

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1359**

*Hearing Decision 15-UI-16866 Affirmed - Disqualification*  
*Hearing Decision 15-UI-46917 Modified - Overpayment and Penalties, Reduced Monetary Penalty*

**PROCEDURAL HISTORY:** On September 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding voluntarily left work without good cause (decision # 120512). On September 29, 2015, the Department served notice of an administrative decision assessing a \$4,871 overpayment, \$1,217.75 monetary penalty, and 52 penalty weeks (decision # 201191). Claimant filed timely requests for hearing on both decisions. On October 23, 2015, ALJ Vincent conducted a consolidated hearing, and on October 30, 2015 issued Hearing Decision 15-UI-46866, affirming decision # 120512, and Hearing Decision 15-UI-46917, affirming decision # 201191. On November 17, 2015, claimant filed timely 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-46866 and 15-UI-46917. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1358 and 2015-EAB-1359).

EAB considered claimant's written argument to the extent it was relevant and based on the record.

EAB did not consider the employer's argument. The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information and texts that were not part of the hearing record with a request that EAB consider the new information and texts. Given that the employer knew the October 23<sup>rd</sup> hearing was to determine whether claimant's work separation was disqualifying, though, the employer has not shown that it was outside its reasonable control to be prepared to present evidence of the texts the employer alleges show that claimant voluntarily left work and why during the hearing as required by OAR 471-041-0090 (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) Tropic Air began employing claimant as an HVAC system installer on February 8, 2010. Tropic Air did not always provide claimant with full time employment.

(2) In 2012, claimant had a valid claim for unemployment insurance benefits. On November 14, 2012, the Department issued claimant a “fraud” decision, assessing an overpayment and misrepresentation penalties, based on claimant’s failure to accurately report his earnings while claiming unemployment insurance benefits.<sup>1</sup> That decision subsequently became final.<sup>2</sup>

(3) On October 25, 2014, claimant filed a new initial claim for unemployment insurance benefits.<sup>3</sup> His weekly benefit amount was \$367. The maximum weekly benefit amount in effect at the time was \$549. Claimant filed weekly claims for benefits for various weeks between week 52-14 and 33-15, which are the weeks at issue.

(4) Claimant filed a weekly claim for benefits for the week ending December 27, 2014 (week 52-14), and reported that he had earned \$144. He received \$345 in unemployment insurance benefits. Claimant had not had any earnings that week. The discrepancy between claimant’s reported and actual earnings caused him to be underpaid by \$22.

(5) Claimant filed a weekly claim for benefits for the week ending January 3, 2015 (week 53-14), and reported that he had earned \$450. He received no unemployment insurance benefits. Claimant had not had any earnings that week. The discrepancy between claimant’s reported and actual earnings caused him to be underpaid by \$367.

(6) Claimant filed a weekly claim for benefits for the week ending April 4, 2015 (week 13-15), and reported that he had no earnings. He received \$367 in unemployment insurance benefits. He had earned \$135 that week. The discrepancy between claimant’s reported and actual earnings caused him to be overpaid by \$13.

(7) Claimant filed a weekly claim for benefits for the week ending April 11, 2015 (week 14-15), and reported that he had no earnings. He received \$367 in unemployment insurance benefits. He had earned \$202.50 that week. The discrepancy between claimant’s reported and actual earnings caused him to be overpaid by \$81.

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<sup>1</sup> We take notice of what a “fraud” decision is, based on our specialized knowledge of Department procedures. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>2</sup> We take notice of Department records, which fail to show any indication that the 2012 fraud decision was appealed to, or overturned by, the Office of Administrative Hearings (OAH), EAB or subsequent judicial proceedings. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>3</sup> We take notice of claimant’s initial claim filing date, which is contained in Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

(8) Claimant filed a weekly claim for benefits for the week ending April 18, 2015 (week 15-15), and reported that he had earned \$202 . He received \$287 in unemployment insurance benefits. Claimant had earned \$229.50 that week. The discrepancy between claimant's reported and actual earnings caused him to be overpaid by \$28.

(9) Claimant filed a weekly claim for benefits for the week ending May 2, 2015 (week 17-15), and reported that he had no earnings. He received \$367 in unemployment insurance benefits. He had earned \$514 that week and was not entitled to receive any weekly benefits. The discrepancy between claimant's reported and actual earnings caused him to be overpaid by \$367.

(10) On May 15, 2015, Tropic Air's owner sent claimant an after-hours text message questioning claimant about some invoices. Claimant felt that the owner was accusing claimant of lying about jobs, and that the owner had done so before.

(11) Claimant felt the owner had "gone too far." Audio recording ~10:20. Claimant was dissatisfied with some of his working conditions, including the owner's failure to provide him with a regular work schedule or full time work, and the way in which the owner questioned him in an accusatory manner about his work and invoices.

(12) After receiving the owner's text message, claimant replied to the owner with a text message stating that he was going to drop off the keys and van. Claimant then drove to the owner's home in the company van, dropped it off, entered the house, left the keys in the owner's house, and left without speaking with the owner. Claimant did not intend to continue working for the employer.

(13) After May 15, 2015, claimant did not maintain contact with the owner, except to send the owner a text message asking for his final paycheck. He did not ask about returning to work. On May 22, 2015, claimant collected his final paycheck from the employer's business.

(14) On May 24, 2015, claimant restarted his unemployment insurance claim. He reported to the Department that he had been laid off because of a lack of work at Tropic Air. He did not report that he had quit work.

(15) Claimant filed weekly claims for benefits from May 24, 2015 through August 22, 2015 (weeks 21-15 through 33-15). Each of those weeks, claimant was disqualified from receiving benefits based on the Department's conclusion, affirmed herein, that claimant had voluntarily left work at Tropic Air without good cause. The Department paid him \$367 per week for each of those weeks based on claimant's false report that he had been laid off work. Factoring all benefits paid to claimant between weeks 52-14 and 33-15, including crediting claimant for the weeks he was underpaid, the Department overpaid claimant by \$4,871 for the weeks at issue.

(16) On October 2, 2015, claimant admitted to a Department employee that he had quit his job with Tropic Air, and did not know why he had not reported that to the Department or responded to the Department's inquiries about his work separation.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant quit work without good cause, and that he was overpaid and subject to misrepresentation penalties. We

disagree with the Department and ALJ about the amount of claimant's monetary penalty, and conclude that it must be reduced from \$1,217.75 to \$715.65.

**Nature of the 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).

On May 15, 2015, claimant became upset with the owner, returned the company van to the owner's home, dropped off the keys, and left. At the time, continuing work was available for him. Claimant claimed at the hearing that his intent was to return the van to the owner, but not to quit work. Claimant's claim is not plausible, however, given that the only additional contact he made to the employer was to request his final paycheck. He also later admitted to a Department employee that he knew he had quit work.

The record shows that it is more likely than not when claimant returned the van and keys to the owner's home, he did so with the intent to quit his job. The work separation was a voluntary leaving.

**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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 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 did not quit work for a grave reason. Claimant was upset with the owner for questioning his invoices or work. However, the employer had the right to monitor claimant's work and review his invoices to make sure they were accurate. Claimant did not show that the manner in which the owner questioned him was abusive or hostile such that he had no alternative but to quit work immediately without allowing the employer the opportunity to address any concerns claimant had.<sup>4</sup> Claimant also was upset that he was not provided with a regular schedule or full time hours. However, he did not demonstrate that his hours were reduced rather than just typical of his ongoing work with the employer,

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<sup>4</sup> Claimants are not required to endure slurs or personal abuse for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits. See e.g. *McPherson v. Employment Div.*, 285 Or 541, 557, 591 P2d 1381 (1979). Generally speaking, however, the type of oppressive working conditions that are considered grave enough to amount to good cause for quitting work are those in which the claimant is, for example, subjected to ongoing unwanted sexual advances and touching despite complaints, ongoing sexual harassment, ongoing verbal abuse, sexist and ageist remarks, fits of temper, hostility and slurs based on gender or other protected classes, or assault. See, accord *Beth A. Jackson* (Employment Appeals Board, 13-AB-0502, April 2, 2013); *Brenda A. Kordes* (Employment Appeals Board, 12-AB-3213, January 8, 2013); *Stephen G. Wilkes* (Employment Appeals Board, 12-AB-3173, December 14, 2012); *James D. Hayes* (Employment Appeals Board, 11-AB-3647, February 9, 2012); *Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011); *Shirley A. Zwahlen* (Employment Appeals Board, 11-AB-2864, December 12, 2011); *Denisa Swartout* (Employment Appeals Board, 11-AB-3063, October 28, 2011); *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011).

and, even if he had, he made no claim that the personal expense of continuing to work with the employer exceeded his remuneration, or that working reduced hours for the employer interfered to such an extent with his ability to obtain full time work that he had no choice but to quit.<sup>5</sup> Claimant did not establish the gravity of his situation, or show that he improved his circumstances by quitting work under the circumstances as he described them, and, therefore, failed to establish that he quit work for good cause.

**Overpayment and penalties:** 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.*

ORS 657.100 provides that an individual is unemployed, and therefore eligible for benefits, if the individual is "unemployed." An individual is only considered "unemployed" if he either performs no work and receives no remuneration, or if he performs less than full-time work and receives remuneration in an amount less than his weekly benefit amount. *Id.* An individual's weekly benefit amount is subject to reduction by the amount of earnings paid or payable that exceeds the greater of ten times the minimum wage or one-third the individual's weekly benefit amount. ORS 657.150(6).

During weeks 52-14 and 53-14, claimant over-reported his earnings, resulting in a \$389 underpayment which must be credited to him.

During weeks 13-15 through 15-15, claimant received earnings from work that reduced his weekly benefit amount, but, because he did not report the earnings to the Department, his benefits were not reduced and he was overpaid by \$122.

During week 17-15, claimant received earnings from work that exceeded his weekly benefit amount. He was, therefore, not "unemployed" that week, and no benefits were payable. Claimant did not report any earnings that week to the Department, however, so he was overpaid by \$367.

During weeks 21-15 through 33-15, claimant was disqualified from receiving unemployment insurance benefits because of a disqualifying work separation with Tropic Air. Because claimant had not reported his work separation to the Department when he restarted his claim, however, the Department was not aware of the potentially disqualifying work separation and paid him \$367 in unemployment insurance benefits each week that he was not entitled to receive, overpaying him a total of \$4,771 for those 13 weeks.

Claimant was overpaid benefits during each of the specified weeks because he either failed to report his earnings from work, under-reported his earnings from work, or reported to the Department that he was laid off from work by Tropic Air instead of reporting that he had voluntarily quit that job, each of which was a false statement, misrepresentation, or failure to disclose a fact material to whether he was entitled to receive benefits. Regardless of claimant's knowledge or intent in making those reports to the

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<sup>5</sup> OAR 471-030-0038(5)(e) (establishing when an individual has good cause for quitting work due to a reduction in hours).

Department, because the overpayments were caused by claimant's false statements of material facts, he is liable to repay the full amount of the overpayment to the Department.

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.

The Department neither asserted nor proved that claimant's false reports about his earnings during weeks 52-14, 53-14, 13-15, 14-15, 15-15 and 17-15 were the result of willful misrepresentations made by claimant for the purpose of obtaining benefits he was not entitled to receive. One-third of those false reports were in the Department's favor, and the remaining reports appear just as likely as not to be the result of inadvertence or mistake. For example, claimant reported receiving earnings totaling \$202 the week after the employer reported claimant had earned \$202.50. The record fails to show that claimant received benefits for those six weeks because of a willful misrepresentation, and no penalties should be assessed based on that portion of the overpayment, which, for the six weeks specified, totaled \$100.

The Department established that claimant willfully misrepresented his work separation from Tropic Air during week 21-15, however. Claimant was aware at the time he reported that he was laid off by Tropic Air due to a lack of work that continuing work had been available to him on the same terms he had worked for years. Claimant, however, caused the work separation by returning the van and keys to the employer and refusing to engage in further contact with the employer except to collect his final paycheck. He confirmed to the Department in October 2015 that he knew he had voluntarily left that job. The only reasonable inference that can be drawn from claimant's decision to falsely report the nature of his work separation to the Department when restarting his claim and claiming 13 weeks of benefits while unemployed was that he made the false report in order to obtain benefits. We therefore conclude that claimant made a willful misrepresentation to obtain benefits, and he is liable for penalties based on the \$4,771 he was overpaid due to his willful misrepresentation.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052(1)(b) (February 23, 2014), which provides that the misrepresentation penalty is calculated by dividing the total amount of benefits overpaid to the individual for the disqualifying act by the maximum Oregon weekly benefit amount in effect, rounding off to the nearest two decimal places, multiplying the result by four, and rounding the total up to the nearest whole number. In this case, the total amount of benefits overpaid to claimant for the disqualifying act was \$4,771.<sup>6</sup>  $\$4,771 \div 549 = 8.69 \times 4 = 34.76$ , rounded up = 35 weeks.

OAR 471-030-0052(2) also provides that the number of weeks of disqualification assessed shall be doubled, but not to exceed 52 weeks, if the individual has one previous disqualification under ORS 657.215, and that prior disqualification determination has become final. The Department established that claimant had one previous disqualification ("fraud") determination from 2012, which, due to the passage of time and statutory timelines for appealing administrative decisions, and the absence of any

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<sup>6</sup> As stated above, claimant's disqualifying act was his failure to accurately report his work separation to the Department. The overpayment resulting from that act was \$4,771, or \$367 per week from week 21-15 through 33-15.

As previously stated, claimant is not liable for penalties based on his failures to accurately report his earnings between weeks 52-14 and 17-15.

record that claimant appealed that determination, we infer has become final. Therefore, claimant's disqualification period is doubled to 70 weeks, which must then be reduced to 52 weeks to remain within the maximum number of penalty weeks established by statute.

In addition to the penalty weeks, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is also 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 monetary penalty percentage is determined by applying the provisions of OAR 471-030-0052 (7), which bases the percentage on the number of misrepresentation "occurrences" the individual has. For the first or second occurrence within 5 years of the occurrence for which a penalty is being assessed, the penalty is 15 percent of the total benefits the individual received but to which the individual was not entitled. *Id.*

The occurrence for which the penalty is being assessed in this case was claimant's single failure to accurately report his work separation in 2015. That incident counts for one occurrence. Claimant was also liable for a misrepresentation penalty in 2012, which was within 5 years of the most recent incident. The Department did not provide any information about the number of "occurrences" that were associated with the 2012 misrepresentation, but we infer based on the assessment of misrepresentation penalties that the incident had to have involved at least one additional occurrence. On this record, then, the total number of misrepresentation occurrences was two, and OAR 471-030-0052(7) dictates that claimant is liable for a 15 percent penalty based on the amount of benefits overpaid for his disqualifying act.

The amount of benefits overpaid to claimant based on his disqualifying act in this case was \$4,771. 15% of \$4,771 is \$715.65, which is the penalty amount in this case.

In conclusion, claimant voluntarily left work without good cause, and was disqualified from receiving benefits because of that work separation. Claimant was overpaid \$4,871 that he must repay, is liable for a reduced monetary penalty totaling \$715.65, and is subject to 52 penalty weeks.

**DECISION:** Hearing Decision 15-UI-46866 is affirmed. Hearing Decision 15-UI-46917 is modified.

Susan Rossiter and J. S. Cromwell

**DATE of Service: December 18, 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](http://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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