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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0938

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 91941). Claimant filed a timely request for hearing. On July 13, 2016, ALJ Frank conducted a hearing, and on July 21, 2016 issued Hearing Decision 16-UI-64247, affirming the Department's decision. On August 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted copies of two audio recordings to EAB and requested that EAB consider them as evidence. Although claimant offered both audio recordings as hearing exhibits, the ALJ did not admit them into evidence because claimant did not send them to the employer in advance of the hearing, the ALJ thought both might have been unlawfully obtained and the employer conceded the facts that claimant sought to establish through the recordings. Audio at ~7:00, ~19:30. Under ORS 165.540(1)(c), the recording claimant sought to introduce of his in-person conversation with the employer's office manager was unlawfully obtained because claimant did not inform the office manager that he was recording their conversation. While it appears that the recording claimant made of his telephone conversation with the employer's owner was lawfully obtained under ORS 165.540(1)(a) even if he did not notify the owner that he was recording it since claimant was a party to that communication, that does not necessarily mean the ALJ erred in not admitting that recording into evidence. As a result of claimant's admitted failure to provide the recording to the employer in advance of the hearing, the ALJ rightly did not admit it into evidence. Audio at ~7:00. It would be inappropriate for EAB to consider that recording when the ALJ rightly excluded it. Claimant's request for EAB to consider the audio recordings is denied.

FINDINGS OF FACT: (1) Tim Dixon Construction, Inc. employed claimant as a laborer from August 14, 2014 until April 10, 2016. The employer's office was in Salem, Oregon.

(2) Monday, January 11, 2016, was claimant's first day of working at a job site in Roseburg, Oregon. Beginning that day, claimant drove one of the employer's vehicles from the employer's Salem location to Roseburg each Monday and from Roseburg to the Salem location at the end of each work week. The vehicle that claimant drove towed a trailer in which the tools needed on the job site were transported to and from Roseburg. Sometime after January 11, 2016, claimant spoke to the employer's owner and told him he thought he should receive pay for the time he spent driving the employer's vehicle to and from Roseburg. At this time or shortly after, claimant also told the owner he thought he should receive pay for the time he spent before his work shift organizing tools for the job and putting those tools away after the end of his shift. The owner told claimant that he was not going to pay claimant for the drive time or the time he spent dealing with the tools and was not legally required to do so. Sometime in mid-February 2016, claimant stopped driving the employer's vehicle to and from Roseburg each week and drove his own vehicle.

(3) On April 4, 2016, claimant drove the employer's vehicle and the tools from Salem to Roseburg for the first time since mid-February 2016, and he drove them from Roseburg to Salem on April 6, 2016. The employer's job in Roseburg ended on April 6, 2016.

(4) On April 8, 2016, claimant went to the employer's office manager in Salem and informed her he had entered the drive time from Salem to Roseburg on April 4 and the time for the return trip on April 6 on his time card. Claimant told the office manager that the employer was lawfully required to compensate him for the time he had spent driving the employer's vehicle and summarized parts of the relevant law as he understood them. The office manager told claimant she did not think the employer needed to compensate him for his driving time. However, the office manager also told claimant he should speak to the owner about compensation for driving time. The conversation between both of them became strained. As the conversation continued, the office manager stated to claimant that, although she did not have the authority to hire or fire company employees, she did not think claimant's attitude made him a "good fit for the company" and he was "more than welcome" to look for work elsewhere. Audio at ~25:46. The conversation then ended. The office manager did not tell claimant he was discharged or fired and claimant did not state he was quitting.

(5) Sometime between April 8 and April 10, 2016, claimant sent a text message to the owner inquiring whether he had been informed of the conversation between claimant and the office manager and asking whether "I still have a job." Audio at ~36:20. On April 10, 2016, the owner called claimant. The owner and claimant discussed claimant's conversation with the office manager and the issue of claimant's compensation for the time he spent driving the employer's vehicle and tools to and from Roseburg on April 4 and 6, 2016. The owner told claimant that he was the one who approved the employer's time cards, not the office manager, and the issue of his pay for drive-time would be decided by him. After further discussion, the owner told claimant he would authorize payment for the driving time claimant had entered on his time sheet. The owner then brought up to claimant that he had heard from other employees that claimant was looking for a new job. The owner asked claimant "what he wanted to find from another job," and claimant replied that he wanted a job that was unionized, that had benefits and a retirement plan. Audio at ~38:18, ~38:30. The owner told claimant the employer could not afford to provide the type of compensation and benefits that claimant wanted and he told claimant, "It's up to you [if you want to work for someone other than the employer]. I'm not going to make the decision for you." Audio ~38:30. Claimant said, "Fine" and the conversation ended. Audio at ~38:46.

The owner did not tell claimant he was discharged, fired or terminated and claimant did not say he was leaving work.

(6) After April 10, 2016, claimant did not return to work and did not contact the employer. On April 10, 2016, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

Because claimant contended the employer discharged him and the employer contended claimant quit work, the first issue this case presents is the nature of the work separation. 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).

Claimant readily stated the neither the employer's office manager or its owner ever told him he was fired or used similar words expressing an intention to involuntarily end his work relationship with the employer. Audio at ~21:15, ~22:30. Claimant based his contention that he was discharged on the comment the office manager made to him on April 8, 2016 that he might not be a "good fit" for the company. Audio at ~11:18. However, this comment was more of an observation than the expression of an intention to discharge, and claimant did not dispute the office manager's testimony that she prefaced her comment with the statement that she did not have the authority to hire or fire anyone on behalf of the employer. As well, if claimant thought the office manager had discharged him on April 8, 2016 there was no reason for him to contact the owner on April 10, 2016 to inquire whether he was discharged and to discuss further the issue of pay for his driving time. It is not likely or plausible that the content and circumstances surrounding claimant's conversation with the office manager caused claimant to believe that he was discharged.

As to claimant's conversation with the owner on April 10, 2016, claimant also did not contend the owner ever told him directly that he was fired or discharged. Claimant appeared to base his conclusion that he had been discharged on the owner's failure to directly answer the question he raised in this text message about whether he had been discharged. Audio at ~43:29. From both claimant and the owner's descriptions of their conversation, claimant's initial question was lost as the topics of claimant's interaction with the office manager, drive-time compensation and what claimant wanted from employment came to dominate the conversation. Both claimant and the owner substantially agreed that the owner repeatedly inquired about claimant's intentions with respect to his employment and told claimant several times he had to make a decision about what he was going to do. Audio at ~37:50, ~43:29. The owner's inquiries put the decision squarely on claimant as to whether he was going to remain an employee of the employer. Even if claimant told the owner in the April 10, 2016 conversation he wanted to continue working for the employer, claimant's actions in not returning to work after April 10, 2016 were objective manifestations of an unwillingness to continue working for the employer. Since claimant was the first party to express an objective intention to sever the work relationship, the work separation was a voluntary leaving as of April 10, 2016, the day after which he discontinued working.

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.

Because claimant contended he did not leave work, he did not offer any reasons directly justifying a decision to leave work. However, claimant did testify about his belief that the employer engaged in unlawful employment practices when it refused to compensate him for his driving time and his time spent in dealing with the tools. Audio at ~12:20, ~15:44, ~18:19. If claimant was subjected on an ongoing basis to unlawful pay practices by the employer it likely would have been good cause to leave work since a reasonable and person would not continue working indefinitely for an employer who failed to pay him in accordance with state law. *See J. Clancy Bedspreads and Draperies v Wheeler,* 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when pay dispute was not resolved and was ongoing at the time of the leaving) *and compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (when wage dispute based on alleged unlawful acts not ongoing, and only remaining issue at the time of the leaving was the amount of the restitution for the back pay, claimant did not have good cause to leave work); *Appeals Board Decision* 12-AB-0380, February 8, 2012 (citing both authorities, EAB held claimant had good cause to leave work when employer was taking unlawful deductions from his pay which unlawfully reduced the amount he was paid for his work to less than minimum wage and employer likely would have continued doing so as long as claimant remained employed).

With respect to claimant's driving time, OAR 839-020-0043(3) (January 9, 2002) would require the employer to compensate claimant if the employer "required" him to pick up and transport the tools from the employer's location in Salem to the Roseburg job site. With respect to claimant's getting tools out and storing them at the beginning and end of shifts, OAR 839-020-0043(1) (January 9, 2002) would require the employer to compensate claimant for this time as a "preparatory and concluding" work activity if those activities were "an integral and indispensable part" of the activity for which claimant was employed. Although claimant might have believed the employer violated both regulations by refusing to compensate him for his driving and tool handling times, it would be necessary for us to further develop the facts surrounding both activities to determine whether the employer's failure to compensate claimant for them was indeed unlawful. However, assuming for the sake of argument that the employer's practices were unlawful, when claimant raised the issue of driving time pay for April 4 and April 6, 2016 with the owner, the owner agreed to pay him. Because the owner was responsive to this request on April 10, 2016, there was no basis for claimant to assume the owner would not also have paid him for his preparatory and concluding activities with the tools if claimant had raised that issue with the owner, or that the owner would refuse on an ongoing basis to pay claimant for driving time or preparatory and concluding activities in the future. Given that the issue of compensation for driving time had apparently arisen only in connection with job in Roseburg, that job had concluded on April 6, 2016 and it appeared the owner would pay for drive-time and preparatory and concluding activities in the future, any dispute between claimant and the employer over compensation was not ongoing at the

time claimant quit on April 10, 2016. Since it does not appear likely the issue of claimant's compensation for drive-time and preparatory and concluding activities would arise in the future if he remained employed, the only conceivable issue remaining when claimant quit was his back pay for driving time from January 11, 2016 until mid-February 2016 and his preparatory and concluding activities occurring on unspecified dates. Under *Marian Estates*, disputes that are not ongoing, but limited to restitution for the employer's past actions that have since been corrected, are not good cause to leave work. Since the matter of claimant's compensation for activities associated with his work was the only basis discernible for his decision to leave work, there are no other grounds to consider in determining whether claimant left work for good cause.

Claimant did not show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-64247 is affirmed.

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

DATE of Service: <u>September 8, 2016</u>

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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