

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0024

Reversed & Remanded

PROCEDURAL HISTORY: On November 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121630). On November 9, 2015, the Department served notice of an administrative decision assessing a \$4,302 overpayment, 32 penalty weeks, and a \$645.30 monetary penalty (decision # 193759). Claimant filed timely requests for hearing on both decisions. On December 10, 2015, ALJ S. Lee conducted hearings, and on December 17, 2015 issued Hearing Decisions 15-UI-49627, affirming decision # 121630, and Hearing Decision 15-UI-49632, assessing a \$4,302 overpayment, and no penalty weeks or monetary penalty. On January 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-49627 and 15-UI-49632. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0023 and 2016-EAB-0024).

CONCLUSIONS AND REASONS: Hearing Decisions 15-UI-49627 and 15-UI-49632 are reversed, and these matters remanded to the Office of Administrative Hearings (OAH) for further proceedings.

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 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

ORS 657.310(1) provides that an individual who receives 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 Hearing Decisions 15-UI-49627, the ALJ found claimant was credible in her belief that she was owed back wages, but did not face a situation of such gravity that she had no reasonable alternative but to quit because she had not worked long for the employer, and could have avoided further unpaid wages by using the employer's timeclock to record her hours while she pursued a wage claim for unpaid back wages with the Bureau of Labor and Industries (BOLI).¹ The ALJ further concluded that BOLI's findings after claimant quit were not relevant.²

The employer employed claimant as a specialist baker. The employer promised to pay claimant \$18 per hour for all regular hours of work. When claimant was working for the employer, she was entitled under state and federal law to compensation at one and one half times her regular hourly rate for any work beyond 40 hours a week. Claimant testified at hearing that she quit work because the employer failed to pay her all her wages. Thus, it is necessary to determine if it is more probable than not that the employer had actual or constructive knowledge that claimant worked time for which the employer did not pay her, and if continuing to work would have exposed claimant to a substantial risk of continuing underpayment. *See Nielsen v. Employment Dept.*, 263 Or App 274 (2014).

The record does not contain the information necessary to decide if the employer failed to pay claimant all of her work time. For example, the ALJ failed to ask the dates or pay periods for which claimant allegedly was underpaid or not paid, or what work hours she and the employer recorded for each of those pay periods. The record does not show how much in wages the respective parties assert claimant was paid and should have been paid during each pay period.

The record does not contain sufficient information to show whether the employer knew or should have known for each pay period whether claimant was working overtime. It is not clear from the record if the employer refused to pay claimant wages she demanded because it did not agree with the reported hours worked, because it did not authorize overtime during each pay period, because it refused to pay time and a half for any work beyond 40 hours per week, or for some other reason such as inability to pay. The record also fails to show if claimant believed she was authorized to work overtime, and the basis for that belief during each pay period she allegedly worked overtime. The employer's owner asserted that she told claimant at hire that she was not permitted to work overtime. However, the ALJ did not ask if the

¹ Hearing Decisions 15-UI-49627 at 3.

² *Id.*

timecards and claimant's recorded hours showed claimant worked overtime hours and what subsequent instructions the employer gave, if any, regarding overtime. Claimant asserted at hearing that she requested her unpaid wages, but it is not clear from the record if she provided the employer with proof or some accounting of her unpaid wages, when she first demanded the wages and if the underpayment was due to overtime hours she had worked. The record does not show for each pay period if the employer paid claimant according to records claimant kept of what times she worked each shift, the time clock, or a presumed 40-hour work week for each pay period. For the weeks claimant used the time clock, the record does not show if the time clock records are the same as claimant's records. Claimant asserted she did not take lunch breaks. The record does not show if claimant told the employer, or the employer otherwise knew, that she did not take her lunch breaks. We disagree that the details of the BOLI investigation are irrelevant. Although the BOLI complaint and details of any BOLI investigation did not influence claimant's decision to quit, that evidence is relevant and material to this inquiry because it tends to show information regarding the allegations of unpaid wages and show corroboration (or the lack thereof) of claimant's concerns of non-payment or underpayment.

The record similarly lacks information to show if the alleged failure to pay claimant all her wages was likely to continue when claimant quit. The record fails to show what action the employer took to limit claimant's work hours to avoid overtime, or to enforce its requirement that claimant use the employer's time clock, rather than relying on claimant's records. The ALJ did not ask if claimant did anything that concealed that she was working overtime.

In sum, absent further inquiry, we cannot determine whether the employer failed to pay claimant all her wages, and if it was an ongoing problem, such that pursuing alternatives to leaving work would subject claimant to the risk of continuing underpayment. We therefore cannot determine whether claimant quit work for a reason of such gravity that no reasonable and prudent person would have continued working for the employer. We therefore cannot determine whether claimant quit work with good cause.

Because the ALJ failed to conduct a full inquiry into the details necessary for consideration of whether claimant quit work with good cause, we cannot determine whether claimant is disqualified from receiving benefits for weeks 22-15, 23-15, and 28-15 through 43-15, and therefore received \$4,302 in benefits to which he was not entitled and is liable under ORS 657.301(1) for penalty weeks and a monetary penalty.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant quit work with good cause, Hearing Decisions 15-UI-49627 and 15-UI-49632 are reversed, and these matters are remanded for development of the record.

DECISION: Hearing Decisions 15-UI-49627 and 15-UI-49632 are set aside, and these matters remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 28, 2016

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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