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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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# EMPLOYMENT APPEALS BOARD DECISION
# 2016-EAB-0852

*Hearing Decision 16-UI-63174 Affirmed*
*Hearing Decision 16-UI-63176 Modified*

**PROCEDURAL HISTORY:** On May 25, 2016, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant voluntarily left work without good cause (decision # 124135) and the second concluding claimant was not able to work during the weeks of January 31, 2016 through March 5, 2016 (decision # 123413). On May 26, 2016, the Department served notice of a third administrative decision concluding that claimant made willful misrepresentations to obtain benefits and assessing a $1,194 overpayment, a monetary penalty of $358.20 and nine penalty weeks. Claimant filed timely requests for hearing on the three decisions. On June 30, 2016, ALJ M. Davis conducted three hearings and on July 6, 2016 issued three hearing decisions, the first affirming decision # 124135 (Hearing Decision 16-UI-63174), the second reversing decision # 123413 (Hearing Decision 16-UI-63172) and the third modifying the overpayment decision and assessing a $1,194 overpayment but no penalties (Hearing Decision 16-UI-63176). On July 14, 2016, claimant filed applications for review of Hearing Decisions 16-UI-63174 and 16-UI-63176 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-63174 and 16-UI-63176. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0851 and 2016-EAB-0852).

Claimant submitted a written argument which contained information that was not part of the hearing record. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. Therefore, under OAR 471-041-0090 (October 29, 2006), EAB did not consider the new information. EAB considered only information received into evidence at the hearing when reaching this decision.

Because no adversely affected party sought review of the portion of Hearing Decision 16-UI-63176 that concluded claimant was not liable for a monetary penalty or an assessment of penalty weeks, EAB has confined its review of that hearing decision to its assessment of an overpayment.

**FINDINGS OF FACT:** (1) Sometime before Thanksgiving 2015, November 26, 2015, claimant injured his back. On November 30, 2015, claimant filed an initial claim for unemployment insurance benefits. That claim was determined valid and had a weekly benefit amount of $254. The maximum weekly benefit amount in effect at the time claimant filed his initial claim was $567.

(2) On December 4, 2015, Marvel's Lone Elder Pizza hired claimant for part-time work as a delivery driver and a cook. The employer paid claimant $9.25 per hour for his work, and claimant received an additional $2 or $3 for every pizza he delivered. The hours that claimant worked each week for the employer varied, but averaged approximately 7.5 hours per week in December 2015 and 11.8 hours in January 2016. The employer reasonably expected claimant to report for work unless he was ill, exigent circumstances prevented him from doing so or the employer had given him permission to take time off from work. Claimant understood this expectation as a matter of common sense.

(3) Sometime before January 21, 2016, claimant decided to seek work as a self-employed person filming sports events. On January 21, 2016, Friends of Tigard High School retained claimant to scout basketball teams it would play in upcoming games and to film games in which those teams played. Friends of Tigard paid claimant to attend and film two or three basketball games per week at a rate of $40 per game.

(4) Claimant worked for the employer on January 23 or 24, 2016. The first game that claimant filmed for Friends of Tigard High School was on January 26, 2016. The hours that claimant was retained to work filming high school basketball games conflicted with the hours he was scheduled to work for the employer. Claimant decided he would rather work filming basketball games than for the employer.

(5) On January 28, 2016, claimant saw a physician for the injury to his back that he sustained in November 2015. The physician gave claimant a note that excused him from work on February 1, 2 and 3, 2016. Despite the physician's note, claimant was physically able to work for the employer on those days, as he had been since he was injured. Sometime before February 1, 2016, claimant dropped the doctor's note excusing him from work from February 1 through February 3, 2016 in the employer's safe for the employer's owner to retrieve.

(6) Claimant did not report for work on February 1, 2 and 3, 2016, although he was physically able to do so. On February 4, 2016, claimant was scheduled to work for the employer. On that day, claimant contacted the employer's owner by text message and told her he was unable to work because he was still in pain from his injured back. Claimant told the owner he would keep in touch.

(7) Between February 4 and approximately February 10, 2016, claimant did not contact the employer. Since the employer had only a very few employees, it was difficult for it to operate if claimant was not available to work. Sometime before February 10, 2016, the employer called the Oregon Department of Labor and Industries (BOLI) for information about whether it was required to keep claimant's position open for him or whether it was allowed to replace him. A BOLI representative told the employer it could lawfully replace claimant. On February 10, 2016, the employer's owner contacted claimant and told him the employer could not keep his position open for him and was going to hire someone else to replace him. Claimant responded to the owner that he understood.

(8) Claimant claimed benefits for the weeks of January 31, 2016 through March 5, 2016 (weeks 05-16 through 09-16), the weeks at issue. Although claimant was asked in each weekly claim report if he had voluntary left a position or been discharged from a position during that week, he did not report a change in his status with the employer. Claimant was paid $140 in benefits for week 05-16, $120 in benefit for week 06-16, $80 in benefits for week 07-16, $80 in benefits for week 08-16, $80 in benefits for week 09-16. Exhibit 1 in record for 2016-UI-51167.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for misconduct. For weeks 05-16 through 09-16, claimant was overpaid $1,054 in benefits which he is liable to repay or to have deducted from any future benefits otherwise payable to him.

**The Work Separation.** The standard for determining whether a work separation is properly characterized as a voluntary leaving or a discharge is set out in OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was 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).

In Hearing Decision 16-UI-63174, the ALJ concluded that claimant voluntarily left work, rather than the employer having discharged him. The ALJ principally based her conclusion on claimant's failure to contact the employer after February 4, 2016, which indicated to the ALJ that he was unwilling to work for the employer, and the testimony of the employer's witness that she would have tried to create a work schedule for claimant around the hours he worked for Friends of Tigard Basketball if he had told her of the second job, which indicated to the ALJ that the employer had continuing work for claimant. Hearing Decision 16-UI-63174 at 3. However, from claimant's testimony, it appears that his intentions were unclear around February 4, 2016 and he did not tell the employer about the second job or that he was quitting because he "wanted to keep [his] options open" for some period of time in the event the second job did not work out, which suggests he was unwilling to sever the work relationship. Transcript at 12. While the employer might have been willing to accommodate claimant's work schedule at the other job, the fact of the matter is that the employer was never informed of the second job and never had an opportunity to make accommodation or to exhibit its willingness to continue to employ claimant. Rather, sometime between February 4, 2016 and approximately February 10, 2016, the employer contacted BOLI to learn if it could lawfully hire someone else to fill claimant's position, which indicates it was unwilling to continue to employ claimant unless it was required to do so, On approximately February 10, 2016, when the employer informed claimant that his position was no longer open, that was an unequivocal communication that it was unwilling to allow claimant to continue working and he was discharged. On this record, claimant's work separation was a discharge on approximately February 10, 2016.

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.

For approximately ten days, claimant willfully refused to report to work for the employer because he preferred to work for Friends of Tigard High School. Claimant candidly admitted that, although he provided the physician's excuse to the employer before February 1, 2016 and he told the employer on February 5, 2016 that he was still was unable to work, he was, in fact, quite able to work and, by inference, he was intentionally deceiving the employer about his reasons for not reporting for work. That an individual has secured a second job is not an exigent circumstance that excuses him from the obligation to continue reporting to his other job, particularly when he has not informed the other employer of the second job or tried to accommodate the work schedules for the two jobs. By failing to report for work on and after February 4, 2016, and deceiving the employer about the reason for his absence, claimant willfully violated the employer's expectations.

Claimant's behavior in willful violations of the employer's standards are not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment only if, among other things, it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant's willful behavior was repeated on the several workdays between February 4, 2016 and February 10, 2016. Because claimant's violations were not a single or an infrequent event, they are not excusable as an isolated instance of poor judgment. Nor were claimant's willful violations excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not contend he mistakenly thought the employer would allow him to fail to report for work because he preferred his second job, and any such contention would have been implausible.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits based on this work separation.

**The Overpayment** ORS 657.310(1) states that an individual who receives any benefits to which he is not entitled because the individual, *regardless of the individual's knowledge or intent,* made or caused to be made a false statement or misrepresentation of a material fact or failed to disclose a material fact is liable to repay the amount of the overpaid benefits or to have the amount of the benefits deducted from any future benefits otherwise payable to him (emphasis added).

Claimant was not entitled to receive benefits during the week he had a disqualifying work separation and for subsequent weeks as set out in ORS 657.176(2). Claimant did not disclose to the Department during his weekly claims reports that the employer discharged him on February 10, 2016 and, since that discharge was for disqualifying reasons, he was not entitled to receive benefits. Even if claimant did not know he had been discharged, or was under the misapprehension that if he was working for another employer, Friends of Tigard High School, the employer's discharge was not disqualifying, ORS 657.310(1) makes him liable to repay those overpaid benefits.

In Hearing Decision 16-UI-63176, the ALJ determined that claimant's work separation occurred on February 4, 2016 (during week 05-16) and claimant therefore was required to repay the $1,194 in benefits that were paid to him for weeks 05-16 through 09-16. However, EAB has determined that claimant's work separation actually occurred on February 10, 2016, which is during week 06-16.

Accordingly, based on this work separation, claimant was not entitled to receive benefits for weeks 06-16 through 09-16 and he was overpaid $1,054. Hearing Decision 16-UI-63176 is modified to reflect the amount of the overpayment.

Claimant is liable to repay $1,054 in benefits overpaid to him or to have them deducted from any future benefits otherwise payable to him.

**DECISION:** Hearing Decisions 16-UI-63174 and 16-UI-63176 are affirmed.

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

**DATE of Service: August 22, 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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