

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0542**

*Reversed*  
*No Disqualification*  
*Overpayment and Penalty Weeks Assessed*

**PROCEDURAL HISTORY:** On April 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision #130345 ). On April 15, 2015, the Department served notice of an administrative decision (#201375) concluding that based on decision #130345, claimant willfully misrepresented that he had not quit a job and failed to report a material fact to obtain unemployment benefits. This decision assessed a \$18,980 overpayment, a \$2,847 monetary penalty, and 52 penalty weeks. Claimant filed timely requests for hearings.

On May 1, 2015, ALJ Hoyer conducted a hearing regarding claimant's request for a hearing on decision #130345, the voluntary quit decision, and on May 7, 2015, issued Hearing Decision 15-UI-38116, affirming the administrative decision. On May 8, 2015, ALJ Hoyer conducted a hearing regarding claimant's request for a hearing on decision #201375, the overpayment decision, and on May 14, 2015, issued Hearing Decision 15-UI-38492, affirming the administrative decision. On May 11, 2015, claimant filed application for review of Hearing Decisions 15-UI-38116 and 15-UI-38492 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-38116 and 15-UI-38492. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0542 and 2015-EAB-0633).

Claimant failed to certify that he provided a copy of claimant's argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Forest River Manufacturing, a manufacturer of travel trailers, employed claimant from April 10, 2000 to August 22, 2013, last as a tow master. Claimant's duties included using a fork lift to move trailers off the line and park them, and setting up and disassembling trailer shows. Claimant normally worked five days a week, Monday through Friday.

(2) In March 2013, claimant suffered a heart attack. He returned to work after he took approximately five days off for treatment, and was restricted from working overtime for several months.

(3) In late June 2013, the employer gave claimant a written warning for smoking on an unscheduled break, contrary to a newly-adopted employer rule. Claimant had forgotten about the new rule, and had stepped away from his workplace to smoke. Also in late June and early July 2013, the employer suspended claimant for several days for unknown reasons.

(4) On August 12, 2013, claimant began setting up a trailer show in the employer's parking lot. Because claimant was responsible for the set up and disassembly of this show, the employer directed him to work every day from August 12 through 24. Claimant found this work schedule to be stressful and exhausting.

(5) When claimant reported for work on August 22, 2013, he had worked for the employer for 11 days without a day off. Claimant felt he needed a day off to rest and recuperate from his stressful work schedule. Sometime between 10:30 and 11:00 a.m., claimant asked the plant manager if he could have the day off; the plant manager responded that the general manager would not like that. Claimant repeated his request for the day off; the plant manager said the general manager needed claimant to disassemble the trailer show. Claimant then left the workplace, and went home. Claimant intended to take the day off to rest, and return to work the next day.

(6) Approximately one hour after claimant left the workplace on August 22, 2013, he received the following text from the plant manager: "You walked off the job. We're done. Bring in the keys." Claimant returned his keys to the employer, but never talked to any of the employer's managers about his work situation. Claimant performed no work for the employer after August 22.

(7) On November 19, 2012, claimant filed a claim for unemployment benefits. The claim was determined valid with a weekly benefit amount of \$466. The maximum weekly benefit amount was \$524.

(8) Claimant claimed and was paid \$466 per week in benefits for week 27-13 (June 30 through July 6, 2013). During week 27-13, claimant worked for the employer and earned \$620. When claimant claimed benefits for that week, he reported that he earned \$124 working for the employer.

(9) Claimant claimed and was paid \$466 each week in benefits for weeks 35-13 through 46-13 (August 25 through November 16, 2013). On August 29, 2013, claimant spoke to a Department representative

about his claim; claimant told the representative that the employer had laid him off due to lack of work. Transcript of May 18, 2015 Hearing at 18.

(10) Claimant filed a new claim for benefits on November 24, 2013. On that date, he spoke to a Department representative and told the representative that the employer had laid him off in August due to a lack of work. Transcript of May 18, 2015 Hearing at 18. The claim was determined valid with a weekly benefit amount of \$497. Claimant claimed and was paid \$497 each week in benefits for weeks 49-13 through 23-14 (December 1, 2013 through June 7, 2014).

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant was discharged, but not for misconduct. Claimant was overpaid \$466 in unemployment benefits, must repay the benefits he was overpaid, and is liable for 4 penalty weeks.

### **Hearing Decision 15-UI-38116 --Work Separation.**

We begin our analysis by determining the nature of claimant's work separation. 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).

Both claimant and the employer's representative described claimant's work separation as a voluntary quit. The language of OAR 471-030-0038(2) and not the parties' characterization of the separation determines whether the work separation was a discharge or a voluntary leaving, however. Here, claimant abruptly left the workplace on August 22, 2013. Claimant was tired and stressed because of a work schedule he felt was demanding, and frustrated by the employer's refusal to allow him time off. Claimant fully intended to return to work the next day, on August 23. The employer concluded that claimant had walked off the job, and sent claimant a text informing claimant that "[w]e're done. Bring in the keys." On these facts, we find that the employer clearly expressed an unwillingness to allow claimant to continue working. Claimant's work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

Claimant knew and understood, as a matter of common sense, that the employer expected he would perform the work assigned to him, work all scheduled hours and obtain prior approval for any time he wanted to take off from work. Claimant violated this expectation when he left work abruptly, contrary to his supervisor's directive that he remain on the job. Claimant's conduct demonstrated a willful disregard of the employer's interest and constituted misconduct.

Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct.<sup>1</sup> Although claimant's conscious decision to violate the employer's expectations by walking off the job involved poor judgment, claimant had never before deliberately violated the employer's policies. Claimant received a written warning for taking an unscheduled smoke break in June 2013 because he forgot about the employer's newly imposed rule.<sup>2</sup> Claimant's sudden departure from the workplace was a singular occurrence and, therefore, isolated. Considering that claimant's behavior was triggered by a demanding work schedule and given claimant's 13 years of work for the employer, we find that his abrupt departure from work was not conduct so egregious that it would cause the employer to lose trust in claimant or otherwise make a continued employment relationship impossible.

For the above reasons, we conclude that the employer discharged claimant because of an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment benefits under ORS 657.176(2) on the basis of this work separation.

### **Hearing Decision 15-UI-38492—Overpayment and Misrepresentation**

An individual is not "unemployed," and therefore not eligible to receive benefits, for any week in which the remuneration paid or payable to the individual for services performed during the week is greater than the individual's weekly benefit amount. *See* ORS 657.100(1), ORS 657.150(6), ORS 657.155(1)(f). ORS 657.150(6). 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.*

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<sup>1</sup> OAR 471-030-0038(1)(d) (August 3, 2011) provides:

As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

- (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
- (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
- (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
- (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

<sup>2</sup> Because the record contains no evidence regarding the reasons why the employer suspended claimant in July 2013, we cannot conclude that the conduct that resulted in the suspension was willful or wantonly negligent.

During week 27-13 (June 30 through July 6, 2013), claimant earned \$620 working for the employer, which was more than his weekly benefit amount. Claimant was thus not unemployed, was not eligible for benefits during that week, and was overpaid \$466. Regardless of claimant's knowledge or intent when he misreported his earnings to the Department, he is liable to either repay the benefits or have the \$466 deducted from any future benefits otherwise payable to him under ORS chapter 657.

For the reasons discussed above, claimant is not disqualified from the receipt of unemployment benefits on the basis of his August 22, 2013 work separation from the employer. He was therefore not overpaid unemployment benefits for weeks 35-13 through 46-13 (August 25 through November 16, 2013) and 49-13 through 23-14 (December 1, 2013 through June 7, 2014) and is not required to repay the benefits he received for these weeks.

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. Claimant failed to accurately report his earnings for week 27-13 (June 30 through July 6, 2013). There is no evidence in the record, however, as to why he did so. The Department has the burden to demonstrate that a claimant violated ORS 657.215, and the statute requires "that an intent to misrepresent for the purpose of obtaining benefits be found." *Pruett v. Employment Division*, 86 Or App 516, 740 P2d 196 (1987). The Department failed to meet this burden and did not demonstrate that claimant's failure to accurately report his earnings resulted from a willful misrepresentation.

However, on two occasions -- on August 29, 2013 and November 24, 2013 -- claimant told a Department representative that the employer had laid him off due to a lack of work. When he made these statements, claimant knew that they were not true; he believed that he had voluntarily left work. Transcript at 43-44. Because of these deliberate misrepresentations, claimant is subject to a disqualification for four weeks of future benefits under OAR 471-030-0052(1)(b)(February 23, 2014).<sup>3</sup>

Claimant was overpaid benefits he was not entitled to receive and must repay \$466 in benefits. He is disqualified from benefits for four weeks.

**DECISION:** Hearing Decision 15-UI-38116 is set aside, as outlined above. Hearing Decision 15-UI-38492 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service: June 30, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the

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<sup>3</sup> OAR 471-030-0052(1) (b) provides that if a disqualification is imposed because the disqualifying act is related to the claimant's work separation, the number of weeks of disqualification will be the greater of four weeks, or the number of weeks calculated by applying a formula specified in OAR 471-030-0052(1)(a) to the amount of benefits overpaid. Because claimant was not overpaid any benefits, he is disqualified from four weeks of future benefits.

‘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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