

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1503

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 101956). Claimant filed a timely request for hearing. On December 2, 2015, ALJ M. Davis conducted a hearing, and on December 4, 2015, issued Hearing Decision 15-UI-48804, affirming the administrative decision. On December 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. EAB also considered the employer's written argument to the extent that it was relevant and based on evidence in the record.

FINDINGS OF FACT: (1) From June 8 to October 13, 2015, claimant worked for the employer as an esthetician. At the time she was hired, claimant gave the employer a Federal tax W-4 form, in which she claimed one exemption.

(2) On February 1, 2015, the employer changed the name of its company from Islands Tanning and Med Spa, Inc. to BOGO. Many customers were unhappy with the name change because they had purchased lifetime memberships with Islands Tanning and Med Spa that they were unable to use with BOGO. Customers repeatedly complained to claimant about their dissatisfaction with the change in the employer's business, and claimant found it stressful to respond to and attempt to handle these complaints.

(3) The employer's owner often called claimant at night, after her work day ended, just to wish claimant good night. He also regularly called claimant at work, asking where she was. Exhibit 2. Claimant disliked these calls and found them upsetting, but did not complain to the owner because she was afraid

he would discharge her if he did. She also did not complain to the manager of the employer's location where she worked because this manager was the owner's wife.

(4) From June 8 through August 15, 2015, claimant received only one paycheck stub with her paychecks. In addition, two of claimant's paychecks – those she received on July 5 and July 20, 2015 – were handwritten.

(5) When claimant was initially hired, the owner offered her \$15 per hour. At some time during her employment, the owner placed her on salary. On or about September 15, 2015, the owner removed her from her salaried position, and placed her in a position that paid \$16 per hour, with scheduled work hours of 35 to 45 per week. Exhibit 2.

(6) On October 6, 2015, claimant reported to work suffering from nausea and diarrhea. On that date, she received her paycheck for the September 16 through 30, 2015 pay period. She saw that the paycheck stub indicated that she had the status of an independent contractor and that no Federal or State income taxes had been withheld from her wages for the pay period. The paycheck stub showed that for the year to date, only \$39.12 in Federal income tax and \$37.27 in State income tax had been withheld from her wages. Exhibit 2. Claimant asked the owner for a copy of her form W4; the owner responded that he could not find this form but could "fix" the withholding. Exhibit 2, Department representative 10/15/2015 notes. Claimant left work before she had finished her work shift; she sent a text to a coworker explaining that she was unable to finish her shift because she was ill.

(7) On October 7, 2015, claimant consulted a physician who diagnosed her as suffering from stress as a result of her job. The physician prescribed medication for claimant, gave her a note excusing her from work for two weeks, and orally advised claimant not to return to work for the employer. Claimant sent a picture of the doctor's note excusing her from work to the owner. The owner responded in a text in which he told her that the doctor's note did not excuse her actions in leaving before her shift was completed on October 6, and that she could not return to work until her actions were "discussed and resolved." Exhibit 2.

(8) Between October 6 and 13, 2015, the employer's owner repeatedly texted claimant to ask about her health, and also to ask when she planned to return to work. The owner also contacted claimant's father and sister to ask about claimant's health.

(9) By letter dated October 13, 2015, claimant notified the owner that she was quitting her job, effective immediately. Claimant left work for the employer because the stress of the work environment had caused her to become ill, and because of the employer's improper pay practices.

(10) The employer mailed claimant her final paycheck for the October 1 through 16, 2015 pay period. This paycheck stub indicated that claimant was an independent contractor, and showed that no Federal or State income taxes had been withheld from her wages for the pay period.

CONCLUSION AND REASONS: We disagree with the ALJ, and conclude that claimant voluntarily left work with good cause.

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.

Claimant quit her job because of the stressful work environment she was experiencing, and because of the employer’s improper pay practices. To the extent that claimant quit her job because of stress in the workplace, she demonstrated good cause for leaving work. The record shows that working under the employer’s owner affected claimant’s mental and physical health to such an extent that her doctor advised her to quit her job. Under these circumstances, no reasonable and prudent person would have continued working for the employer.

To the extent that claimant quit her job because of the employer’s pay practices, she also showed good cause for leaving work. By law, an employer is required to withhold Federal and Oregon income taxes from an employee’s paycheck, based on the number of withholding exemptions claimed by the employee. See 16 USC § 3401-3406 and ORS 316.167. Although claimant claimed one withholding exemption when she began work for the employer, the employer failed to withhold the appropriate amount of Federal or Oregon income taxes from her paycheck. Instead, the owner treated her as an independent contractor who was exempt from these withholdings. The owner’s failure to comply with the law was intentional; the hourly pay rates he offered and imposed on claimant indicate that he clearly considered her to be an employee and not an independent contractor. The owner also showed he was unwilling to address claimant’s concern about his failure to withhold taxes. When claimant brought this problem to his attention on October 6, he did nothing to address the issue and her final paycheck continued to show that no withholdings had been made. A reasonable and prudent person, of normal sensitivity, exercising ordinary common sense, cannot be expected to continue working for an employer who repeatedly failed to pay her in accordance with the law and there was a substantial risk that the problems would be ongoing. See *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 voluntarily left work with good cause. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-48804 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 12, 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. 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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