

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0733

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125513). Claimant filed a timely request for hearing. On May 19, 2015, ALJ R. Davis conducted a hearing, and on May 27, 2015 issued Hearing Decision 15-UI-39111, affirming the Department's decision. On June 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, specifically, a written statement from Joseph DeLorenzo, who worked for the employer as a location manager from April 2013 until he quit in August 2014. In the statement, Mr. DeLorenzo confirmed that during his employment "[o]n multiple occasions," his and his subordinates' paychecks "were not available on the stated pay days." He also averred that he had agreed to defer three paychecks from the winter months to the following summer, but the checks were not paid to him "on the predetermined scheduled agreed upon by myself and [the] CEO." EAB may consider a party's new information if the information is relevant and material to EAB's determination, and factors or circumstances beyond the party's reasonable control prevented claimant from offering the information during the hearing. OAR 471-041-0090(2) (October 29, 2006). The information is relevant and material to a determination of whether the employer paid its employee's on time. The statement is dated May 20, 2015, after the hearing in this matter, and was, therefore, not available at the time of the hearing. Claimant's failure to anticipate that his testimony about that matter would require corroboration or be entirely disregarded by the ALJ was beyond his reasonable control. We have, therefore, admitted the statement into evidence as EAB Exhibit 1. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record as EAB Exhibit 1.

FINDINGS OF FACT: (1) Clean Air Lawn Care, Inc. employed claimant as its Portland, Oregon location manager from January 1, 2012 to December 5, 2014.

(2) In November 2014, the employer's owner notified claimant that the employer was changing its management structure, eliminating the salaried manager position claimant held, which paid \$45,000 per year, and transferring claimant to an hourly position, in which the owner expected claimant would work approximately 40 hours per month during the winter at a rate of \$17.50 per hour. The owner gave claimant the choice of accepting the new terms of employment and continuing to work, or leaving his employment.

(3) Claimant was interested in accepting the new terms of employment and continuing to work for the employer despite the changes to his position, pay structure and pay rate. However, he was concerned about the new terms of continued employment because the employer had repeatedly failed to pay him on its regularly scheduled payday, instead issuing paychecks days or weeks late. The problem was not confined to the Portland, Oregon location, and although claimant had discussed the issue with the owner, the problems persisted.

(4) Claimant had expected to be paid for work he performed during the first half of November on November 20, 2014, which was the employer's regularly scheduled payday. The employer did not pay him on that date. On December 2, 2014, the employer mailed the paychecks it was supposed to have issued on November 20, 2014. By December 5, 2014, however, claimant had not yet received his November 20, 2014 paycheck.

(5) On December 5, 2014, claimant sent an email to the employer's owner stating that he wanted to wait to receive his November 20, 2014 paycheck before he committed to accepting the new terms of employment. The owner accepted claimant's position and asked claimant to contact the owner when he was ready. Claimant received the November 20, 2014 paycheck on December 5, 2014. However, claimant's next regularly scheduled paycheck was also due December 5, 2014 and claimant did not receive that check. Claimant chose not to return to work after December 5, 2014.

(6) On December 15, 2014, claimant received his December 5, 2014 paycheck.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant quit 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) (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.

The ALJ found that claimant "voluntarily left work because the employer changed his pay structure from a salary of \$45,000 to \$17.50 per hour," and concluded that claimant did not have good cause to

quit work for that reason.¹ In so finding, the ALJ did not make any findings based on claimant's testimony that he did not quit for that reason, and would have accepted the new terms of employment the employer offered him had the employer paid him on time, and the owner's testimony that claimant stated, in his final communication to the owner, that his commitment to continuing to work was contingent upon his receipt of the paychecks the employer owed him.² Therefore, the record does not support the ALJ's conclusion.

ORS 652.120 requires employers to establish and maintain regular paydays, on which the employer must pay all employees the wages that are due. In this case, the employer agreed that it did not pay claimant on its regularly established payday on at least two occasions, once in the summer of 2014 and again in November 2014. Audio recording at ~12:45, 13:20. Additionally, claimant testified, and corroborated with his witness's written statement, that the employer also failed to pay employees on other established paydays, as well. Finally, the record also shows that although the employer alleged it paid claimant's December 5, 2014 paycheck on time, it was not available to claimant on the regularly established payday, and claimant received it 10 days late, December 15, 2015.³ It is more likely than not that the employer repeatedly failed to pay claimant the wages he was due on its scheduled paydays.⁴

Employees have a legal right to expect to be paid on regularly established paydays, and no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working indefinitely for an employer who failed to pay him in accordance with state law on a repeated or ongoing basis. *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). It is not reasonable to expect claimant to file a wage and hour claim with the Oregon Bureau of Labor and Industries (BOLI), or continue to pursue the dispute with the employer, when doing so means that the individual would have to continue to work without receiving regularly scheduled paychecks.

Claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-39111 is set aside, as outlined above.⁵

¹ Hearing Decision 15-UI-39111 at 2.

² Audio recording at ~22:20, 30:15.

³ Claimant had not quit work until the day that check was due, making it more likely than not that the employer was required to pay claimant's December 5, 2014 check on that date under ORS 652.120. Even if that check was considered a "final" check, it should still have been paid on December 5, 2014, which was the next regular payday after claimant quit. ORS 652.140(2).

⁴ The employer's owner testified that paychecks were delayed on the two occasions he acknowledged occurring because of lost mail or other issues outside his control. However, there are no exceptions to the employer's obligation to pay employees on established paydays in the applicable law.

⁵ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take days to two weeks for the Department to complete.

Susan Rossiter and D. H. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: August 3, 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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