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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
# 2017-EAB-0082

*Affirmed*
*Disqualification*

**PROCEDURAL HISTORY:** On October 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110031). Claimant filed a timely request for hearing. On December 29, 2016, ALJ L. Lee conducted a hearing, and on January 5, 2017 issued Hearing Decision 17-UI-74174, affirming the Department's decision. On January 23, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Newberg Chevrolet employed claimant as a service writer from April 20, 2016 to September 23, 2016. Claimant previously worked for a predecessor business in the same position at the same location for 17 years, until his previous employer sold the business to Newberg Chevrolet. He continued working for Newberg Chevrolet thereafter.

(2) The employer paid claimant a base salary of $800 per month. The rest of claimant's income was commission-based. He earned commissions based on a percentage of the services he sold and customer satisfaction. Throughout claimant's years working for the employer and its predecessor company he was one of only two service writers. He and the other service writer each handled about 50% of the available business and earned commissions based on that percentage of work.

(3) The employer hired a new employee to work, in part, as a service writer, but also to help the employer rebuild its service business after a number of the service staff had left their jobs. The employer intended the new person to assist the service writers, who were sometimes overwhelmed with their work, and to rebuild the service side of the business and maintain that revenue stream. The employer thought that if it had more service staff, the business would perform more service work, and the customer pool from which the service writers' commissions derived would be larger, consequently increasing the amount of commission-based pay each of the service writers earned.

(4) On approximately September 16, 2016, claimant learned that the employer had hired a third service writer. Claimant felt concerned. He had concluded based on his observations that business had been declining, and, comparing the first part of 2016 to the latter parts, attributed his $319 reduction in weekly pay to declining business. Claimant concluded that the amount of available business, and commissions, was going to either remain constant or be further reduced. He was concerned that if he had to share the available customer pool with two other service writers instead of just one, he would experience a 17% reduction in the number of customers he served, and, consequently, earn approximately 17% less in commission-based earnings.

(5) Claimant thought about things over the weekend. He thought that the employer's decision to hire a third service writer did not make sense, and felt "we're just going backwards" and "kind of like my back's up against the wall." Transcript at 10. All he "was seeing was a decrease in pay." Transcript at 12. He thought that having a third service writer would "turn into . . . everybody's going to be jumping for that phone. I just – I – I just decided to not, you know, stay there." Transcript at 11.

(6) On approximately September 19, 2016, claimant notified the employer that he planned to leave work on Friday, September 23, 2016. Although the employer repeatedly asked claimant to reconsider his decision to quit work, claimant ultimately left work as planned on September 23, 2016.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant voluntarily left work without good cause.

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). At the hearing and in his written argument, claimant argued that his benefits should not be denied because his compensation was going to be reduced by more than 10%, and, under OAR 471-030-0038(5)(d), an individual whose compensation is reduced by more than 10% has good cause for quitting work. Unfortunately, however, that is not what OAR 471-030-0038(5)(d) says.

OAR 471-030-0038(5)(d) (August 3, 2011) (emphasis added), in its entirety, is as follows:

> (d) Reduction in rate of pay: If an individual leaves 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*. The median rate of pay in the individual's labor market shall be determined by employees of the Employment Department adjudicating office using available research data compiled by the department.
>
> (A) This section applies only when the employer reduces the rate of pay for the position the individual holds. It does not apply when an employee's earnings are reduced as a result of transfer, demotion or reassignment.
>
> (B) *An employer does not reduce the rate of pay for an employee by changing or eliminating guaranteed minimum earnings, by reducing the percentage paid on commission, or by altering the calculation method of the commission.*

(C) An employer does not reduce the rate of pay by loss or reduction of fringe benefits.

(D) *If the Employment Department cannot determine the median rate of pay, the provisions of OAR 471-030-0038(4) apply*.

According to subsection (d), the relevant reduction in pay is not 10% or more below the individual's previous rate of pay; the reduction must be 10% or more below the "median rate of pay for similar work in the individual's normal labor market." The record in this case contains no evidence about what the median rate of pay for service writers in claimant's normal labor market area was, much less that any reduction in claimant's pay made his rate of pay 10% or more below it, and where, as here, the median rate of pay has not been determined, OAR 471-030-0038(4), and *not* OAR 471-030-0038(5)(d), applies.

Even assuming that the median rate of pay for service writers in claimant's labor market area was part of the record, OAR 471-030-0038(5)(d) would still be inapplicable to this case because claimant's rate of pay was not being reduced. His commission rates, including his base salary and the commission percentages, were all remaining the same; it was only the size of his available customer pool that was changing. Even assuming that the reduction in the size of his available customer pool was, effectively, a reduction in pay, such a reduction could only be considered an alteration to the calculation method (*i.e.* 50% of the customer pool versus 33% of the customer pool), and OAR 471-030-0038(5)(d)(B) specifically states that a reduction in rate of pay does not occur when a claimants' pay is reduced by altering the calculation method of the commission. For all those reasons, we conclude that OAR 471-030-0038(5)(d) is inapplicable to claimant's case, and OAR 471-030-0038(4) must be applied.

OAR 471-030-0038(4) defines "good cause," 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. 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 did not meet his burden in this case. Although claimant was concerned that the quantity of available commission-related transactions was going to be reduced by approximately 17% when the employer's new service writer began working, and, consequently, his commission-based earnings would be proportionately reduced, the situation was not grave because at the time claimant notified the employer he was going to quit working, the new service writer had not yet started his employment. At the time he actually left employment one week later, claimant did not assert or show that he had realized any actual reduction in earnings, much less such a substantial reduction in earnings that he had no reasonable alternative but to quit work and reduce his earnings, and earning potential, to nothing. Under the circumstances claimant described, we cannot conclude that no reasonable and prudent person would have continued to work for the employer an additional period of time; he would have instead waited to see what actual effect, if any, the employer's decision to hire a new service writer would have on his commission-based income.

Claimant quit work without good cause. He is disqualified from receiving unemployment insurance benefits because of this work separation until he requalifies for benefits.

**DECISION:** Hearing Decision 17-UI-74174 is affirmed.

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

**DATE of Service: February 6, 2017**

**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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