

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0272**

*Modified*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct, within 15 days of a planned voluntary leaving without good cause (decision # 114942). Claimant filed a timely request for hearing. On March 5, 2018, ALJ Seideman conducted a hearing, and on March 8, 2018 issued Hearing Decision 18-UI-104795, affirming the Department's decision. On March 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based upon the hearing record.

**FINDINGS OF FACT:** (1) High Desert Delivery, Inc. employed claimant as a delivery driver from October 2017 to December 7, 2017.

(2) The employer failed to pay claimant for all the hours he worked on four occasions in approximately two months.<sup>1</sup> When claimant told the owner that he had not been paid, the owner estimated what he thought he owed claimant, without going through payroll to ensure that the employer was accurately calculating or accounting for withholdings, and paid claimant in cash.

(3) In early December 2017, claimant notified the employer that he planned to quit work on December 15, 2017. On December 6, 2017, claimant called in sick because he was ill. That night, he took his wife to the emergency room, and then stayed home to care for her on December 7, 2017. On December 7, 2017, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was not for misconduct; however, since we find that claimant's planned voluntary leaving would have been for good

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<sup>1</sup> Claimant had other concerns about his employment; however, because the pay issue is dispositive we need not and do not address those issues in this decision.

cause, the work separation must be adjudicated as a discharge, and claimant is not subject to disqualification from benefits.

ORS 657.176(2)(a) and (c) require a disqualification from unemployment insurance benefits for individuals who are discharged for misconduct or quit work without good cause. ORS 657.176(8) provides that when an individual has notified an employer that he will leave work on a specific date, not be for good cause, and the employer discharges him, not for misconduct, within 15 days prior to the date of the planned voluntary leaving, the separation is adjudicated as though the planned voluntary leaving had occurred, although the date of the individual's disqualification from benefits is deferred until the week prior to the week of the planned voluntary leaving.

There is no dispute that claimant's employment ended on December 7, 2017 when the employer discharged claimant. However, the ALJ in this case determined that ORS 657.176(8) applied to this case because claimant had, at the time of the discharge, planned to quit his job on December 15<sup>th</sup>, and claimant's planned quit was not for good cause. In so concluding, the ALJ found as fact that claimant's self-employment in a mobile window repair business and his divorce factored into his decision to quit work. Hearing Decision 18-UI-104795 at 1-2. We disagree. Claimant testified that the primary reason he quit work was the pay issue. He testified about his self-employment venture and divorce when the ALJ asked why claimant claimed benefits and moved away from the Prineville area, not when asked why he decided to quit work in the first place. Those factors were, therefore, irrelevant to claimant's decision to quit work, and the relevant question in this case is whether claimant had good cause to quit work because the employer failed to pay claimant for all the hours he worked and failed to account for his hours and payroll deductions when reimbursing him for underpaid wages by cash.

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 time.

Claimant provided unrefuted testimony that on at least four occasions in his approximately two months of employment the employer failed to pay claimant for all the hours he worked, and when correcting the underpayment, the owner estimated the wages and deductions and paid him with cash without accounting for the amounts he was withholding from claimant's pay. ORS 652.120(1) requires that employers establish and maintain regular paydays, upon which the employer must pay employees all the wages due and owing to them. ORS 652.610(1) requires that employers provide employees, whenever payment of wages is made, with an itemized statement showing, among other things, the gross and net wages and the amount and purpose of each deduction made during the pay period at issue. On this record, the employer violated both of those laws with respect to payment of claimant's wages on at least four occasions. Claimant therefore had good cause to quit work due to what appears to have been repeated and, likely, ongoing violations of Oregon's wage and hour laws. *Compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute is not ongoing, and only the issue of back pay restitution continues to exist, claimant did not have good cause to quit work);

*J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute was ongoing).

Because claimant's planned voluntary leaving was for good cause, ORS 657.176(8) does not apply, and claimant's planned voluntary leaving is immaterial to whether or not he should be disqualified from receiving unemployment benefits. Claimant's work separation therefore must be adjudicated as a discharge, based upon the employer's December 7, 2017 decision to end claimant's employment.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The events that immediately preceded the discharge in this case appear to be claimant's absences from work due to his illness on December 6<sup>th</sup> and his wife's illness on December 7<sup>th</sup>. OAR 471-030-0038(3)(b) states that absences due to illness are not misconduct. Therefore, to the extent the employer discharged claimant because of those two absences, the discharge was not for disqualifying misconduct.

The employer did not attend the hearing in this matter and therefore did not offer any evidence suggesting another reason why the employer chose to end claimant's employment on December 7, 2017. In a discharge case the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In the absence of evidence suggesting misconduct, the employer has not met its evidentiary burden.

Claimant's discharge was not for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of his work separation in this matter.

**DECISION:** Hearing Decision 18-UI-104795 is modified, as outlined above.<sup>2</sup>

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

**DATE of Service:** April 11, 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](http://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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<sup>2</sup> This decision modifies a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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