

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1069

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 90100). Claimant filed a timely request for hearing. On August 27, 2015, ALJ Holmes-Swanson conducted a hearing, and on August 28, 2015 issued Hearing Decision 15-UI-43649, affirming the Department's decision. On September 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Cascade Home Décor LLC employed claimant from October 7, 2013 to June 9, 2015, last as an online salesperson.

(2) Prior to January 1, 2015, the employer paid claimant a monthly salary of \$2,500. In late 2015, claimant and the employer's owner orally agreed to change claimant's pay structure from January 1 through June 30, 2015. The owner understood that claimant would be paid claimant 60% of net online sales per month. Claimant understood that he would be paid 60% of net online sales or \$1,600 per month, whichever was greater.

(3) In practice, the employer paid claimant a monthly salary of \$3,500 per month from January through April 2015, regardless of whether that amount was more or less than 60% of net online sales. The employer paid claimant his monthly salary on the eighth day of the following month.

(4) In May 2015, customers began canceling a substantial amount of online purchases from the employer due a third party's failure to deliver the purchased items, significantly reducing the employer's net online sales. As a result, the employer did not pay claimant a monthly salary or commission for May

on June 8, 2015. On June 9, 2015, claimant met with the owner and asked to be paid for May, offering to accept less than \$3,500 if he was paid within two weeks. The owner refused claimant's offer and suggested that they discuss the matter again in two or three days. Claimant responded by quitting work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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.

In Hearing Decision 15-UI-43649, the ALJ concluded that claimant quit work without good cause on June 9, 2015 because he had the reasonable alternative of accepting the employer's owner's offer to meet again before the end of the week to calculate claimant's pay and attempt to resolve the dispute regarding claimant's compensation for May 2015.¹ However, the employer's failure to pay claimant for May 2015 on June 8, 2015 violated ORS 652.160, which requires every employer to establish and maintain a regular payday, at which date the employer must pay all employees the wages due and owing to them. Although the owner may have needed time to determine claimant's commission on net online sales for May 2015, the employer was legally required to pay claimant no less than minimum wage for the hours he worked during that month, and pay him that amount in the interim until the commission amount was determined. ORS 653.015; OAR 839-020-0010 (October 8, 1996).² On June 9, 2015, the employer refused to commit to paying claimant any amount of wages on any specific date. Faced with an employer's failure and ongoing refusal to pay wages in accordance with Oregon law, a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to quit work. *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).

Claimant quit work with good cause. He is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-43649 is set aside, as outlined above.³

Susan Rossiter and J. S. Cromwell.

¹ Hearing Decision 15-UI-43649 at 3.

² See BOLI Technical Assistance for Employers - Commissions: Questions & Answers, http://www.oregon.gov/boli/TA/pages/t_faq_tacommis.aspx.

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

DATE of Service: September 29, 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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