

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1469**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 21, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 132238). Claimant filed a timely request for hearing. On November 23, 2015, ALJ Shoemake conducted a hearing, and on November 24, 2015 issued Hearing Decision 15-UI-48327, affirming the Department's decision. On December 8, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent it was relevant and based on the hearing record.

**FINDINGS OF FACT:** (1) Gray Guns, Inc. employed claimant as a manager from March 28, 2011 to September 16, 2015.

(2) Claimant had ongoing concerns about a number of issues, including the employer's payroll practices. Due to persistent cash flow problems, the employer frequently failed to pay claimant all of his earnings on the employer's established paydays. Over a period of thirty-three paydays the employer did not pay claimant on time twenty-two times.

(3) Claimant repeatedly discussed the payroll issues with the employer, whenever he was told his paycheck was going to be late. The employer arranged to pay claimant first when it had the money, and the owner sometimes borrowed from his personal funds to pay claimant, but the payroll problems were continued throughout claimant's employment.

(4) Claimant did not file a wage complaint with the Oregon Bureau of Labor and Industries. Claimant believed in the employer's business and tried to work harder to generate revenue to help alleviate the employer's financial problems. However, claimant regularly observed that the employer made the type of decision "that was constantly putting us in a situation where we had no – no money." Transcript at 13.

(5) The employer was scheduled to issue claimant a paycheck on August 31, 2015, but did not pay him until September 4, 2015.

(6) On September 14, 2015, the employer's owner instructed claimant to help others complete a trigger project instead of finishing the work in claimant's own queue. Claimant suggested to the owner that he should continue working on his own queue because he "thought it was the best idea that I stay on the work that was paying our bills, which was the H&K work, my concern being that payroll had been consistently late. That work was based on the profit margin that we were getting on the triggers. It was costing us money. It was costing the shop money to do those triggers and so my concern was for the company that I needed to do the H&K work because I knew that that meant that the company was gonna have money to be able to pay its bills . . ." Transcript at 16-17. After exchanging several messages and discussing the issue, claimant and the owner disagreed about the work claimant should perform, and the owner instructed claimant not to report to work that day.

(7) Claimant concluded that the owner did not want him working on things "that I had committed to do to my customers and it was bringing money into the shop to pay its bills," and that the employer's serious money issues and the owner's decision-making were "just gonna get worse," and decided to quit work. Transcript at 17-18.

(8) On September 15, 2015, claimant's regular mid-month paycheck was due. The employer did not issue a paycheck for claimant on the scheduled payday.

(9) On September 16, 2015, claimant quit work.

(10) On September 18, 2015, the employer gave claimant his September 15th paycheck. At the time, the office manager told claimant she did not think the bank would cash it because the employer's account was overdrawn by approximately \$7,000.

**CONCLUSIONS AND REASONS:** We disagree with the Department and the ALJ, and conclude that claimant quit work with good cause.

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) (August 3, 2011). 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, the separation is a discharge. OAR 471-030-0038(2)(b).

The owner alleged that he decided to discharge claimant on September 15, 2015, and, on September 16, 2015, discharged claimant before claimant quit work. The owner's allegation is implausible. On September 15, 2015 the employer had agreed to meet with claimant to discuss his future with the employer's business; the employer's actions indicate that the employer had yet to make a decision about claimant's employment. Transcript at 42. On September 16, 2015, the owner suggested to claimant that he take some time off work, which also indicates he had not discharged claimant. Transcript at 37. After the separation, the owner posted social media website messages indicating that claimant had "left" work. Transcript at 33. Although the owner might subjectively have intended his statements to amount to a discharge, it appears on this record that the first unequivocal act to sever the employment

relationship occurred when claimant quit work during the September 16th meeting. We therefore conclude that claimant's work separation was a voluntary leaving.

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 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-48327, the ALJ concluded that claimant quit work without good cause, reasoning that, because claimant had tolerated the practices throughout his employment without involving "regulating authorities," the situation was not grave. We disagree.

ORS 652.120(1) requires that "[e]very employer shall establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them." Throughout claimant's employment, the employer often failed to pay claimant all the wages due to him on his regularly scheduled paydays. Claimant repeatedly discussed the issue with the employer, but the employer continued to be unable to pay claimant his full salary on time. Claimant finally quit work the day after the employer again failed to pay him on his regularly scheduled payday.

It is not dispositive of the issue that claimant tolerated the unlawful pay practices as long as he did. No reasonable and prudent person would continue working for an employer if the employer's ongoing pay practices violated Oregon's wage and hour laws, for example, if the employer failed to pay claimant on scheduled work days. See *Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012) (employer's unlawful payroll deductions reduced claimant's hourly rate of pay to below the state minimum wage). Nor is it dispositive that claimant did not file a wage complaint with the appropriate regulatory agency. Claimant made reasonable efforts to resolve the issue without filing a wage complaint, and, at the point that he could no longer tolerate the practices, it was not reasonable to expect claimant to continue working an additional period of time while waiting for the regulatory agency to act on his complaint. See *accord J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when the wage dispute was ongoing); *c.f. Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (claimant did not have good cause to quit when the wage dispute was resolved, and only the issue of back pay restitution continued to exist).

We therefore conclude that claimant quit work with good cause due to the employer's unlawful payroll practices. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation. Although claimant listed other issues in addition to the payroll practices that contributed to his decision to quit work when he did, because one of the reasons that contributed to claimant's decision to quit when he did amounted to good cause, it is unnecessary to determine whether any other reasons also constituted good cause.

**DECISION:** Hearing Decision 15-UI-48327 is set aside, as outlined above.<sup>1</sup>

Susan Rossiter and J. S. Cromwell

**DATE of Service: January 7, 2016**

**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](http://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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<sup>1</sup> 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.