

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0535

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90851). On March 28, 2018, decision # 90851 became final without claimant having filed a request for hearing. On April 2, 2018, claimant filed an untimely request for hearing. On April 26, 2018, ALJ Shoemake conducted a hearing, and on May 4, 2018 issued Order No. 18-UI-108773, allowing claimant's late request for hearing and affirming decision # 90851. On May 23, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in support of his application for review. However, claimant failed to certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument or the new information that claimant sought to introduce by way of the written argument. EAB considered only information received into evidence at the hearing when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to allowing claimant's untimely request for hearing are **adopted**. The remainder of this decision addresses the merits of decision # 90851.

FINDINGS OF FACT: (1) Andy's Auto Supply, Incorporated employed claimant as an automotive technician from March 13, 2017 until January 12, 2018.

(2) During his employment, claimant developed the impression that the employer was not paying him at least minimum wage for all of the hours he worked. Claimant did not complain to the employer about not receiving minimum wage. Claimant also developed the impression that the employer was not paying him for all of the hours he actually worked. Claimant mentioned to the employer only a few times that he thought he was not receiving pay for all of the hours that he worked. In response to

claimant's complaints, the employer would try to explain to claimant how it had calculated claimant's pay, which claimant thought was "making up excuses" and "nonsense." Audio at ~25:28.

(3) On January 12, 2018, claimant was having problems finishing a difficult repair on a vehicle. The employer's lead technician was asked to consult with claimant and to advise him on completing the repair. Claimant initially understood that a new water pump needed to be installed in the vehicle because he might have failed to adequately secure a bolt or had used a wrong bolt near the water pump. Claimant was upset about having to replace the water pump due to an error he made. Shortly thereafter on January 12, 2018, claimant notified the employer that he was leaving work.

(4) The employer's payroll records showed that for the pay period January 1, 2018 through January 15, 2018, which was claimant's last pay period, claimant worked 34 hours at a wage of \$11.25 per hour, and earned a total of \$382.50. Claimant sometimes worked less than 40 hours per week or 80 hours in a two week payroll period, particularly during holiday seasons or when the employer's business was slow.

CONCLUSIONS AND REASONS: 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). "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.

Claimant contended at hearing that he left work when he did because he thought the employer was not going to pay him for replacing the water pump in the vehicle he had repaired based on the employer's alleged practice of not paying him for all of the hours he worked and not paying him at least minimum wage for those hours. Claimant was correct that Oregon law required him to receive at least minimum wage for each hour that he worked, which as of July 1, 2017 was \$11.25 per hour in the Portland, Oregon metropolitan area in which the employer was located and he lived. See ORS 653.025 (requiring employers to pay minimum wage); OAR 839-020-0010(2) (July 1, 2016) (employees "shall be paid no less than the applicable minimum wage for all hours worked"); <https://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx>. EAB decisions have consistently held that it may be good cause for a claimant to leave work when the claimant has worked for an employer for an indefinite period for less than minimum wage or under other unlawful conditions of employment. See *EAB Decision 2014-EAB-1191* (August 13, 2014); *EAB Decision 2014-EAB-0614* (May 14, 2014); *EAB Decision 13-AB-0949* (July 17, 2013); *EAB Decision 12-AB-2132* (August 30, 2012); *EAB Decision 12-AB-0380* (February 8, 2012). The issue is whether claimant demonstrated that his employer likely engaged in unlawful pay practices.

Claimant's testimony about the employer's failure to comply with Oregon minimum wage law was not completely logical and consistent with common sense. First, claimant initially testified that he did not complain to the employer about its failure to pay minimum wage and then, toward the end of his

testimony, suddenly reversed himself and asserted that he “pretty much complained every time I had to sign [for] my check.” Audio at 20:36, ~21:26, ~21:37, ~38:07. Second, accepting claimant’s initial testimony as accurate, it is highly unlikely that claimant would not have complained to the employer about its failure to pay him minimum wage based on his dislike of “conflict” if the employer truly was not paying him minimum wage and if claimant was unable to pay his bills as result. Audio at ~20:36, ~21:26, ~21:37, ~38:07.

As well, claimant did not persuasively rebut the testimony of the employer’s witness, based on the employer’s payroll records from a third party payroll company, that he was paid the state-mandated minimum wage of \$11.25 for every hour that he worked, including those shown on his final paycheck. Claimant was unable to testify with any specificity about the number of hours he actually worked in any period for which he contended he was not paid at least minimum wage and he did not have earnings records. Audio at ~23:51. And while claimant generally contended that he was at work “every hour of every day” and that he worked 80 hours every two week pay period, he admitted that he sometimes went home early and sometimes did not work when the employer’s business was slow, without any estimate of the number of hours and weeks that he worked less than full-time. Audio at ~38:30. Given the vague generality of claimant’s impression that he was not paid minimum wage for every hour that he worked, it cannot be concluded more likely than not that the employer was engaging in an unlawful labor practice, and was not paying him for all the hours that he worked, in compliance with Oregon minimum wage law. Absent additional evidence, claimant did not establish on this record that he had good cause to leave work based on the employer’s pay practices.

Aside from claimant’s contentions about the employer’s unlawful employment practices, no aspects of the workplace that claimant described appear to constitute grave circumstances that caused claimant to leave work. On this record, claimant did not show that he had good cause for leaving work on January 12, 2018.

Claimant did not meet his burden to show that he had good cause for leaving work when he did. He therefore is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-108773 is affirmed.

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

DATE of Service: June 21, 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.

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