

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1143

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 144216). Claimant filed a timely request for hearing. On September 22, 2016, ALJ Seideman conducted a hearing, and on September 23, 2016, issued Hearing Decision 16-UI-67905, affirming the administrative decision. On October 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) In 2001, claimant began work for Loren Berg Chevrolet as general sales manager. On April 20, 2016, Loren Berg Chevrolet was purchased by a new owner and became Newberg Chevrolet, the employer.

(2) When claimant was employed by Loren Berg Chevrolet, he was paid 5% of the dealership's gross profit income per month, with a guaranteed income of \$6,000 per month. Claimant also received \$50 for every warranty sold, which increased his income by \$800 to \$1200 per month. In addition, he received \$500 to \$700 per month through a rewards program offered by Ally Auto Finance. Audio recording at 23:30.

(3) On April 26, 2016, claimant met with the employer's new owner and agreed to a pay plan under which claimant would continue to receive 5% of the dealership's gross profit income per month, but would not be guaranteed a minimum income of \$6,000 per month. In addition, claimant would no longer receive any additional income from the Ally rewards program or the sale of warranties. The new employer needed to build up its business before it would be eligible to participate in the Ally rewards program. Audio recording at 36:26, 37:22.

(4) On April 29, 2016, a new employee told claimant that he had been hired to replace claimant and that he wanted claimant to tell him "everything" about the work claimant had been doing. Audio recording at 20:27.

(5) Claimant, who was upset to find out that he was being replaced, spoke with the owner who suggested that they meet to discuss claimant's concerns. On or about May 2, 2016, claimant left the workplace and never returned. Claimant called the owner twice and left messages, asking that the owner contact him to set up a meeting. When the owner did not return his calls, claimant decided he had been discharged.

(6) The employer had continuing work available for claimant. Had claimant remained on the job, he would have earned more than \$6,000 per month for the months of May, June and July under the terms of the pay plan to which he agreed on April 26.

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

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). Although the employer had work available for claimant, he chose to leave the workplace, and stop trying to contact the owner. Because claimant's actions demonstrate his unwillingness to continue working for the employer, his work separation was a voluntary leaving.

Disqualification: 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.

Claimant offered two reasons why he quit his job – because he believed the employer had discharged him and because his monthly income had been reduced under the terms of the pay plan implemented by the employer. To the extent that claimant quit his job because he believed he had been discharged, claimant failed to demonstrate good cause for leaving work. Claimant's belief that he had been discharged was based on a new employee's assertion that he was claimant's replacement and the failure of the employer's owner to return claimant's telephone messages asking that the owner contact claimant to set up a meeting. If claimant was having difficulties in contacting the owner by telephone, he had the reasonable alternative of going to the dealership to speak with the employer in person. A reasonable prudent person does not conclude that he has been discharged because of a problem experienced in contacting his employer.

To the extent that claimant quit his job because he was dissatisfied with the pay plan offered by the employer, he failed to demonstrate good cause for leaving work. Although OAR 471-030-0038(5)(d) provides that under limited circumstances the reduction to an individual's rate of pay may constitute good cause for leaving work, the provision does not apply to situations where the employer changes or

eliminates guaranteed minimum earnings or alters the way it calculates commissions. OAR 471-030-0038(5)(d)(B). Under the new pay plan, claimant received a monthly salary that was equal to 5% of the employer's profits, but lost the guarantee he would receive a monthly minimum income of \$6,000; he also lost additional commissions he had been receiving based on the sale of warranties and through the Ally rewards program. While claimant was understandably upset about those changes to his pay structure, he did not know, at the time he quit, what his earnings were likely to be under the new pay plan. Claimant had the reasonable alternative of continuing to work for the employer to determine what his earnings would be under the terms of the pay plan. Had claimant remained on the job, he would have earned more than \$6,000 per month for the months of May, June and July 2016. A reasonable and prudent person, working for a business recently acquired by a new owner, would wait to see how much he would be earning before deciding that the new employer's pay plan would significantly reduce his income to such an extent that he had no alternative but to quit his job.

Claimant voluntarily left work without good cause. He is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-67905 is affirmed.

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

DATE of Service: October 25, 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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