

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0162

Affirmed
Disqualification
Overpayment and Penalties

PROCEDURAL HISTORY: On October 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause (decision # 95354). On October 31, 2016, claimant filed a timely request for hearing on decision # 95354. On November 4, 2016, the Department served notice of an administrative decision concluding claimant was overpaid \$6,233 she was liable to repay, and imposing a \$1,246.60 monetary penalty and 52 penalty weeks (decision # 195152). On November 7, 2016, claimant filed a timely request for hearing on decision # 195152. On December 8, 2016, ALJ Shoemake conducted two hearings, and on December 15, 2016 issued Hearing Decision 16-UI-72982, affirming decision # 95354, and Hearing Decision 16-UI-73007, affirming decision # 195152. On December 20, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB). On January 6, 2017, EAB issued Appeals Board Decisions 2017-EAB-1425 and 2017-EAB-1425, reversing and remanding the hearing decisions at issue for further development of the record.

On January 31, 2017, ALJ Shoemake conducted hearings, and on February 2, 2017, issued Hearing Decision 17-UI-76072, which adopted Hearing Decision 16-UI-73007, and Hearing Decision 17-UI-76076, which adopted Hearing Decision 16-UI-72982. On February 6, 2017, claimant filed applications for review.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-76072 and 17-UI-76076. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0161 and 2017-EAB-0162).

FINDINGS OF FACT: (1) On January 4, 2013, claimant spoke with a Department representative who told claimant she needed to report her work separations from the U. S. Post Office, even though claimant believed she had been participating in training and had not been employed by the U.S. Post Office. 1/31/17 Hearing on decision # 195152, Transcript at 5. On January 15, 2013, the Department issued a decision concluding that claimant misrepresented her work separation to receive unemployment benefits and imposing a disqualification from future benefits. That decision became final on February 4, 2013 without a request for hearing having been filed. 12/8/16 Hearing on decision # 195152, Transcript at 7. On July 17, 2014, the Department issued a decision concluding that claimant engaged in a misrepresentation to receive unemployment benefits and imposing a disqualification from future benefits. On August 5, 2014, that decision became final without a request for hearing having been filed. *Id.*

(2) In approximately 2014, claimant began work as a caregiver. As a caregiver, she worked 5 to 20 hours per week in Portland, and was paid \$14 per hour. Claimant received her caregiver job assignments one week in advance, and usually worked during the days. 12/8/16 Hearing on decision # 95354, Transcript at 8. Claimant was paid 54 cents per mile for travel to her caregiver job assignments. *Id.*

(3) From July 17, 2015 until May 11, 2016, Bluestone and Hockley Realty, the employer, employed claimant as an on call manager. As an on call manager, claimant had no regularly scheduled hours but was called to work at one of the employer's properties when a permanent manager unexpectedly quit or was discharged by the employer. From the end of December 2015 until the beginning of May 2016, claimant was not called to perform any work for the employer. 12/8/16 Hearing on decision # 95354, Transcript at 7.

(4) On April 26, 2016, the employer offered and claimant accepted a full time position as a manager at one of its properties in Woodburn, Oregon. The job paid \$12 per hour, and also paid claimant a flat rate of \$15 for the 70 mile roundtrip commute to travel between her home in Happy Valley, Oregon and the job site in Woodburn. 1/31/17 Hearing on decision # 95354, Transcript at 7.

(5) On May 8, 2016, claimant filed an initial claim for benefits. The claim was determined to be valid, and a weekly benefit amount of \$271 established. At the time claimant filed her claim, the maximum weekly benefit amount was \$567.

(6) On May 10, 2016, claimant began work for the employer in Woodburn. On May 11, 2016, she sent the employer the following email: "I would like to inform you that today is my last day with the [employer]." 12/8/16 Hearing on decision # 95354, Transcript at 14. Claimant quit her job for the employer because she believed the hours of work conflicted with the hours she worked as a caregiver, and because the cost of the commute was expensive. Claimant was concerned about the cost of gas needed to travel to Woodburn and back, as well as the cost of her car; claimant was using a "loaner" car for which she had to pay more if she drove it more than 50 miles a day. 1/31/17 Hearing on decision # 95354, Transcript at 8. Claimant was not aware if the employer would allow her to continue working in another assignment after she quit the Woodburn job.

(7) Claimant claimed benefits for weeks 19-16 through 42-16 (May 8 through October 22, 2016). She was paid \$271 per week in benefits for weeks 20-16 through 42-16, receiving a total of \$6,233 in

benefits. When claimant filed her claim for the week ending May 14 (week 19-16), she certified that she had not quit a job during that week.

CONCLUSION AND REASONS: Claimant voluntarily left work for the employer without good cause. Claimant willfully failed to report a work separation to receive benefits to which she was not entitled. Claimant was overpaid \$6,233 in benefits; she is liable for a monetary penalty of \$1,246.60 and is disqualified from future benefits otherwise payable to her for a period of 52 weeks. Claimant is liable to pay to the Department the amounts of the overpayment and the monetary penalty or to have those amounts deducted from any future unemployment benefits otherwise payable to her.

Work Separation. 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.

Claimant quit her job for the employer because she believed that the hours of work conflicted with the hours she worked as a caregiver, and because she believed that travel to the job site was too expensive. To the extent that claimant quit her job because it conflicted with her caregiving work, claimant failed to meet her burden to demonstrate a conflict between the work hours for the two jobs, or to show that she was unable to schedule the hours she worked as a caregiver to accommodate her work for the employer. Claimant was unable to remember what hours she worked as a caregiver at the time she accepted work for the employer, asserting only that these hours conflicted with the hours the employer expected her to work. 1/31/17 Hearing on decision # 95354, Transcript at 9. Although claimant testified that she was notified of her caregiving assignments one week in advance of the assignments, she provided no information as to how work was assigned and whether she was able to select her assignments and work hours. To the extent claimant quit work for the employer because of the cost of commuting to the job site, claimant failed to provide accurate information regarding these expenses. Claimant no evidence regarding the actual cost of her roundtrip to the Woodburn and back to her home in Happy Valley, *i.e.*, how much she spent on gas and how much she had to pay for additional miles on her “loaner” car. Because claimant failed to provide sufficient information about her caregiving job or her travel expenses, she failed to meet her burden to demonstrate that a reasonable and prudent person, who faced the same situation as claimant – the need to accommodate another part time job and a 70 mile commute to work – would decide that continued work for the employer constituted a grave situation.

Claimant had had the reasonable alternative of asking the employer if other, more compatible work assignments were available for her. Claimant did not do so, however, and indicated in her May 12 email that she no longer wished to perform any work for the employer. Although the employer’s representative admitted that it was never made clear to claimant that she could continue working for the employer even if she voluntarily left the Woodburn job,¹ a reasonable and prudent person would have

¹ 12/8/16 Hearing on decision # 95354, Transcript at 12.

asked the employer about other available assignments before quitting. For all of the foregoing reasons, we therefore conclude that claimant voluntarily left work for the employer without good cause.

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.*

Claimant is disqualified from receiving benefits for weeks 19-16 through 42-16 as a matter of law based on decision # 95354, which, as of the date this decision is being issued, has been affirmed by both the ALJ and EAB. The Department paid claimant \$6,233 in benefits for those weeks, making claimant overpaid. The Department paid claimant based on her report that she had not quit her job for the employer, an assertion that is, regardless of claimant's knowledge or intent when making it, false as a matter of law. Because the Department's payment of benefits to claimant for weeks 19-16 through 42-16 was based on her false statement, claimant is liable to either repay the amount she was overpaid or have it deducted from future benefits otherwise payable under chapter 657.

Misrepresentation and Penalties. An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified from benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). In addition, an individual who has been disqualified from benefits under ORS 657.215 for making a willful misrepresentation, and who has three or four "occurrences" within five years, is liable for a penalty in an amount equal to 20 percent of the total amount of benefits the individual received but was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An "occurrence" shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7).

When claimant claimed benefits for the week of May 8 through 14, 2016 (week 19-16), she certified that she had not quit a job during the week. That representation was false, because she voluntarily left work for the employer on May 11, 2016. Claimant provided a number of reasons why she stated she had not quit a job when she filed her claim for week 19-16. She asserted that her false statement resulted from a misunderstanding, testifying that "...I didn't quit working. I had several jobs and still do not understand these questions about quitting job." 12/8/16 Hearing on decision # 95354, Transcript at 15. Claimant's assertion is implausible; the question on the claim form to which she responded asked if she had quit *a* job during the week for which she was claiming benefits, not if she had quit her job or jobs. Claimant also contended that she contacted the Department "more than once" to find out how to report her work separation;² when questioned about the dates of these contacts, she remembered only one on November 2, 2016 – a contact that occurred after claimant had filed her claim for week 19-16.³ Finally, claimant testified that in filing her 2016 claim for benefits, she followed the instructions she had been given by a Department representative about a prior claim she filed when she separated from work for Pizza Hut.

² 12/8/16 Hearing on decision # 195152, Transcript at 15.

³ 12/8/16 Hearing on decision # 195152, Transcript at 16.

According to claimant, she applied the advice she had previously been given because the circumstances of her work separation from the employer were “identical” to the circumstances of her work separation from Pizza Hut. 1/31/17 Hearing on decision # 195152, Transcript at 10-13. Claimant’s assertion that she was just doing what a Department representative told her to do is unlikely, however. Claimant testified that she stopped working for Pizza Hut because she was no longer given any hours,⁴ a situation entirely different from her voluntary leaving work from the employer. Because claimant’s testimony about her failure to report she quit a job when she claimed benefits for week 19-16 was implausible and internally inconsistent, we conclude it more likely than not that she misrepresented facts concerning her work separation from the employer, that she did so willfully to obtain benefits, and that she is liable for penalties under ORS 657.215.

When the disqualifying acts under ORS 657.215 relate to the provisions of ORS 657.176, the number of weeks of disqualification assessed will be 52, if the individual has two previous disqualifications under ORS 657.215, and those disqualifications became final. OAR 471-030-0052(3)(b) (February 23, 2014). Because claimant has two prior disqualifications which became final (Finding of Fact 1), she is disqualified from 52 weeks of benefits.

Claimant is also liable for a monetary penalty equal to 20 percent of the overpaid benefits because her failure to report the work separation when claiming week 19-16 was her third occurrence of misrepresentation within five years. Twenty percent of \$6,233 is \$1,246.60, making claimant’s total repayment liability \$7,479.60 (\$6,233 + \$1,246.60).

DECISION: Hearing Decisions 17-UI-76072 and 17-UI-76076 are affirmed.

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

DATE of Service: March 2, 2017

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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⁴ 1/31/17 Hearing on decision # 195152, Transcript at 10.