

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0583

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 114209). Claimant filed a timely request for hearing. On April 29, 2016, ALJ S. Lee conducted a hearing, and on May 5, 2016 issued Hearing Decision 16-UI-58958, affirming the Department's decision. On May 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) First Call Resolution LLC employed claimant from January 15, 2015 to January 14, 2016 as a custodian.

(2) The employer customarily hired independent contractors to perform custodial duties, but made an exception when it hired claimant as a part time hourly employee. Claimant was dissatisfied that he was not given an employee handbook, thorough job reviews, or an email address like the independent contractors. An email address or access to a computer was not necessary for claimant to perform his job duties. The employer had an employee handbook on site for all employees to use.

(3) Sometime shortly after he was hired, the employer discharged its night crew, leaving claimant as the only custodian cleaning the employer's site. Claimant began working full time at that time.

(4) Beginning a few months after claimant's employment began, the employer's vice president of operations occasionally asked claimant to quit and allow the employer to hire him as an independent contractor. Audio Record at 9:18 to 9:52. Claimant was not willing to do so, because he believed it would result in reduced earnings.

(5) The employer did job reviews every six months, and employees could earn a pay raise at each review. The amount of the raise was commensurate with the employee's performance, normally a maximum hourly raise of \$0.35. Claimant's received a raise of \$0.40 per hour at his first six-month

review on July 18, 2015, but there was an administrative delay before the employer implemented the wage increase. The employer implemented the pay raise before the end of 2015.

(6) In August 2015, claimant missed two days of work due to illness. During his absence, the employer hired a new night custodial crew. Because of the new night crew, claimant returned to a part time schedule of 20 hours per week. As a result of the reduction in hours, claimant's earnings were reduced, and he no longer qualified for paid holidays. Claimant was also dissatisfied with the reduction in hours and duties because, although he was able to keep busy during his shift, he felt as though "[he] wasn't really needed anymore," and "was being phased out." Audio Record at 16:14 to 16:18.

(7) A human resources generalist for the employer visited claimant's work site every two weeks and was available to discuss performance reviews, pay raises, and other personnel issues. Claimant did not discuss his pay issues with the human resources generalist.

(8) As of January 2016, claimant believed the employer had approved another pay raise for him. On January 14, 2016, claimant met with the site director and told her that his raise had not yet been implemented. She expressed surprise and told claimant she thought he had already received a pay raise. Claimant continued to discuss his employment with the site director and told her, "I feel like quitting." The site manager responded, "Good, I don't want you around here anymore." Claimant responded, "Okay, I'm done. I'm out of here." Audio Record at 21:37 to 21:45. Claimant left the job site and had no further communications with the employer.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude claimant voluntarily left work without good cause.

OAR 471-030-0038(2) (August 3, 2011) sets forth the standard for determining if the termination of a work relationship should be considered a discharge or a voluntary leaving. 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). 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).

Although the employer reduced claimant's hours and had asked claimant several times to quit and continue working as an independent contractor rather than an employee, the record shows the employer was willing to allow claimant to continue working as a part time employee at the time his employment ended. Claimant, not the employer's site manager, initiated the conversation on January 14, 2016, including the possibility of ending the employment relationship, when claimant stated, "I feel like quitting." The work relationship ended when it did because claimant expressed his unwillingness to continue working for the employer, prompting the manager's response that she did not want claimant "around here anymore," and claimant's assent to ending the employment relationship. Because claimant was the moving party in initiating the separation, and it likely would not have occurred when it did but for his agreement, the 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). If an

individual leaves work due to a reduction in hours, the individual has left work without good cause unless continuing to work substantially interferes with the return to full time work or unless the cost of working exceeds the amount of remuneration received. OAR 471-030-0038(5)(e) (August 3, 2011). If an individual quit work due to a reduction in the rate of pay, the individual has left work without good cause unless the newly reduced rate of pay is ten percent or more below the median rate of pay for similar work in the individual's normal labor market area. OAR 471-030-0038(5)(d). However, the loss or reduction of fringe benefits is not considered a reduction in the rate of pay. OAR 471-030-0038(5)(d)(C). Otherwise, "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, had no reasonable alternative but to leave work. The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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.

Claimant was unable to identify a single, proximate cause for leaving work when he did, and instead provided an amalgam of factors we address herein. The preponderance of the evidence shows the employer failed to pay some of claimant's wages on time because it delayed in implementing claimant's July 2015 pay raise. *See* 652.120. Individuals generally have good cause to leave work due to unlawful wage practices only where the practices were likely to continue unresolved. *Accord Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where employer's past unlawful payroll practices had impacted claimant but were unlikely to reoccur, claimant did not have good cause to leave work). However, claimant failed to show that he had good cause to quit work due to an ongoing wage issue because the problem resulting from the July 2015 pay raise was resolved during 2015 and before claimant quit work. Moreover, although claimant alleged at hearing that the employer approved a second pay raise of \$0.40 per hour before he quit (Audio Record at 39:46 to 40:12), the employer's human resources generalist testified at hearing that claimant quit before his annual review in January 2016, and before he received a second raise. Audio Record at 29:53 to 30:38. Thus, the preponderance of the evidence does not show that the employer granted a second raise, much less that it failed to pay it on time, before claimant left work.

Claimant quit work, in part, because he was dissatisfied with the reduction in his hours of work, which also resulted in lost holiday pay. Claimant did not assert, and the record does not otherwise show, that continuing to work substantially interfered with claimant's return to full time work, or that the cost of working for the employer exceeded the amount of remuneration he received. Thus, claimant did not show he had good cause to leave work due to a reduction in hours. Claimant lost holiday pay, a fringe benefit, due to the reduction in hours. OAR 471-030-0038(5)(d) does not apply to this case, because the loss of fringe benefits is not considered a reduction in pay. To the extent claimant quit work due to a reduction in hours or the loss of holiday pay, he did not show he left work for good cause.

Claimant also quit work, in part, because he believed his work was unnecessary and the employer was going to eliminate his position. However, four months had passed since the employer hired a new night crew and reduced claimant's hours, and the record fails to show that being discharged in the future was more than a mere possibility. Thus, claimant failed to show that no reasonable and prudent person in his circumstances, who had the option of continuing to work for the employer even if there was a possibility of discharge sometime in the future, would have chosen to leave work on January 14 rather than continue to work for the employer for an additional period of time.

To the extent claimant left work because he was treated differently than the other custodians who worked as independent contractors, claimant quit work without good cause. Although claimant would have preferred to have an email account, a personal copy of the employee handbook, and more extensive reviews, the record does not show that his working conditions created a grave situation for claimant.

In sum, we conclude that claimant voluntarily left work without good cause. He is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-58958 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: June 21, 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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