

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1244

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 111407). Claimant filed a timely request for hearing. On September 22, 2015, ALJ Holmes-Swanson conducted a hearing, and on September 28, 2015 issued Hearing Decision 15-UI-44987, reversing the Department's decision. On October 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered documents not presented during the hearing contending that it did not have "proper time" to organize these documents since it did not receive the documents that claimant was going to offer into evidence until the day before the scheduled hearing. However, the employer should reasonably have known it needed to prepare its case in advance of the scheduled hearing, and should reasonably have anticipated claimant's justifications for leaving work since claimant had complained to employer representatives about them in the past. *See e.g.*, Transcript at 92. As a result, the employer failed to demonstrate, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from offering these documents during the hearing. As well, the documents the employer offered are not relevant given the bases for this decision, as set out below. *See* OAR 471-041-0090(2)(a). Finally, the employer did not certify that it provided a copy of its argument and its additional documents to claimant as required by OAR 471-041-0080(2)(a). For these reasons, EAB did not consider claimant's argument or the additional documents it offered. EAB considered only information received into evidence during the hearing when reaching this decision.

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) STA Corp. employed claimant as a bartender from June 1, 2011 until approximately May 28, 2015.

(2) Throughout claimant's employment, the employer deducted from claimant's pay the amount of money that the bookkeeper determined her till was short during the pay period. Claimant signed an agreement authorizing the employer to deduct shortages from her pay. Claimant complained to the employer's president about these deductions and the president provided documents to her verifying the correctness of the amounts it had deducted. The president told claimant it was appropriate for the employer to take such deductions. The employer also deducted amounts from claimant's paycheck for "insurance," even though the employer did not provide claimant with any type of insurance. Transcript at 15 and 23. When claimant asked the employer's president why deductions were being taken in her pay for "insurance," the president did not provide her with an explanation. Transcript at 15.

(3) Throughout claimant's employment, the employer did not schedule any rest or meal breaks for claimant. The employer's president considered that such breaks for employees were "at will," and told employees that they could take breaks if "if it [wasn't] busy" or "there's no customers to be waited on" and they were able to monitor their work areas for the arrival of any customers needing service. Transcript at 95, 96, 97. Claimant was not able to take rest breaks or meal breaks on a regular basis during her shifts. The employer's president thought that the exigencies of operating a bar excused him from the requirement of providing breaks to employees.

(4) In December 2014, claimant was injured in an automobile accident and unable to work. Claimant borrowed a significant amount of money from the employer to pay her living expenses when she was unable to work. Claimant understood she was required to repay these amounts to the employer when she received an insurance settlement from the accident.

(5) In approximately early May 2015, claimant returned to work after the automobile accident. At around that time, the employer's president presented a promissory note to claimant to sign guaranteeing that she would repay the money that the employer had loaned to her. When claimant reviewed the terms of the note, she did not agree to the rate of interest it established on the loaned money, the re-payment schedule or the late fees that would be assessed if payments were not made on time.

(6) On May 16, 2015, sometime during her shift, the employer's president called claimant to his office. He wanted claimant to sign the promissory note. Claimant raised her objections to the note and refused to sign it. Both claimant and the president became "upset." Transcript at 45. Claimant left the workplace with the president following her and their conversation continued at claimant's car in the parking lot. Claimant left.

(7) Later on May 16, 2015, claimant called another bartender at the workplace and told him she had forgotten to drop off some cash receipts that she had gathered during her shift and placed in the pocket of her apron. Claimant returned to the workplace, gave the money to the bartender on duty and left again. Sometime later, still on May 16, 2015, claimant called the bartender about her upcoming work schedule and the bartender told her she needed to speak with the employer's president before she could return to work.

(8) Sometime between approximately May 19 or 20, 2015 and May 23 or 24, 2015, claimant met with the employer's president at his home to discuss returning to work. The president told claimant he was going to change the hours that she was working. Claimant told the president she wanted to think about his proposal. Around this time, claimant decided she was not willing to continue working for the employer for several reasons, including the lack of breaks, the payroll deductions and for "everything I had to deal with on a - on a day-to-day basis." Transcript at 16, 17, 19.

(9) On approximately May 28, 2015, claimant met again with the employer's president. The president told her that "it was not gonna work out" and that claimant and the employer needed to "part ways." Transcript at 5, 13. Claimant did not return to the workplace again. Claimant voluntarily left work on May 28, 2015.

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

The first issue this case presents is the nature of claimant's work separation. The employer's president contended that claimant left work, either when she did not contact him as requested after May 16, 2015 or when she did not respond to his proposal to change her hours after it was made, sometime between May 19 and 24, 2015. Transcript at 41, 42, 43. Claimant contended that the employer discharged her, for no apparent reason, on approximately May 28, 2015. Transcript at 5. The regulation applicable to the proper characterization of a work separation states that if claimant could have continued to work for the employer for an additional period of time when the work ended, 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 is not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The facts presented by both parties to support their characterization of the work separation were vague and difficult to reconcile with other aspects of the same party's testimony. While the employer's president stated that he thought claimant had resigned after May 16, 2015, that makes little sense since he did not dispute that he met with claimant sometime between May 19 and 24, 2015 to discuss a change in her scheduled hours when such a meeting would have been unlikely if she had actually quit work. As well, from his testimony it appeared that, although the president had some grounds to discharge claimant for her failure to attend work after May 16, 2015, when she was allegedly scheduled, he insisted that he did not, and claimant insisted that she did not know why he allegedly discharged her on approximately May 28, 2015. Moreover, claimant's testimony that it was unlikely she would have continued to work for the employer beginning in late May 2015 suggests that she was unwilling to work for the employer if the president had wanted to continue the employment relationship. On this record and attempting to reconcile divergent testimony of both parties, it appears that by May 28, 2015 both claimant and the president wanted to sever the employment relationship. A mutual agreement to end the employment relationship is properly characterized as a voluntarily leaving and not a discharge. *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998). This record most strongly supports that claimant voluntarily left work on May 28, 2015 and there was at least an implicit agreement to end that relationship.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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 her employer for an additional period of time.

ORS 652.610(3) provides that, with certain exceptions that are not relevant to this case, it is unlawful for an employer to withhold, deduct or divert any portion of an employee's pay unless the employer is authorized by law to do so, the employee has authorized the employer do so and the deduction is for the employee's benefit, or the ultimate recipient of the withheld pay is not the employer. OAR 839-020-0020 (January 9, 2002), OAR 839-020-0025 (January 1, 2014) and OAR 839-020-0027 (January 1, 2011) set out certain exceptions to the prohibition against employer-imposed deductions from an employee's pay. None of the deductions the employer made in claimant's paycheck – for "insurance" and for till shortages allegedly caused by the claimant --fall within any recognized exception to ORS 652.610(3), and were not made for the claimant's benefit. Assuming that claimant signed an authorization allowing the employer to deduct till shortages from her pay, that authorization and the employer's behavior in imposing that deduction was still an unlawful employment practice.

With respect to the employer's failure to provide meal and rest breaks to claimant, OAR 839-020-0050(2)(a) (January 1, 2014) provides that an employer must, for each work period of between six to eight hours, provide to an employee a meal break of thirty continuous minutes "during which the employee is relieved of all duties." OAR 839-020-0050(6)(a) states that an employer must, for each four hour segment of work, provide an employee a rest period of not less than ten minutes "during which the employee is relieved of all duties." Here, the employer's president contended that the employer did not act unlawfully by authorizing claimant to take rest and meal breaks only if the bar was not busy, in lulls between customers and in a location from which claimant could monitor the bar area to determine if any customers arrived. Transcript at 95, 96, 97. However, this type of rest or meal break did not constitute a continuous break in which claimant was relieved of all job duties. By its nature, it appears likely that the employer's break policy was unlawful. While there are certain narrow exceptions to the break requirement, there is insufficient evidence in the record to support the applicability of these exceptions. Specifically, there was no evidence that the employer had obtained an exemption from the Bureau of Labor and Industries (BOLI), that it would cause an "undue hardship" to the employer's operations to allow breaks and the employer provided to claimant the required BOLI notice of its break policy, that the industry in which the employer operated habitually established a meal period of no less than twenty minutes during which claimant was relieved of all job duties, that the failure to provide a break was caused by temporary and unforeseeable circumstances or that claimant signed a written waiver to forego her meal break periods. See OAR 839-020-0050(3); OAR 839-020-0050(4); OAR 839-020-0050(5); OAR 839-020-0050(7). In addition, although there is also an exception to making rest breaks available to certain employees in a retail or service establishments, all of the conditions of that particular subsection must be met, including, among others, that claimant worked less than five hours in any period of sixteen continuous hours and that claimant worked alone. OAR 829-020-0050(6)(b). The record in this case does not support the applicability of this exception since it appears that when claimant was on duty she usually worked shifts of eight hours in a sixteen hour period and she did not work alone. Transcript at 21, 28, 95-96. Having ruled out that the employer was entitled to an

exemption from providing uninterrupted rest and meal breaks to claimant, it appears that the employer's break policy was an unlawful employment practice.

EAB has consistently held that no reasonable and prudent person would continue working indefinitely for an employer who engaged in unlawful employment practices on an ongoing basis.¹ Here, the employer persisted in taking unlawful deductions from claimant's pay and did not allow her to take lawfully required breaks despite her complaints. On these grounds, claimant demonstrated good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment benefits. EAB does not address claimant's other reasons for leaving work since the employer's unlawful employment practices are a sufficient ground to avoid claimant's disqualification from benefits.

DECISION: Hearing Decision 15-UI-44987 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 13, 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 Elisha A. Coen* (Employment Appeals Board, 2015-EAB-0748, August 10, 2015) (good cause to leave work when employer did not provide breaks lawfully required breaks allowed at employee's work station to did not constitute relief from all job duties); *Chelvey L. Francis* (Employment Appeals Board, 2015-EAB-1191, August 13, 2014) (good cause to leave work when claimant took reasonable steps to secure employer's compliance with state wage laws); *Brandon L. Lopez* (Employment Appeals Board, 2014-EAB-0614, May 12, 2014) (good cause to leave work when employer failed to pay claimant in compliance with state law on an ongoing basis after claimant complained); *Kaitlynn A. Amis* (Employment Appeals Board, 13-AB-0959, July 7, 2013) (good cause to leave work when, despite complaints, employer did not provide rest and meal breaks required by state law); *Orville E. Baumgardner* (Employment Appeals Board, 12-AB-2132, August 30, 2012) (good cause to leave work when employer did not pay claimant in accordance with state law); *Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012) (good cause to leave work when employer did not pay claimant state required minimum wage and unlawfully deducted cash shortages from claimant's pay).