

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1008

Hearing Decision 15-UI-43081 Reversed – No Disqualification
Hearing Decision 15-UI-43090 Modified – Reduced Overpayment & Penalties

PROCEDURAL HISTORY: On July 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154741). On July 16, 2015, the Department served notice of an administrative decision concluding that claimant was overpaid \$12,078 and liable for a \$2,415.60 monetary penalty and 52 penalty weeks. Claimant filed timely requests for hearing. On August 13, 2015, ALJ R. Frank conducted a hearing, and on August 17, 2015 issued Hearing Decisions 15-UI-43081, affirming decision # 154741 and 15-UI-43090, affirming decision # 194673. On August 21, 2015, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-43081 and 15-UI-43090. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1008 and 2015-EAB-1009).

Claimant's written argument included new information regarding her work separation from Health Care Coalition. Claimant argued that she was prevented from presenting the information because the ALJ would not allow her the opportunity to do so. OAR 471-041-0090 (October 29, 2006) (EAB may only consider a party's new information if it is relevant, material, and factors beyond her reasonable control prevented her from presenting the information during the hearing). Because we have found in claimant's favor on the work separation, however, we need not and did not consider whether claimant should be entitled to present the new information.

Claimant also argued, as she did at hearing, that she did not make willful false statements to the Department when she filed her initial and first two weekly claims for benefits. As we explain, below, claimant's arguments are inconsistent and implausible. Claimant claimed that her poor memory prevented her from reporting her work with Health Care Coalition, but also that she decided not to report her work with that business because she thought a different position qualified her to receive benefits. In other words, although claimant was asked to report her most recent employer, and not just to report the

employer from which she thought she had worked or earned enough to become eligible for benefits, she made a deliberate choice not to report her work with the employer. Likewise, her argument that her memory prevented her from reporting her wages might be credible if she had worked only an hour or two, or if a great deal of time had lapsed between the dates she worked and the dates she claimed. Claimant's argument is implausible, though, given the proximity of her work to the dates of her claims, and the significance of having spent 18 or 30 hours at work and receiving \$504 to \$870 in wages.

EAB considered claimant's remaining arguments when reaching this decision to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Claimant had chronic back pain. She was prescribed a narcotic medication to relieve her pain. Claimant had severe anxiety and social anxiety. She was prescribed an anti-anxiety medication to relieve her anxiety symptoms. Claimant's medications made her feel drowsy, and made driving hazardous for her. Claimant's medications also affected her short-term memory.

(2) For the eight months between approximately March 2014 through November 2014, claimant was unemployed and unable to find work. Claimant applied for work at Health Care Coalition. The work was located in Grants Pass, Oregon approximately 216 miles away from her residence in Woodburn, Oregon. Claimant believed that she would not be able to perform some of the duties associated with the work, including teaching and public speaking, because of her anxiety. Because claimant was desperate and panicked because of her inability to find work, she decided to apply for the job and try to perform it.

(3) Health Care Coalition employed claimant as a healthy start program manager from November 18, 2014 to February 4, 2015.

(4) Claimant had difficulty working for the employer. She had short-term memory problems and anxiety that negatively affected her work. She could not commute between her residence and the employer's business, so she purchased an RV and parked it as close to work as possible. She did not get internet or phone service at the RV, and her cell phone did not work while she was at the RV. Claimant drove to her Woodburn residence on the weekends, but had difficulty doing so because the medication she took made her too drowsy to drive safely.

(5) By early February, claimant learned that her husband's employer was transferring him to Redmond, Oregon, which would add additional distance to her weekend commute. She also learned that she was going to be assigned to a public speaking engagement, teaching a class about a subject she did not know well enough to teach, triggering an anxiety attack. Claimant felt that, although she had tried to work for the employer in Grants Pass, it was impractical and unsafe to continue commuting to a job she was incapable of performing because of her severe anxiety and decided to quit work.

(6) On January 31, 2015, claimant filed an initial claim for unemployment benefits. Her weekly benefit amount, and the maximum benefit amount in effect at the time, was \$549. When claimant filed her initial claim and weekly claims for benefits, she did not notify the Department that she had worked for Health Care Coalition and did not report that she had quit work.

(7) On February 4, 2015, claimant notified the employer that she quit work, effective immediately.

(8) On February 4, 2015, claimant also filed a weekly claim for benefits for the week ending January 31, 2015. When she filed her weekly claim, she reported that she had not worked any hours or had any earnings that week. Claimant had actually worked 30 hours and earned \$840 that week.

(9) On February 8, 2015, claimant filed a weekly claim for benefits for the week ending February 7, 2015. She reported to the Department that she had not worked any hours or had any earnings that week. Claimant had actually worked 18 hours and earned \$504 that week.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant left work with good cause. Claimant was not overpaid based on a disqualifying work separation. Claimant failed to report earnings when filing weekly claims for benefits, and is therefore liable for an \$870 overpayment, \$174 monetary penalty and 11 penalty weeks.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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). Claimant had severe anxiety and chronic back pain, which may be considered permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Hearing Decision 15-UI-43081, the ALJ concluded that claimant quit work without good cause. The ALJ reasoned that, although claimant had listed a “variety of factors that had led to her resignation” that could “potentially constitute good cause,” she also said she quit work because of a public speaking engagement, and, rather than doing so, had the reasonable alternative of either telling the employer she could not do it, or refusing to do it and accepting the repercussions.

It is more likely than not that the claimant in this case did not quit work for one reason over another. Rather, her testimony, and inability to specify a penultimate reason for quitting work the morning of February 4, 2015, shows that it is more likely than not that many factors informed her decision to quit work when she did. Claimant quit work because the job was too far from her residence, she took medication that made her drowsy at work and while driving, making the commute hazardous, her husband was moving to a location that would make the commute longer, she had severe anxiety and could not do certain aspects of her work, and she had memory problems that made it difficult for her to do the work. All of those factors constituted a grave situation for claimant, and there were no reasonable alternatives available to her at the time of the work separation that would have resolved her issues or enabled her to continue working.

However, most, if not all of those factors existed at the time she accepted a position with the employer. Therefore, she created the gravity of the situation that led to her decision to quit work. OAR 471-030-0038(5)(f) provides that, where the gravity of the situation experienced by the individual results from her own deliberate actions, the actions of the individual in creating the grave situation must be examined

under OAR 471-030-0038(4) to determine whether good cause for leaving the work existed. In this case, claimant accepted the position with the employer because she was so desperate for work that she felt she had to try to do the job even though she thought her social anxiety and severe anxiety would prevent her from doing the job, and even though the work was located over 200 miles from her residence and would necessitate her buying and living in an RV in order to take the job. We infer the gravity of the circumstances from claimant's desperation and the lengths to which she had to go to try to make the job work despite her concerns, and conclude claimant had good cause for quitting work. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

Overpayment and Misrepresentation. Only unemployed people are eligible for unemployment insurance benefits. *See* ORS 657.155(1). An individual is not employed, and no benefits are payable, for any week in which an individual earns more than her weekly benefit amount. ORS 657.100(2).

The Department paid claimant \$549 in unemployment insurance benefits for week 4-15. However, during week 4-15, claimant earned \$840.00. Because her earnings exceeded her weekly benefit amount of \$549, claimant was not unemployed, and, therefore, was not eligible to receive those benefits. She was overpaid \$549 for week 4-15.

Individuals who work less than full time, or earn less than their weekly benefit amount, are unemployed, and are potentially eligible for reduced benefits. ORS 657.100(1); ORS 657.155(6). The weekly benefit amount must be reduced by the amount of the earnings that exceeds the greater of one-third the weekly benefit amount or ten times the Oregon minimum hourly wage.

During week 5-15, claimant earned \$504. Her earnings exceeded one-third her weekly benefit amount by \$321. Therefore, a reduced benefit amount of \$288 was payable to claimant for week 5-15. However, the Department paid claimant \$549 in benefits for week 5-15. Therefore, claimant was overpaid by \$321.

In total, claimant was overpaid \$870 for weeks 4-15 and 5-15.

In Hearing Decision 15-UI-43090, the ALJ also concluded that claimant was overpaid for weeks 6-15 through 26-15. Hearing Decision 15-UI-53090 at 2. However, that overpayment was based on a disqualification from benefits for voluntarily leaving work without good cause. Because we have determined that claimant left work with good cause, she was not disqualified from benefits based on that work separation, and was not overpaid.

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.*

Claimant received \$870 in benefits she was not entitled to receive because she did not report to the Department that she had 30 hours of work and \$840 in earnings during week 4-15, and 18 hours of work

and \$504 in earnings during week 5-15. Regardless of claimant's knowledge or intent when reporting her work and earnings to the Department, claimant's reports were false, and the information she withheld was material to her entitlement to benefits. She is, therefore, liable to either repay the \$870 overpayment to the Department or have it deducted from future benefits.

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.

Claimant willfully made three false statements to the Department when filing her initial and weekly claims for benefits. First, she did not report the fact that she had worked for the employer or quit her job, second, she reported that she did not have any work or earnings during week 4-15, and third, she reported that she did not have any work or earnings during week 5-15. Claimant did not present any plausible reasons for making the false statements. Although she did not recall events of January 31st through February 8th at the time of the hearing, claimant was still attached to the employer when she filed her January 31st initial claim for benefits, and, therefore, knew she had worked for that employer at the time of the initial claim filing. When she filed her weekly claim for benefits on February 4th, it is more likely than not that she knew she had worked 30 hours the previous week, and, when she filed her weekly claim for benefits on February 8th, it is more likely than not that she could have recalled working 18 hours the previous week. Given the proximity of her hours of work and attachment to the employer to the dates she filed her initial and weekly claims, it is unlikely that claimant could not recall having worked for the employer or worked hours each week, or that she lacked access to information about her work and earnings. It is more likely than not that claimant was aware of her connection to the employer, work and earnings at the times of her claims, and she intentionally failed to report them for the purpose of obtaining benefits. Claimant's false statements about her separation, work and earnings were, therefore, willful, and claimant is liable to be disqualified for benefits.

OAR 471-030-0052(1) provides that the length of a penalty disqualification related to work and earnings is established by dividing the total overpayment by the maximum benefit amount, rounding the result to two decimal places, multiplying it by four, then rounding the result up to the nearest whole number. When the disqualification is also related to the provisions of ORS 657.176 (work separations), four weeks must be added to the calculation.

In this case, claimant's overpayment was \$870, divided by \$549 equals 1.58, multiplied by 4 equals 6.32, and rounded up to the nearest whole number equals 7, plus four weeks for the misrepresentation related to ORS 657.176, making claimant's total penalty 11 weeks. Therefore, claimant is disqualified from 11 future weeks of benefits that would otherwise be payable to her.

Finally, in addition to the other penalty, 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 percentage is based on the number of "occurrences" of misrepresentation. OAR 471-030-0052(7).

In this case, claimant had three misrepresentations. First, when she failed to report her affiliation and separation from the employer when filing her initial claim, then when failing to report her work and earnings from week 4-15, and finally when failing to report her work and earnings from week 5-15.

The percentage that is applicable when an individual has three misrepresentation occurrences is 20 percent. OAR 471-030-0052(7)(b). 20 percent of \$870 is \$174. Therefore, claimant's monetary penalty is \$174.

In sum, claimant is liable for an \$870 overpayment, a monetary penalty of \$174 and 11 penalty weeks.

DECISION: Hearing Decision 15-UI-43081 is set aside, as outlined above. Hearing Decision 15-UI-43090 is modified.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 8, 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 '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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.