not exercise its right to an independent medical examination.

(6) Rather than allow BOLI to pursue a claim on her behalf for accrued but unpaid sick leave, on November 6, 2014, claimant filed a small claims action in Benton County and served the employer. On November 19, 2014, before a court resolved the claim, the employer paid claimant \$1,686 for 136 hours of accrued but unpaid sick leave. However, the employer declined to pay claimant disability benefits for the period October 27 through December 1, 2014 in the amount of \$1,787.58.

(7) On December 5, 2014, claimant quit work with the employer, in part, because it failed to pay claimant sick pay, vacation pay and disability benefits it owed her in a timely manner. Claimant explained in her resignation letter, "I cannot continue to work for a company that is not honest in its business dealings, and among other things, refuses to pay its employees sums that are rightfully due them." Transcript at 55.

(8) On January 20, 2015, claimant filed a legal action against the employer for the unpaid disability benefits between October 27, 2014 and December 1, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 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). 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 left work, at least in part, because the employer failed to pay her sick pay, vacation pay and disability benefits she believed it owed her in a timely manner. We agree with the ALJ that, by failing to pay claimant fringe benefits she was qualified to receive when due, the employer violated its

responsibility under Oregon's Wage and Hour Law.¹ Hearing Decision 15-UI-35247 at 3. The employer did not dispute that it paid claimant the vacation benefits it owed her only after it learned that claimant had contacted BOLI about filing a claim against it for those benefits. Nor did it dispute that it paid claimant the sick benefits it owed her only after she filed a lawsuit against it for those benefits. Finally, it did not dispute that it declined claimant's physician's request to extend her leave period after it received supporting documentation and without exercising its right to have her examined by a physician of its choice if it disagreed. On this record, the employer arbitrarily withheld fringe benefits to which claimant was entitled in violation of ORS 652.210.

No reasonable and prudent person would continue working under those circumstances for an employer that failed to pay wages or fringe benefits it owed and would, more likely than not, continue to delay or deny payment when the same circumstances reoccurred. It was not reasonable to expect claimant to continue her lawsuit or complain to BOLI about the employer's practices and continue working while arbitrarily being denied disability payments for an indefinite period of time while BOLI or a court investigated and/or resolved the dispute. *Accord J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute was ongoing); *compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute is not ongoing, and only the issue of back pay restitution continues to exist, claimant did not have good cause to quit work).

Claimant quit work with good cause, and is, therefore, not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-35247 is affirmed.

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

DATE of Service: May 19, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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¹ *See*, ORS 652.210; "Technical Assistance for Employers." http://www.oregon.gov/boli/TA/pages/t_faq_tabenefits.aspx. That section provides in part, "Fringe benefits for employees may include forms of compensation such as vacation pay, sick leave, holiday pay, personal time off, bonuses, severance pay, and pensions. While there is no legal requirement that employers offer such benefits, once promised, they may not be arbitrarily withheld." Wage claims and other legal actions frequently arise over disputes regarding these benefits policies.