

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1354

Modified
No Overpayment or Monetary Penalty
Disqualification for Four Weeks of Future Benefits

PROCEDURAL HISTORY: On August 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103206). On September 1, 2015, the Department served notice of an administrative decision concluding that claimant willfully misrepresented the nature of his work separation from the employer to obtain benefits and therefore was overpaid \$13,200 in benefits that he is liable to repay, is disqualified for 52 weeks of future benefits, and assessed a \$1,980 monetary penalty (decision # 202841). Claimant filed timely requests for hearing on both decisions. On October 21, 2015, ALJ Vincent conducted hearings, and on October 29, 2015 issued Hearing Decision 15-UI-46801, concluding the employer discharged claimant, but not for misconduct, and Hearing Decision 15-UI-46785, affirming decision # 202841. On November 13, 2015, claimant filed an application for review of Hearing Decision 15-UI-46785 with the Employment Appeals Board (EAB). On November 18, 2015, Hearing Decision 15-UI-46801 became final without an application for review having been filed.

FINDINGS OF FACT: (1) On January 12, 2015, the employer, Cornelius Disposal Service Inc., discharged claimant. The employer's general manager told claimant he was being terminated for verbally abusing another employee. Claimant signed an employee disciplinary report stating that he was being terminated for using profanity and/or inappropriate language, and violating company rules of conduct.

(2) On or about January 12, 2015, claimant filed an initial claim for benefits, and reported that he had been laid off by the employer due to lack of work, and not discharged. On January 18, 2015, claimant claimed benefits for the week of January 11 through 17, 2015 (week 02-25), and reported that he had not been fired from a job that week. Claimant understood that he had been discharged by the employer and

fired from his job. He misrepresented the nature of his work separation and reported that he had not been fired to obtain benefits.

(3) Claimant claimed benefits for the weeks from January 18 through July 11, 2015 (weeks 03-15 through 27-15), the weeks at issue. The Department paid claimant \$13,200 in benefits for those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant willfully misrepresented the nature of his work separation from the employer to obtain benefits. However, we disagree with the ALJ and conclude that claimant was not overpaid benefits for the weeks at issue. Claimant therefore is not liable to repay the \$13,200 or have it deducted from future benefits otherwise payable to him under ORS chapter 657. Claimant therefore is disqualified for only four weeks of future benefits, and not assessed a monetary penalty.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if an employer discharged a claimant for misconduct. A work separation is a discharge 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. OAR 471-030-0038(2)(b) (August 3, 2011). 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.

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. When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176, the number of weeks of disqualification shall be the greater of four weeks or that determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number. OAR 471-030-0052(1)(a)-(b) (February 23, 2014). 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).

Hearing Decision 15-UI-46801 concluded the employer discharged claimant, and became final without an application for review having been filed. Claimant's reports that he was laid off due to a lack of work and not fired therefore were false as a matter of law. At hearing, claimant testified that he reported being laid off due to a lack of work and not fired because the employer's general manager told him only that his "job had been eliminated," and there was "no room" for claimant "in the company." Transcript at 36. However, the general manager testified that she clearly told claimant he was being terminated for verbally abusing another employee, and that claimant signed an employee disciplinary report stating that

he was being terminated for using profanity and/or inappropriate language, and violating company rules of conduct. Transcript at 20-25. The signed employee disciplinary report was received into evidence as part of Exhibit 1. Although claimant denied reading or signing the document, the general manager's version of events was corroborated by a written statement from claimant's supervisor, who was present at the time. Exhibit 1. The preponderance of evidence in the record therefore shows that the general manager clearly told claimant he was being terminated for verbally abusing another employee, and that claimant signed an employee disciplinary report stating that he was being terminated for using profanity and/or inappropriate language, and violating company rules of conduct. Claimant therefore must have understood that he had been discharged and fired from his job when reporting that he had been laid off due to a lack of work and not fired. We therefore find it likely that claimant willfully misrepresented the nature of his work separation to obtain benefits.

In Hearing Decision 15-UI-46785, the ALJ concluded that because claimant willfully misrepresented the nature of his work separation from the employer, he was not entitled to the \$13,200 in benefits he received for the weeks at issue.¹ However, Hearing Decision 15-UI-46801 concluded the employer discharged claimant, not for misconduct. Claimant therefore was not disqualified from receiving benefits based on his work separation from the employer, and was entitled to the \$13,200 he received. He therefore was not overpaid, and is not liable to repay the \$13,200 or have it deducted from future benefits otherwise payable to him under ORS chapter 657, and cannot be assessed a monetary penalty. Because claimant willfully misrepresented the nature of his work separation to obtain benefits, but no benefits were overpaid, however, OAR 471-030-0052(1)(b) provides claimant must still be disqualified for only four weeks of future benefits.

DECISION: Hearing Decision 15-UI-46785 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 21, 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.

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¹ Hearing Decision 15-UI-46785 at 2.