

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0325**

*Hearing Decisions 16-UI-54022 and 16-UI-54028 Reversed*  
*No Disqualification*  
*No Overpayment, No Penalties*

**PROCEDURAL HISTORY:** On February 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 111106). On March 17, 2015, decision # 111106 became final without a request for hearing having been filed. On March 25, 2015, the Department served notice of an administrative decision, based on decision # 111106, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and therefore was overpaid \$1,517 in benefits, is disqualified for 12 weeks of future benefits, and assessed a \$227.25 monetary penalty (decision # 195714). On April 14, 2015, decision # 195714 became final without a request for hearing having been filed. On January 5, 2016, claimant filed late requests for hearing on decisions # 111106 and # 195714. On January 8, 2016, ALJ Kangas issued Hearing Decisions 16-UI-50687 and 16-UI-50686, dismissing claimant's late requests for hearing subject to her right to renew the requests by responding to an appellant questionnaire by January 22, 2016. On January 22, 2016, the Office of Administrative Hearings (OAH) received claimant's responses. On February 5, 2016, OAH canceled Hearing Decisions 16-UI-50687 and 16-UI-50686, and scheduled hearings. On February 29, 2016, ALJ Seideman conducted hearings, and on March 1, 2016 issued Hearing Decisions 16-UI-54022 and 16-UI-54028, allowing claimant's late requests for hearing on decisions # 111106 and # 195714, and affirming both decisions. On March 18, 2016, claimant filed applications for review of Hearing Decisions 16-UI-54022 and 16-UI-54028 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-54022 and 16-UI-54028. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0324 and 2016-EAB-0325). No party applied for review of those portions of Hearing Decisions 16-UI-54022 and 16-UI-54028 allowing claimant's late request for hearings on decisions # 111106 and # 195714. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on her work separation from the employer, was overpaid benefits, is disqualified from future benefits, and assessed a monetary penalty.

**FINDINGS OF FACT:** (1) TMS last employed claimant as a sales agent from November 21, to December 21, 2014.

(2) Claimant repeatedly missed work due to family issues resulting from the fact that she and her husband were separating. Claimant did not qualify for a family leave, and requested a reduction in hours until she resolved her family issues.

(3) On or about December 14, 2014, the employer's human resources employee informed claimant that the employer was unwilling to reduce her hours. The human resources employee told claimant that to avoid being discharged for repeatedly missing work, it probably would be best if claimant took a few weeks off, and that her job would be waiting for her when she was ready to return. The human resources employee further stated that although claimant was not eligible for family leave, she could file for unemployment insurance benefits. Claimant agreed to take a few weeks off and return to work for the employer. The human resources employee confirmed their agreement with the employer's owner, who told the human resources employee that claimant could return to work when ready. The human resources employee told claimant that her leave of absence would be documented as a temporary layoff due to the circumstances, including claimant's ineligibility for family leave.

(4) Based on her conversation with the human resources employee, claimant did not report for work from December 15 through December 21, 2014 or notify the employer each day that she would be absent, but intended to return to work within a few of weeks, as agreed. Unknown to claimant, however, the employer was unwilling to allow her to return to work after December 21, 2014.

(5) Based on her conversation with the human resources employee, claimant believed she qualified for unemployment insurance benefits. Claimant therefore restarted her initial claimant for benefits on January 2, 2015, reporting to the Department that she had been laid off for lack of work. Claimant claimed benefits for the weeks from December 21, 2014 through February 28, 2015 (weeks 52-14 through 08-15). The Department paid claimant \$1,517 in benefits.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant, not for misconduct. Claimant therefore was not overpaid benefits, is not disqualified from future benefits, or liable for a monetary penalty.

**Work Separation.** The first issue in these cases is the 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

In Hearing Decision 16-UI-54022, the ALJ found as fact that claimant "ended her employment" on December 14, 2014, after she and the employer's human resources employee agreed that "it would be best for her to voluntarily quit rather than be discharged," and the human resources employee told

claimant that she could have her job back when she was ready to return.<sup>1</sup> Based on that finding, the ALJ concluded that the work separation was a voluntary leaving, asserting that claimant's testimony at the hearing clearly showed she "made her own decision to terminate her employment."<sup>2</sup> However, claimant testified that on December 14, 2014, she and the employer's human resources employee, acting on behalf of its owner, orally agreed that claimant would take a temporary leave of absence. Audio Record (9:30 a.m.) at 27:15. The record supports that finding, given that neither the human resources employee nor the owner testified at the hearing to refute claimant's testimony. As of December 21, 2014, claimant was willing to return to work as agreed, but the employer was unwilling to allow her to do so. The work separation therefore is a discharge, and not a quit.

**Discharge.** ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence.

The employer discharged claimant because she failed to report for work from December 14 through 21, 2014, or notify the employer each day that she would be absent. However, claimant and the employer's human resources employee, acting on behalf of its owner, orally agreed on December 14 that claimant would take a leave of absence for several weeks and return to work when she was ready to do so. The employer failed to show claimant knew or should have known she was expected to notify the employer each day that she would be absent. Absent such a showing, the employer failed to establish misconduct. Hearing Decision 16-UI-54022 therefore is reversed, and claimant is not disqualified from receiving benefits based on her work separation from the employer.

**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.* 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).

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<sup>1</sup> Hearing Decision 16-UI-54022 at 2.

<sup>2</sup> *Id.* at 3.

In Hearing Decision 16-UI-54028, the ALJ concluded that claimant received \$1,517 in benefits to which she was not entitled because Hearing Decision 16-UI-54022 concluded that claimant quit working for the employer without good cause, disqualifying claimant from the receipt of benefits for weeks 52-14 through 08-15.<sup>3</sup> The ALJ further concluded that claimant “knew that she had quit” working for the employer, and therefore willfully made a false statement or misrepresentation when she reported to the Department on January 2, 2015 that he had been laid off due to lack of work.<sup>4</sup>

However, because we reverse Hearing Decision 16-UI-54022, claimant is not disqualified from the receipt of benefits based on her work separation from the employer, and therefore is entitled to the \$1,517 she received. Nor is claimant disqualified from future benefits or liable for a monetary penalty. When claimant restarted her initial claim for benefits on January 2, 2015, claimant believed she was on a temporary leave of absence. The employer’s human resources employee had advised her to take a leave of absence to resolve her family issues to avoid being discharged for repeatedly missing work. The human resources employee also told claimant that her leave of absence would be documented as a temporary layoff, and that she could file for unemployment insurance benefits. It therefore is plausible that claimant believed was being laid off to resolve the family issues that had been causing her to repeatedly miss work, and that the employer had no work available for her. The Department failed to show otherwise, and therefore failed to establish claimant willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits.

In sum, the employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving benefits for weeks 52-14 through 08-15 based on her work separation from the employer. Claimant therefore is entitled to the \$1,517 she received she received. The Department failed to establish that claimant willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits. Claimant therefore is not disqualified from future benefits under ORS 657.215, or liable for a monetary penalty under ORS 657.310(2).

**DECISION:** Hearing Decisions 16-UI-54022 and 16-UI-54028 are set aside, as outlined above.<sup>5</sup>

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

**DATE of Service:** April 19, 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](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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<sup>3</sup> Hearing Decision 16-UI-54028 at 3-4.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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