

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1845

Hearing Decision 14-UI-28983 Modified – Disqualification
Amended Hearing Decision 14-UI-29258 Modified - Overpayment, No Penalties

PROCEDURAL HISTORY: On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 72113). On October 14, 2014, the Department served notice of an administrative decision (decision # 195287) assessing an \$8,070 overpayment, a \$1,210.50 monetary penalty, and 52 penalty weeks. Claimant filed timely requests for hearings on both decisions. On November 18, 2014, ALJ Vincent conducted hearings on both decisions, and on November 19, 2014 issued Hearing Decision 14-UI-28983, affirming decision # 72113, and Hearing Decision 14-UI-28988 and Amended Hearing Decision 14-UI-28988, affirming decision # 195287. On November 25, 2014, ALJ Vincent issued Amended Hearing Decision 14-UI-29258, replacing Amended Hearing Decision 14-UI-28988, and again affirming decision # 195287. On December 2, 2014, claimant filed applications for review on Hearing Decision 14-UI-28983 and Amended Hearing Decision 14-UI-29258 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-28983 and 14-UI-29258. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-1845 and 2014-EAB-1846).

FINDINGS OF FACT: (1) The Saunders Company, Inc. (“employer”) employed claimant from January 2, 2014 to February 25, 2014 as a pipe layer and laborer.

(2) In January 2014, the employer’s foreman told claimant the employer was likely to lay him off due to lack of work. The foreman did not provide a definite layoff date.

(3) In January 2014, a second employer, Taylor Northwest, interviewed claimant and told him he would begin work when the weather improved. On or about February 17, 2014, Taylor Northwest told claimant he would begin work in “two to three weeks,” but did not give claimant a definite start date. Audio Record at 7:16 to 7:26.

(4) On February 17, 2014, claimant gave the employer two weeks' notice that he planned to quit on March 3, 2014. Claimant was willing to work until March 3, 2014.

(5) On February 25, 2014, the employer was experiencing a decrease in its workload and told claimant it had no more work for him.

(6) On March 3, 2014, claimant filed an initial claim for benefits by telephone with the assistance of a Department representative. Claimant told the Department he was laid off due to lack of work on February 25, 2014 after he gave the employer two weeks' notice he would quit on March 3, 2014. Claimant told the Department he expected to return to work with a new employer on March 15, 2014. Claimant's weekly benefit amount was \$538.

(7) On or about March 18, 2014, Taylor Northwest told claimant it did not have a job available.

(8) Claimant claimed benefits for March 2 through June 21, 2014 (weeks 10-14 through 25-14). The Department paid claimant \$8,070 in unemployment insurance benefits. Based on administrative decision # 72113, the Department determined claimant was overpaid \$8,070 in benefits for weeks 10-14 through 25-14.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct, within 15 days prior to claimant's planned quit without good cause. We agree with the ALJ that claimant received \$8,070 in benefits to which he was not entitled, and which he is liable either to repay or have deducted from any future benefits otherwise payable to him under ORS chapter 657. However, we disagree with the ALJ and conclude claimant's overpayment was not the result of a willful misrepresentation, and claimant is not subject to penalty weeks or a monetary penalty.

Work Separation. The first issue in this case is whether claimant quit work or was discharged. 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. OAR 471-030-0038(2)(a) (August 3, 2011). 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).

Claimant notified the employer on February 17, 2014 that he was quitting work on March 3, 2014. However, the employer did not allow claimant to work through his notice period. Because claimant was willing to continue working for the employer until March 3, but was not allowed to do so by the employer, the February 25, 2014 work separation was a discharge.

Discharge. 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. The employer discharged claimant on February 25, 2014, rather than allowing him to continue to work until March 3, because it was experiencing a decrease in its workload. The employer's preference to give work to other employees because claimant had given notice to quit was not attributable to claimant as a willful or wantonly negligent violation of the standards of behavior an employer has the right to expect of an employee. Thus, it was not misconduct.

However, ORS 657.176(8) provides that when an individual has notified an employer that he will quit work on a specific date, and the employer discharged him, not for misconduct, no more than fifteen days prior to that date, and the quit would have been without good cause, the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred, and the individual is disqualified from receiving benefits, except that he is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date. Claimant notified the employer he would end his employment on March 3, 2014. The employer discharged him, not for misconduct, on February 25, 2014, less than 15 days prior to his planned quit date. Therefore, we must determine whether claimant's planned quit would have been without good cause.

Voluntary Quit. 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). OAR 471-030-0038(5)(a) provides that an individual who leaves work to accept an offer of other work has good cause for quitting only if, in relevant part, "the offer is definite and the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances."

On February 17, 2014, Taylor Northwest told claimant he would begin work in "two to three weeks." However, Taylor Northwest did not give claimant a definite start date for the position. Because claimant did not have a definite start date, he did not show the work was to begin in the shortest length of time reasonable under the circumstances after he quit work. Consequently, he did not have good cause to quit his job to accept an offer of other work.

Because the employer discharged claimant, not for misconduct, within 15 days of claimant's planned quit without good cause, the work separation is adjudicated as if the discharge did not occur, and the planned quit did occur. Claimant therefore is disqualified from receiving benefits, except that he is eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. Both those weeks are the same week, the week of February 23 through March 1, 2014 (week 9-14). Accordingly, claimant was eligible for benefits for week 9-14. However, claimant did not claim benefits for week 9-14.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.* An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. 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 of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). The length of the penalty disqualification period and monetary penalty are determined by applying the provisions of OAR 471-030-0052 (February 23, 2014).

In Amended Hearing Decision 14-UI-29258, the ALJ concluded that claimant received \$8,070 in benefits for weeks 10-14 through 25-14 to which he was not entitled because he had given notice to quit but reported his February 25, 2014 work separation as a layoff due to lack of work, and that he is liable to either repay the \$8,070 or have it deducted from any future benefits otherwise payable to him under ORS chapter 657.¹ The ALJ further concluded that claimant was disqualified from future benefits for 52 weeks and liable for a monetary penalty because he willfully misrepresented his February 25 work separation by reporting that he had been laid off due to lack of work from a job to obtain benefits.²

We agree that claimant received \$8,070 in benefits for weeks 10-14 through 25-14 to which he was not entitled because he falsely reported to the Department that the reason for his work separation was a layoff due to lack of work, and that he is liable to either repay the \$8,070 or have it deducted from any future benefits otherwise payable to the claimant under ORS chapter 657. We conclude herein that the employer discharged claimant, not for misconduct, within 15 days prior to claimant's planned quit without good cause. Thus, pursuant to ORS 657.176(8), the work separation is adjudicated as if the discharge had not occurred and the planned quit had occurred. Therefore, claimant's report that he was laid off due to lack of work during week 9-14 was false, and caused him to receive \$8,070 in benefits for weeks 10-14 through 25-14 to which he was not entitled. Regardless of his knowledge or intent when making that report, claimant is liable to either repay the \$8,070 or have it deducted from any future benefits otherwise payable to him under ORS chapter 657.

However, we disagree with the ALJ's conclusion that claimant willfully misrepresented his work separation during week 9-14 to obtain benefits. At hearing, claimant testified that he spoke with the Department about how to report his work separation, and was instructed to report his work separation as a layoff due to lack of work after he disclosed to the Department that he gave the employer notice to quit, but was laid off due to lack of work prior to his planned quit date. Audio Record (decision # 195287) 21:28 to 22:33, 23:33 to 23:53. Claimant's testimony is consistent with our findings of fact, and we find it plausible that claimant accurately reported the events leading to his work separation to the Department and was instructed by the Department to report the work separation as a layoff due to lack of work. Moreover, it is understandable that claimant believed he should report his work separation on February 25 as a layoff due to lack of work because he was willing to work until March 3, but was laid off on February 25 due to lack of work. The Department failed to establish that claimant willfully misreported that he was laid off due to lack of work and had not quit a job during week 9-14 to obtain benefits. Claimant therefore is not disqualified from future benefits or liable for a monetary penalty based on that false report.

Conclusion. Claimant is disqualified from receiving benefits due to his work separation, except that he is eligible for, but did not claim, benefits for week 9-14. Claimant received \$8,070 in benefits to which he was not entitled, and which he is liable either to repay or have deducted from any future benefits otherwise payable to him under ORS chapter 657. Claimant is not disqualified from future benefits or liable for a monetary penalty.

¹ Amended Hearing Decision 14-UI-29258 at 3.

² *Id.*

DECISION: Hearing Decision 14-UI-28983 and Amended Hearing Decision 14-UI-29258 are modified, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: January 16, 2015

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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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