

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0138

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125955). Claimant filed a timely request for hearing. On January 17, 2018 ALJ Seideman conducted a hearing, and on January 24, 2018 issued Hearing Decision 18-UI-101545, reversing the Department's decision. On February 9, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the handwritten note that the employer interlineated on its application for review since it did not certify that the note was provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Pine Shed Ribs & Barbecue employed claimant in its kitchen from July 3, 2017 until November 17, 2017.

(2) As an inducement to accepting a job with the employer, an employer representative told claimant that he would share in tips that customers left when picking up their food in addition to being paid an hourly wage. The employer provided only counter service for its customers. Although the employer did not have servers, customers sometimes left tips in addition to paying for their food orders. The employer took possession of the tips that customers left and it was expected that the employer would distribute each employee's share of the tips to him or her in the employee's weekly paychecks.

(3) During claimant's employment, claimant never received any tips or any share of tip moneys the employer collected and to which he was entitled. On October 22, 2017, the employer held a meeting of all staff. At that meeting, claimant brought up that he had never received a share of the tips left by

customers nor had any other employees. The employer's owners responded that the employer's sales were down and any tips received would not be shared with employees until sales increased. By November 12, 2017, claimant and other employees still had not been distributed a share of the tips that customers left. At a kitchen staff meeting held that day, claimant and other employees gave the owners a copy of materials they had located the website of the Bureau of Labor and Industries (BOLI), stating that tips were owned by restaurant employees and that an employer could not keep them. At that meeting, the owners again stated that they were not going to distribute tips to employees.

(4) During claimant's employment, Friday was the day on which paychecks were to be distributed to employees. Sometimes, however, the employer's paychecks were not available to claimant and other employees on Friday, but were distributed late. Claimant complained about the delay in receiving paychecks.

(5) Around November 12, 2017, claimant carefully reviewed his pay stubs and determined that if he had a six hour shift the employer deducted a half hour meal break from the time for which he was paid even if he had not taken a meal break during that shift. Claimant often worked alone in the kitchen and was not able to take meal breaks most of the time. Sometime around November 12, 2017, claimant protested to the owner and to the manager that he was not able to take meal breaks and that time should not have been deducted from his pay for a meal break that he had not taken. At around this same time, one or both of the owners told claimant that the employer was going to speak with its lawyer about the distribution of tips to employees and that the employer "was going to work on it." Audio at ~11:20. When claimant followed up on this statement, the owner justified the employer's failure to distribute tips on "something that we messed up in the store." Audio at ~11:38.

(6) On Friday, November 17, 2017, worked and received his paycheck for that week. Claimant saw that his paycheck did not include a share of the tip moneys that had been received. Claimant decided to leave work because he was not receiving a share of tips, he was often required to work a shift of six hours or more without having a meal break but the employer still deducted a half-hour from the time for which he was compensated, and the employer sometimes failed to have paychecks available on its scheduled pay day. On November 17, 2017, claimant notified the employer that he was leaving work, effective immediately.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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). "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.

At hearing, claimant's testimony was a cogent, straightforward, and detailed recitation of the employer's defaults, including a chronic failure to distribute to claimant as well as other staff a share of tip moneys

to which they were entitled despite complaints, often not making meal breaks available to claimant but still deducting a half-hour from the time for which he would be compensated, and sometimes not making claimant's check available on the employer's regularly scheduled pay day. In contrast, the testimony of the employer's owner was confusing, inconsistent and somewhat evasive. For example, with respect to claimant's testimony about tips, the owner initially stated that claimant seemed to think he was a server who was entitled to tips and not the line cook that he was, seeming to suggest claimant was not entitled to receive tips, before reversing his testimony and stating that all staff, presumably including claimant, was entitled to receive a share of tips. Audio at ~28:26, ~30:20, ~32:33. Notably, the owner did not contend that claimant ever received any share of the tip moneys that were collected during his employment. At the conclusion of his testimony the owner seemed to concede that the employer had not paid to claimant the tips that he was entitled to receive, stating that tips were a "gray area here" and that "it's something that we do have in mind and we are working on and I wish that these kinds of things worked immediately out of the gate and pleased everybody but that's not how it happens in the real world sometimes [and] **** we're doing the best we can at this end." Audio at ~32:56. On balance, it appears likely that the employer did not pay claimant the share of tips to which he was entitled, despite claimant's complaints and the BOLI materials that were provided to the employer addressing the unlawfulness of the employer's practice.

With respect to meal breaks, although the owner emphasized several times that he never expressly told anyone that they were not allowed to take meal breaks and that he had never witnessed any employee working through meal time, he did not contend that the employer's staffing was adequate to enable kitchen staff like claimant to take meal breaks or that he did not implicitly condone employees skipping their meal breaks. Audio at ~23:05, ~35:55, ~38:32. In connection with whether the employer's payroll system automatically deducted a half hour meal for all employees who worked a shift even if they worked through the meal break, the owner's testimony was hesitant and inconsistent, first stating that he did not think so, then stating that the system did, and then again reversing himself and contending that the employees who worked through a meal break were compensated for that time. Audio at ~36:26, ~38:00. Based on the owner's lack of certainty and the inconsistency in this testimony as compared against claimant's testimony, we accept claimant's account that he often did not take meal breaks due to the press of work and that, regardless, the employer still deducted a half-hour from the time for which he was compensated. With respect to claimant's testimony that the employer sometimes did not have paychecks available on claimant's regular pay day, the owner testified only, "Unfortunately, I'm not here [at the workplace] on paydays so I can't speak to that at all." Audio at ~37:10. In light of the owner's response, we accept as accurate claimant's testimony that sometimes the employer did not have paychecks available on its regularly scheduled payday.

It appears that as of the time that claimant left work, the employer was violating Oregon or federal law on an ongoing basis by its employment practices, despite claimant having notified the employer of his concerns and asked for resolution of the problems. First, although BOLI does not accept wage claims based on tips, the federal Fair Labor Standards Act and its implementing regulations prohibit an employer from retaining an employee's share of tips or from not distributing the share to which the employee is entitled under a valid tip pooling arrangement. 29 USC §203(m)(2); 29 CFR §531.52. Second, an employee who works a shift of six hours or more must be allowed a meal break of one-half hour and must be compensated for that scheduled meal break if he or she does not take that break. ORS 653.261; OAR 839-020-0050(2)(a)-(b) (January 1, 2014). Absent an agreement otherwise with an

employee, an employer must establish and maintain a regular pay day on which the employer will pay all employees the wages due and owing to them. ORS 652.120(1).

No reasonable and prudent person of normal sensitivity, exercising ordinary common sense would continue to work indefinitely for an employer, like that here, that on an ongoing basis, despite complaints, failed to pay him tips to which he was entitled in accordance with federal law, failed to pay him on its regular payday in accordance with state law and failed to provide him meal breaks to him or to pay him when he worked through meal breaks 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 wage dispute over employer's illegal practices was ongoing and not likely to stop); *Cavitt v. Employment Division*, 105 Or App 81, 803 P2d 778 (1990) (an employer's repeated violations of ORS 652.120 by paying with bad checks was good cause for claimant to leave work because "[n]o one should be expected to continue working for an employer who pays with bad checks").¹ In view of the employer's ongoing unlawful employment practices despite claimant's complaints, no reasonable and prudent person would have continued to work for the employer for an indefinite time while waiting for the employer to change its practices.

Claimant had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-101545 is affirmed.

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

DATE of Service: March 8, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

¹ *See also Appeals Board Decision*, 2014-EAB-1191, August 13, 2014 (good cause to leave work when employer failed to pay claimant all amounts owed on regular paydays under ORS 652.120(1) and no indication employer would cease its practice); *Appeals Board Decision*, 2014-EAB-0614, May 14, 2014 (when employer failed to pay claimant all wages owed as required by ORS 652.120(1), claimant had good cause to leave work); *Appeals Board Decision*, 13-AB-0949, July 17, 2013 (claimant had good cause to leave work when employer failed to provide meal and rest breaks required by state law under OAR 839-020-1150(2)(a) and OAR 839-020-0050(6)(a)); *Appeals Board Decision* 12-AB-2132, August 30, 2013 (claimant had good cause to leave work when employer did not pay him in accordance with ORS 653.025 (minimum wage), ORS 653.261 (overtime), OAR 839-020-0010(1) (minimum wage) and OAR 839-020-0030 (overtime) on an ongoing basis).