

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0789

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 113313). Claimant filed a timely request for hearing. On June 12, 2017, ALJ Meerdink conducted a hearing, and on June 13, 2017 issued Hearing Decision 17-UI-85527, affirming the Department's decision. On July 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Painted Paws Grooming Spa employed claimant as a groomer from November 25, 2016 to March 17, 2017.

(2) The owner expected claimant to take unpaid 30-minute lunch breaks when she worked five hour shifts. Claimant understood that the owner expected her to write on her time card that she had taken her unpaid 30-minute break regardless whether she actually took the breaks and thought the owner sometimes adjusted her time cards to reflect breaks claimant had not taken.

(3) The owner did not schedule claimant's breaks or send her on break, but expected her to take them. The owner observed claimant take breaks to eat or to smoke cigarettes and assumed that claimant was taking her 30-minute break periods. Claimant did not actually take the 30-minute breaks.

(4) On March 11, 2017, claimant told the owner she was concerned that she was not being paid for all the time she worked, because she wrote on her time cards that she took unpaid 30-minute breaks when she was actually working during that time. Claimant told the owner of her belief that the owner wanted her to write down that she took 30-minute breaks even if she did not actually take the breaks. The owner told claimant that day that she was not expected to write down breaks she did not take, but that she was expected to take unpaid 30-minute breaks when she worked five hour shifts. Later that day the owner told claimant that going forward, claimant was required to take unpaid 30-minute breaks outside of the grooming shop to ensure that she did not work during her break times.

(5) During the week of March 12, 2017 to March 18, 2017, claimant and the owner had a conversation about claimant's breaks and back pay. Claimant told the owner that the owner owed her for breaks she had written down on her time card but not taken. Claimant believed the situation between her and the owner became uncomfortable as a result of this conversation.

(6) On March 15, 2017, claimant did not take an unpaid 30-minute break during her shift. On March 17, 2017, claimant reported to work and the owner gave her a written reprimand for failing to take her March 15th break. Claimant felt that the owner had falsified her time cards in the past and it was unfair to reprimand claimant for missing a break when she thought the workload had been too heavy to allow her time to take breaks, and when the owner did not schedule breaks for claimant or tell her when to take them. Claimant told the owner she "couldn't do this anymore" and was quitting her job. Audio recording at ~ 18:35. The owner asked claimant to put her resignation in writing, and claimant wrote that "there were unresolvable issues and that she was quitting." Audio recording at ~ 18:55.

(7) After quitting work, claimant filed a claim with the Oregon Bureau of Labor and Industries (BOLI) for unpaid wages. In May 2017, claimant received \$180.37 in unpaid wages from the employer. The employer was not required to pay any penalties as a result of claimant's claim.

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

We infer from the fact that claimant received a monetary settlement for unpaid wages that the employer was not paying claimant in accordance with Oregon law, and, based on the hearing record in this case, we further infer that the unlawful payment practice was, more likely than not, that the employer failed to pay claimant for breaks she had written on her time card but not taken. The employer's failure to pay claimant under the circumstances, however, was not a situation of such gravity that no reasonable and prudent person would have continued working for the employer for an additional period of time.

Claimant alleged that the owner had told her to falsify her time card by reporting breaks she had not actually taken, and alleged that the owner also falsified her time card on occasion. The owner testified, however, that she did not direct claimant to falsify her time card and did not falsify claimant's time card, making the evidence about that matter equally balanced. Although claimant alleged that the owner should have known that claimant was not taking 30-minute breaks, the owner further testified that she saw claimant take breaks and assumed that claimant had taken the breaks she reported. The evidence about the owner's awareness of or involvement in any timecard falsification efforts was, therefore,

equally balanced. Where the evidence is equally balanced, claimant, the party with the burden of persuasion in a voluntary leaving case, has not met her evidentiary burden.

Likewise, although claimant did not want to be “mean” to the employer by filing a claim with BOLI while she remained employed, filing such a claim was a reasonable alternative to quitting when she did. Audio recording at ~ 7:45. By March 11th, almost a week prior to the date claimant quit work, claimant and the employer had discussed claimant’s belief that the owner wanted her to report breaks she had not actually taken and the owner had specifically directed claimant not to do that any longer. On the same date, the owner also instructed claimant that she was to take her 30-minute breaks, and do so away from the grooming center to ensure that she did not work during those breaks. The situation that resulted in claimant being unlawfully underpaid by 30-minutes each time she reported a break she did not actually take was therefore resolved by March 11th, and going forward from that date the only remaining dispute left between claimant and the employer would have been claimant’s claim for unpaid wages. The resolution of a back pay issue such as the one that existed between these parties on March 17th did not amount to a grave situation. While it might have been unreasonable to expect claimant to continue working for the employer for an additional period of time while the unlawful practices resulting in her underpayment were ongoing, it was reasonable for her to continue working for the employer while the back pay issue was resolved. *See accord Marian Estates v. Employment Dept.*, 158 Or App 630, 976 P2d 71 (1999); *J. Clancy Bedspreads & Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998).

For the reasons explained, we conclude that claimant did not establish good cause for leaving work when she did on March 17th. Claimant must therefore be disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-85527 is affirmed.

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

DATE of Service: July 27, 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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