

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0280

Hearing Decision 16-UI-53818 Affirmed – Disqualification
Hearing Decision 16-UI-53816 Affirmed – Overpayment, No Penalties

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 for 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 applications for review of Hearing Decisions 15-UI-49627 and 15-UI-49632 with the Employment Appeals Board (EAB). On January 28, 2016, EAB issued EAB Decisions 2016-EAB-0023 and 2016-EAB-0024, reversing Hearing Decisions 15-UI-49627 and 15-UI-49632, and remanding these matters to the Office of Administrative Hearings for further development of the record. On February 17, 2016, ALJ S. Lee conducted a consolidated hearing. On February 25, 2016, ALJ S. Lee issued Hearing Decision 16-UI-53818, concluding claimant voluntarily left work without good cause, and Hearing Decision 16-UI-53816 assessing a \$4,302 overpayment, and no penalty weeks or monetary penalty. On March 14, 2016, claimant filed applications for review of Hearing Decisions 16-UI-53818 and 16-UI-53816 with EAB.

No adversely affected party filed an application for review of the portion of Hearing Decision 16-UI-53816 the ALJ decided in claimant's favor, specifically, the ALJ's conclusions that claimant was not liable for penalty weeks or a monetary penalty based on her misrepresentations. Therefore, we did not consider those issues when reaching this decision, and instead confined our review to the matters adverse to claimant, the party requesting review.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated claimant's applications for review of Hearing Decisions 16-UI-53818 and 16-UI-53816. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0279 and 2016-EAB-0280).

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.

FINDINGS OF FACT: (1) Sugar Momma's Bake Shop LLC employed claimant from March 30, 2015 to June 2, 2015 as a specialist baker.

(2) During December 2014, claimant met with the employer's owner and agreed she would begin working in March 2015 for 40 hours per week at a rate of \$18 per hour. The owner believed claimant would be able to complete her duties without working overtime because she was an experienced baker.

(3) In March 2015, before claimant began working for the employer, the employer purchased bakery equipment from claimant's parents-in-law. The employer disputed and refused to pay a bill for \$2,422.46 from claimant and her husband for transporting and delivering the equipment because she believed those costs were included in the equipment price paid to claimant's parents-in-law.

(4) On March 15, 2015, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$239.

(5) Claimant began work on March 30, 2015. The owner believed claimant understood she was not permitted to work overtime. Claimant, however, felt she could not complete all her duties to her satisfaction within an 8-hour shift. She believed the employer permitted her to work limited overtime if it was necessary to complete her duties. Claimant kept a personal record of the hours she worked, including overtime, and provided the record to the employer.

(6) The first week of April 2015, the employer told claimant the employer expected her to use the employer's time clock to record her hours. Claimant did not regularly use the employer's time clock, and continued to keep a personal record of her hours.

(7) When she received her paycheck for the week beginning April 26, 2015, claimant noted that she did not receive payment for approximately 12 hours of work that week. On May 15, 2015, claimant told the owner she did not receive payment for all her hours for the week of April 26, 2015. The owner told claimant she would check with the bookkeeper, and if there was an error, pay claimant her unpaid wages in her next paycheck.

(8) After May 15, 2015, the owner told claimant she was not permitted to work more than 40 hours per week, and reminded her that the employer expected her to use the employer's time clock to record her hours worked. Claimant worked at night when the owner was generally not present.

(9) Claimant continued to work overtime and to keep a personal record of her hours, rather than using the employer's time clock. Claimant worked, and reported to her employer, between one and 4.33 hours of overtime each night she worked from April 26 through May 30, 2015. The employer did not pay claimant for all of her overtime hours, resulting in unpaid overtime wages of approximately \$552.78 during that time period. Exhibit 1 at 11.

(10) On June 2, 2015, claimant quit work because the employer owed her unpaid overtime wages from April 26 through May 30, 2015, and refused to repay the disputed equipment delivery charges of 2,422.46.

(11) On June 8, 2015, claimant restarted her unemployment insurance benefit claim and reported that the employer laid her off due to lack of work.

(12) Claimant claimed benefits for May 31 through June 13, 2015 (weeks 22-15 through 23-15), and July 5 through October 31, 2015 (weeks 27-15 through 43-15). These are the weeks at issue. Claimant did not report that she had separated from an employer during the period of May 31 through June 6, 2015 (week 22-15) when she filed her weekly claim for that week.

(13) The Department paid claimant \$4,302 in benefits for weeks 22-15, 23-15, and 27-15 through 43-15.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause and was overpaid \$4,302 in unemployment insurance benefits that she is liable to repay or have deducted from any future benefits otherwise payable to her under ORS chapter 657.

Voluntary Quit. 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. Where the gravity of the situation experienced by the individual results from her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of OAR 471-030-0038(4). OAR 471-030-0038(5)(f).

Claimant quit work because the employer failed to pay all of claimant’s overtime wages and a bill from claimant and her husband for moving equipment the employer purchased from claimant’s family members before claimant began working for the employer. *See* ORS 652.020. Regarding the overtime wages, although it is not reasonable to expect an employee to work indefinitely for an employer that fails to comply with state wage and hour laws, individuals have good cause to leave work due to unlawful wage practices only where the practices were likely to continue unresolved. *Accord Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where employer’s past unlawful payroll practices had impacted claimant but were unlikely to reoccur, claimant did not have good cause to leave work); *J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when unlawful payment practices had impacted claimant and were likely to reoccur). We first address the gravity of the situation regarding nonpayment of overtime claimant worked before the owner told her in May 2015 that she was not authorized to work overtime. The preponderance of the evidence shows the employer owed claimant overtime for that time period. However, although claimant tried to resolve the overtime issue by reporting the unpaid overtime hours to the owner, the owner disputed the number of hours claimant had worked because claimant

presented her personal timekeeping records instead of using the employer's time clock as she had been instructed to do, and the owner believed claimant did not produce more baked goods during that time period although claimant reported she worked additional hours. The employer disputed the amount of unpaid overtime and the bill for moving the equipment, and those matters were not resolved before claimant quit. However, claimant failed to show that those issues would have continued unresolved had she continued to pursue the matter with the employer, or through the Bureau of Labor and Industries (BOLI) or small claims court. Continuing to work while pursuing those options was a reasonable alternative to quitting.

Nor does the record show that claimant would have had to continue working more than 40 hours per week without receiving overtime pay. After claimant provided the employer with her personal timekeeping records showing she had been working overtime, the employer instructed claimant to refrain from working overtime. Absent persuasive evidence that the employer withdrew its prohibition regarding working overtime or that working conditions required claimant to do so, the record shows that, had claimant followed the employer's instructions, the circumstances giving rise to unpaid overtime would not have continued. Thus, the *continuing* gravity of the situation resulted from claimant's own deliberate actions when she continued to work overtime without permission. Absent a showing that claimant had no reasonable alternative but to work overtime, she did not have good cause to quit work due to working unpaid overtime.

Overpayment. ORS 657.176(2)(c) provides that an individual who quit work without good cause is disqualified from the receipt of benefits until the individual has performed service in employment for which remuneration is received that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the quit occurred. 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 unemployment benefits because she reported to the Department that the employer laid her off due to lack of work. However, administrative decision #121630 concluded that claimant voluntarily left work without good cause during week 22-15, and that decision was affirmed by Hearing Decisions 15-UI-49627 and 16-UI-53818. Appeals Board Decision 2016-EAB-0279 affirmed Hearing Decision 16-UI-53818. Thus, regardless of claimant's knowledge or intent, her report to the Department that the employer laid her off for lack of work was false as a matter of law. Claimant did not requalify for benefits under ORS 657.176(2)(c). She therefore is liable to repay the \$4,302 in unemployment insurance benefits she received for weeks 22-15, 23-15, and 27-15 through 43-15, or have that amount deducted from any future benefits otherwise payable to her under ORS chapter 657.

Conclusion. Claimant voluntarily left work without good cause and is thus disqualified from receiving benefits due to her work separation. Claimant received \$4,302 in benefits to which she was not entitled and is liable either to repay or have deducted from any future benefits otherwise payable to her under ORS chapter 657. Claimant is not disqualified from future benefits or liable for a monetary penalty.

DECISION: Hearing Decisions 16-UI-53818 and 16-UI-53816 are affirmed.

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

DATE of Service: April 14, 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.

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.