

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0573

Reversed
No Disqualification
No Overpayment Assessed, No Penalties

PROCEDURAL HISTORY: On April 6, 2016, the Oregon Employment Department (the Department) served notice of the following administrative decisions: decision # 151650 concluded that claimant voluntarily left work without good cause, and decision # 202863 assessed a \$2,478 overpayment, a \$371.70 monetary penalty, and 19 penalty weeks, based on decision # 151650. Claimant filed timely requests for hearing. On May 4, 2016, ALJ Vincent conducted a hearing, and on May 9, 2016, issued Hearing Decisions 16-UI-59117, affirming decision # 202863, and Hearing Decision 16-UI-59118, affirming decision # 151650. On May 17, 2016, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI- 59117 and 16-UI-59118. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0573 and 2016-EAB-0574).

FINDINGS OF FACT: (1) On April 1, 2015, claimant filed an initial claim for unemployment benefits. A weekly benefit amount of \$413 was established.

(1) Precision Welding employed claimant, last as a welder, from April 1, 2015 until February 2, 2016.

(2) On February 2, 2016, the employer's shop manager told claimant that no work was available for claimant for two weeks, that the employer was waiting for the start of a new job, and that the shop manager would call claimant when the new job began and work was available for claimant. Claimant took his tools and left the work site.

(3) On or about February 4, 2016, and again on February 11, 2016, claimant called the telephone number for the employer's shop and was unable to reach anyone or leave a message. Sometime in late February 2016, claimant called one of the employer's owners on his cell phone and left a message, asking why the employer was contesting his eligibility for employment benefits. The owner did not return claimant's call.

(4) On February 4, 2016, claimant restarted his claim for unemployment benefits. When claimant restarted his claim, he indicated that he had been laid off by the employer due to a lack of work. Claimant claimed benefits for weeks 6/16 through 11/16 (February 7 through March 19, 2016), and the Department paid claimant a total of \$2,748 in benefits for these weeks.

CONCLUSION AND REASONS: We disagree with the ALJ. We conclude that the employer discharged claimant, but not for misconduct, and that claimant was not overpaid unemployment benefits.

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).

At the hearing claimant testified that on February 2, 2016, the employer's shop manager told claimant that the employer had no work for him, that the employer would be starting a new job in two weeks, and that the shop manager would contact claimant when the new job started and work would be available for claimant. One of the employer's owners testified that the shop manager told her that on February 4, claimant returned from a service call, picked up his tools, and told the shop manager that he was putting himself on voluntary layoff. 5/5/16 Audio Recording for Hearing on decision # 151650 at 14:13. We conclude that the claimant's first hand testimony about the events of February 2 is entitled to greater weight than the hearsay testimony of the employer's owner. We therefore conclude that the employer did not allow claimant to continue working and that his work separation is a 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.

The employer discharged claimant because it had no work available for him or for other reasons not in the record, and not because of any established conduct in which claimant engaged that constituted a willful or wantonly negligent violation of the employer's expectations. The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation

Overpayment. 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).

In Hearing Decision 16-UI-59117, the ALJ concluded that claimant received \$2,748 in unemployment benefits to which he was not entitled, because he was disqualified from the receipt of these benefits due to his work separation from the employer. The ALJ also concluded that claimant knew he had voluntarily left work for the employer, and therefore willfully made false statements or misrepresentations when he restarted his claim on February 4, 2016 and reported that he had been laid off due to a lack of work.

Because we have concluded that the employer discharged claimant, but not for misconduct, claimant is not disqualified from the receipt of benefits based on his work separation from the employer. He was therefore entitled to the \$2,748 in benefits he received. Nor is claimant disqualified from future benefits or liable for a monetary penalty. As discussed above, the statement claimant made when he restarted his unemployment claim on February 4, 2016 –that the employer laid him off due to lack of work – was correct to the best of claimant’s knowledge. The Department therefore failed to establish that claimant willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits.

In conclusion, the employer discharged claimant, but not for misconduct. Claimant was therefore not disqualified from receiving benefits for weeks 6/16 through 11/16 based on his work separation from the employer. Nor did claimant willfully make a false statement or misrepresentation, or willfully fail to report a material fact to obtain benefits. Claimant was entitled to receive \$2,748 in unemployment benefits, and is not subject to a disqualification from future benefits or liable for a monetary penalty.

DECISION: Hearing Decisions 16-UI-59117 and 16-UI-59118 are set aside, as outlined above.

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

DATE of Service: June 15, 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.