

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0454

Affirmed
Disqualification
Overpayment and Penalties

PROCEDURAL HISTORY: On January 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #144945). On January 29, 2014, the Department served notice of an administrative decision (decision #195586) assessing a \$5,947 overpayment, an \$892.05 monetary penalty, and 46 penalty weeks. Claimant filed timely requests for hearings. On March 11, 2014, ALJ Monroe conducted a hearing on both decisions, and on March 20, 2014 issued Hearing Decisions 14-UI-12955 and 14-UI-12945, affirming the decisions. On March 24, 2014, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-12955 and 14-UI-12945. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0453 and 2014-EAB-0454).

FINDINGS OF FACT: (1) On November 5, 2012, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$209. The maximum weekly benefit amount in effect was \$524.

(2) Applebees Neighborhood Bar & Grill (employer) employed claimant from January 12, 2013 to April 28, 2013 as a line cook.

(3) On January 19, 2013, claimant injured his knee while going to his car during a break at work. On January 29, 2013, claimant went to a doctor regarding his knee injury. The doctor charged claimant \$300 for the appointment. Claimant asked the employer to pay the medical bill. The employer disagreed that the injury was work-related and did not pay the medical bill.

(4) From January 29, 2013 to April 19, 2013, claimant worked one or two days per week for the employer.

(5) The employer scheduled a meeting for all kitchen staff on April 28, 2013. Claimant was scheduled to work a partial shift after the meeting. Claimant attended the staff meeting. After the meeting, he asked the kitchen manager why the employer had not paid the January 29, 2013 medical bill. Claimant argued with the kitchen manager and the general manager about his injury and the medical bill. The managers told claimant they thought he was “scamming” the employer, and claimant responded, “I will see you in court.” Transcript (Case No. 14-UI-12955) at 15. Claimant left work immediately after the argument, and did not work his scheduled shift.

(6) The employer did not tell claimant it had discharged him, and had continuing work available for claimant.

(7) Claimant did not perform services again for the employer after the April 28, 2013 meeting. After April 28, 2013, claimant contacted the employer to request that it allow him to complete an injury report form for the employer.

(8) On May 7, 2013, claimant restarted his claim for benefits and informed the Department he was still working for the employer. Claimant claimed benefits for the period April 28, 2013 through November 30, 2013 (weeks 18-13 through 48-13). For each week claimed, claimant certified that he did not quit a job and that he was not fired or suspended during that week.

(9) Relying on claimant’s reports that he did not quit a job and was not fired from a job during week ending May 4, 2013 (week 18-13), the Department determined claimant was eligible for benefits and paid claimant \$5,947 in regular and emergency unemployment compensation (EUC) benefits for the period April 28, 2013 through November 30, 2013 (weeks 18-13 through 48-13) as detailed in the Schedule of Adjustments contained in the Department’s administrative decision #195586.

(10) On May 31, 2013, claimant signed an associate injury report from the employer regarding his January 19, 2013 injury.

(11) Claimant had seven prior unemployment benefits claims, and understood he was required to report all work separations to the Department.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant voluntarily left work without good cause. Claimant was overpaid and must repay \$5,947 in unemployment insurance benefits, and is liable for an \$892.05 monetary penalty, and subject to 46 penalty weeks.

Work Separation. In the present case, the parties provided conflicting testimony regarding the nature of the work separation. We therefore must address that issue. OAR 471-030-0038(2)(a) (August 3, 2011) provides that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

It is undisputed that claimant attended a scheduled work meeting for kitchen staff on April 28, 2013, and that, after the meeting, he argued with his managers and told them he would “see them in court.” The record also shows claimant was dissatisfied that the employer did not pay his medical bill and that his managers said he had been untruthful about his injury. The record also shows the employer did not tell claimant it was discharging claimant, and that claimant left the employer’s restaurant immediately after the argument, without completing his shift. That claimant attended a meeting for all kitchen staff, and that the employer did not explicitly state it was discharging him, show the employer was willing to allow claimant to continue working. Although claimant’s statement that he would “see them in court” did not explicitly express an unwillingness to continue working, that statement, when combined with his leaving the restaurant without completing his shift on April 28, and not perform services for the employer again after April 28, shows claimant was unwilling to continue working for the employer after the April 28, 2013 argument. The preponderance of the evidence supports the employer’s contention that claimant’s “I will see you in court” comment meant, “I quit.” See Transcript Case No. 14-UI-12955 at 25. Therefore, we conclude that claimant voluntarily left work.

Voluntary Leaving. 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 P2d 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 testified at hearing that he did not quit work, and thus did not provide a reason for why he quit. Transcript Case No. 14-UI-12955 at 22. The record shows the work separation occurred on April 28, after the argument between claimant and his managers. Based on the timing of claimant’s decision to quit, the record shows he left work because he was frustrated that his managers told him he was trying to “scam” the employer, and that the employer had not paid his medical bill. Claimant did not show good cause to leave work for those reasons. It is unlawful for an employer to require an employee to pay the cost of any medical examination or the cost of furnishing any health certificate as a condition of employment. ORS 659A.306(1). However, the record does not establish that the employer required claimant to obtain a health certificate as a condition of continued employment. Claimant’s dissatisfaction with the manner in which the employer addressed his injury and medical bill did not create a situation of such gravity that a reasonable person in claimant’s position would have had no reasonable alternative but to leave work. Rather than leaving work, claimant had the option of continuing to work for the employer while seeking a resolution to his concerns through the employer.

That claimant continued to seek resolution regarding his injury and medical bill after he left work shows it would not have been futile to do so while continuing to work for the employer.

Because claimant did not leave work due to a situation of such gravity that he had no reasonable alternative but to leave work, he did not show good cause for leaving. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

Overpayment and Penalties. ORS 657.310(1) provides that an individual who received benefits to which he was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from future benefits otherwise payable to him under ORS chapter 657. That provision applies if the individual received the benefits because he made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of his knowledge or intent. ORS 657.310(1). An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (July 1, 2008). In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount equal to 15 percent of the amount of the overpayment. ORS 657.310(2).

In Hearing Decision 14-UI-12945, the ALJ concluded claimant willfully made a misrepresentation to the Department for the purpose of obtaining unemployment benefits. We agree with the ALJ. Claimant argued at hearing that he did not quit and the employer never gave him a notice of termination. Transcript 14-UI-12945 at 23 to 24. However, claimant also testified at hearing that he knew his employment ended after the April 28, 2013 argument with his managers. Transcript 14-UI-12945 at 15 to 17. He also testified that he knew he was no longer employed at the time he signed the associate injury report on May 31, 2013. Transcript Case No. 14-UI-12945 at 18. Thus, regardless of claimant's understanding of whether he quit or was fired, he knew a work separation had occurred and did not report the work separation to the Department when he claimed benefits after the April 28 incident, after May 31 when he signed the associate injury report, or any time during the weeks at issue. The record shows, more likely than not, claimant willfully made a false statement, and willfully failed to report a material fact, to obtain benefits.

Based on claimant's willful misrepresentations to the Department to obtain benefits, claimant is subject to penalty weeks and a monetary penalty. The number of penalty weeks is determined under OAR 471-030-0052(1)(a) and (b), which provides that when the disqualification is imposed because the disqualifying act relates to the provisions of ORS 657.176 (disqualifying work separations), the number of penalty weeks is calculated by dividing the total overpayment (\$5,947) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim at the time of the disqualifying act (\$524), rounding off to the nearest two decimal places (11.35), multiplying the result by four (45.4), and rounding it up to the nearest whole number (46), or four weeks, whichever is greater. Claimant therefore is disqualified from benefits for 46 weeks.

Claimant is also liable for a penalty equal to 15 percent of the overpaid benefits. Fifteen percent of \$5,947 is \$892.05, making claimant's total repayment liability \$6,839.05.

DECISION: Hearing Decisions 14-UI-12955 and 14-UI-12945 are affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: April 18, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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