

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0168

Hearing Decision 17-UI-75163 Affirmed ~ Disqualification
Hearing Decision 17-UI-75164 Modified ~ Overpayment, No Penalties

PROCEDURAL HISTORY: On October 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with the employer without good cause (decision # 95159). On October 21, 2016, the Department served notice of an administrative decision assessing a \$9,880 overpayment, \$1,482 monetary penalty and 52 penalty weeks (decision # 193804). On October 26, 2016, claimant filed timely requests for hearing on both decisions. On January 12, 2017, ALJ S. Lee conducted two hearings, and on January 20, 2017, issued Hearing Decision 17-UI-75163, affirming decision # 95159, and Hearing Decision 17-UI-75164, affirming decision # 193804. On February 7, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-75163 and 17-UI-75164. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0167 and 2017-EAB-0168).

FINDINGS OF FACT: (1) Schmizza Restaurant Group, Inc. employed claimant as a bartender from April 25, 2016 to April 30, 2016. At all relevant times, claimant had a full time job with a different employer. The employer hired claimant to work part time. The manager who hired claimant guaranteed claimant a specific work schedule that did not conflict with his full time job.

(2) Claimant worked for the employer for three shifts and developed reservations about whether the job was a good fit for him. Claimant's concerns included the location of supplies and ice relative to the bar and what he thought might be toxic mold. In that context, claimant learned that his hiring manager had left his job and a new manager would be taking over that position. Claimant did not have a good feeling about working for the employer, and, since he already had a full time job elsewhere that paid him enough to meet his financial obligations, decided to quit the part time job, effective April 30, 2016.

(3) Prior to quitting he did not notify anyone at the employer's business about any of his concerns, and, specifically, did not report having any concerns about the location of supplies and ice relative to the bar,

concerns about possible toxic mold, or concerns about whether the new manager would fulfill the hiring manager's promises with respect to his work schedule.

(4) Claimant subsequently lost his full time job and, on May 27, 2016, filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$494. When claimant filed his initial claim for benefits, the Department required him to provide information about his work history, including listing all his employers in the previous two years and how much he had in earnings from each employer. Claimant did not list Schmizza Restaurant Group, Inc. or the restaurant in which he had worked for that employer, and reported no earnings based on his work for the employer. Claimant certified to the Department that the information he had provided about his work history was complete and accurate.

(5) Each week from May 22, 2016 through October 15, 2016 (weeks 21-16 to 41-16), claimant filed weekly claims for benefits. Claimant having omitted information about a potentially disqualifying work separation from his initial claim filing, the Department erroneously paid claimant \$494 per week for each of those twenty weeks, for a total of \$9,880.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause and was overpaid \$9,880 in unemployment insurance benefits; however, we disagree with the ALJ and conclude that claimant is not liable for misrepresentation penalties.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

Claimant's argument at the hearing was, in essence, that the reasons he quit his job with the employer were basically irrelevant because his job with the employer was merely a second, part time job to supplement his income from another, full time job. We disagree. While the fact that claimant had another, full time job is certainly one factor to consider, the applicable law requires that he show good cause for quitting the part time job as a condition of qualifying for benefits. The mere fact that claimant had a full time job does not mean he had good cause for quitting his second, part time job.

Claimant quit work with the employer because he determined after a few days of work that the job was not a good fit for him, citing concerns about the distance of ice and supplies from the bar, possible toxic mold and whether a new manager would honor the hiring manager's promises with respect to claimant's schedule. Claimant did not explain or establish how having to take stairs or walk some distance for supplies and ice created a grave circumstance for him. Nor did claimant establish that his suspicion that mold he spotted might be toxic was a grave situation given that, at the time he quit, he did not report the concern to the employer or even know whether or not his suspicion was actually true. Nor did claimant establish that there was any basis in fact for his scheduling concerns. In sum, claimant did not establish

that any of his concerns constituted situations of such gravity that any reasonable and prudent person, even one with a full time job elsewhere, would feel as though he had no reasonable alternative but to quit, especially without first telling the new manager about his concerns and giving the employer the opportunity to address them. Claimant voluntarily left work with the employer without good cause, and is, therefore, disqualified from receiving unemployment insurance benefits.

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.*

The Department paid claimant \$9,880 in benefits which, because he quit work with the employer without good cause, he was not eligible to receive. He was, therefore, overpaid \$9,880. The Department paid benefits to claimant because, when he filed his initial claim for benefits in May 2016, he withheld information about his employment with the employer and failed to report that he voluntarily quit that job on April 30th. Claimant's failure to report his work and work separation amounted to a false statement or failure to disclose a material fact. Regardless of claimant's knowledge or intent when withholding that information from the Department, claimant caused the overpayment and is therefore liable to repay it or have the overpayment amount deducted from future benefits otherwise payable.

In addition to having to repay the overpayment, an individual who willfully failed to report a material fact to obtain benefits may also be subject to penalties, including a monetary penalty totaling 15 to 30% of the overpayment amount and an assessment of up to 52 penalty weeks. *See* ORS 657.215; ORS 657.310(2). In this case, the Department assessed a \$1,482 monetary penalty and 52 penalty weeks and the ALJ affirmed the assessment. The ALJ reasoned,

When claimant filed his initial claim for benefits, the application specifically asks claimants to list all employers for the last two years. At hearing, claimant testified that because they asked about earnings, he did not believe he was required to report a job that he had worked for less than a week and had not yet received payment for his time. I was not persuaded by claimant's argument, because the instruction is very concise and clear, claimants are to list *all* employers and makes no exceptions based on minimal earnings. When asked why he believed he did not have to report Pizza Schmizza, claimant was unable to provide a satisfactory explanation. Claimant knew he had worked for Pizza Schmizza, claimant knew he had quit the position and the reason he was no longer working for the employer [*sic*]. Accordingly, I conclude that claimant intentionally failed to report a material fact.

Hearing Decision 17-UI-75164 at 5-6. While we do not disagree with the ALJ's findings or conclusions with respect to claimant's knowledge of the facts and his decision to withhold information from the Department, we disagree with the import of those findings.

In order to assess penalties based on an individual's misrepresentation, we must not only find that claimant intentionally committed a misrepresentation, we must also find that he committed the

misrepresentation with the intent “to obtain benefits.” While an individual’s intent may be implicitly obvious in many instances of misrepresentation, it is not in this case. In his testimony, claimant did not deny that the work separation occurred or claim that he reported it; he admitted to both. However, he claimed, and the record does not suggest otherwise, that the reason he withheld information about his employment and work separation was, specifically, that he thought the information would not matter to his entitlement to benefits, his benefit amount, or his claim, testifying, “I had no idea that it would even affect that – affect that at all.” Audio recording at ~ 19:55.

It is apparent in this case that claimant held misconceptions that only his separation from his full time job would affect his ability to receive benefits and that he did not need to report his work or separation from the employer. Given that claimant had worked only three days for the employer, had minimal earnings and had not, a month after his separation, been paid for his work, his belief that his separation and earnings from the employer would not affect his unemployment insurance claim, while incorrect, was not objectively implausible or unreasonably held. Therefore, while evidence shows that it is more likely than not that claimant intentionally withheld information about his work, earnings and separation from the Department, the record also establishes that he did not do so “to obtain benefits,” but, rather, because he sincerely, albeit mistakenly, failed to realize that the information would affect his ability to obtain benefits.

Because claimant’s misrepresentations were not with the intent “to obtain benefits,” he is not subject to monetary penalties or penalty weeks for having made them. He remains, however, liable to repay the full amount of the \$9,880 overpayment to the Department, or have it deducted from future benefits otherwise payable.

DECISION: Hearing Decision 17-UI-75163 is affirmed. Hearing Decision 17-UI-75164 is modified, as outlined above.

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

DATE of Service: February 24, 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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