

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0196

Late Applications for Review Allowed
Hearing Decision 17-UI-74562 Affirmed
Hearing Decision 17-UI-74574 Affirmed

PROCEDURAL HISTORY: On December 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 103046). Claimant filed a timely request for hearing on decision # 103046. On December 19, 2016, the Department served notice of administrative decision assessing a \$432 overpayment, a \$64.80 monetary penalty and four penalty weeks. Claimant filed a timely request for hearing on the overpayment decision. On January 11, 2017, ALJ Triana conducted hearings at 9:30 a.m. and 10:45 a.m., and on January 12, 2017 issued two hearing decision, the first affirming decision # 103046 (Hearing Decision 17-UI-74563), and the second affirming the overpayment decision (Hearing Decision 17-UI-74574). On February 16, 2017, claimant filed untimely applications for review of Hearing Decisions 17-UI-75463 and 17-UI-74574 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-74563 and 17-UI-74574. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0195 and 2017-EAB-0196).

On February 16, 2017, claimant filed a written statement explaining why her applications for review of both hearing decisions were not timely filed. EAB considered claimant's statement in determining whether claimant showed good cause for extending the filing period. On March 7, 2017, claimant submitted a written argument addressing the substantive merits of both hearing decisions on which she sought review by EAB. However, claimant failed to certify that she served her argument on the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Krista Cody Ltd. employed claimant from December 16, 2013 until November 14, 2016.

(2) In approximately September 2016, claimant learned that her 14 year-old daughter had been sexually abused during the past summer. After the daughter returned to school in the fall as a freshman at Astoria High School, the daughter learned that friends of the boy who had abused her attended that school. The presence of this boy's friends caused problems at school for the daughter. In mid-October 2016, claimant arranged to have her daughter transfer from Astoria High School to Warrenton High School. Sometime in early November 2016, claimant discovered that her daughter had been absent from school at Warrenton High School for three consecutive days without her knowledge or permission. Claimant decided that steps needed to be taken to address her daughter's school attendance

(3) During the pay period of September 5 through September 18, 2016, claimant worked 71 hours. During the pay period of September 19 through October 2, 2016, claimant was scheduled to work 77 hours, and actually worked 69 hours. During the pay period of October 3 through October 17, 2016, claimant worked 83 hours. During the pay period of October 17 through October 30, 2016, claimant was scheduled to work 75 hours but actually worked 67 hours. During the week of October 31 through November 16, 2016, claimant was scheduled to work 71 hours, but called in sick for three days and actually worked 47 hours.

(4) Claimant was scheduled to work on November 9, 12 and 13, 2016, but called in sick on those days since she was discussing the matter of her daughter's school attendance with her daughter's father. They decided that claimant's daughter would live with her father and attend school in Beaverton, Oregon.

(5) The next dates claimant was scheduled to work were November 16, 17 and 18, 2016. On November 14, 2016, claimant called and left a message for the employer's manager and chief executive officer. In the message, claimant told the manager that she was having "personal issues," that her daughter was going to move from Astoria to live with her father in Beaverton and claimant was also moving to Beaverton so she could be near her daughter. Audio of 9:30 a.m. Hearing at ~23:21. On November 15, 2016, the manager called claimant to discuss her message from the previous day. Claimant told the manager that she was moving to Beaverton and would not be able to continue working for the employer. The manager commented that claimant was not providing the customary two weeks' notice. Claimant stated that she needed to leave town, but could arrange to stay and work the next week for the employer if she was needed. The manager told claimant she would try to arrange coverage so that claimant was not needed and the call ended. The manager arranged for others to work the shifts that were originally scheduled for claimant on November 16, 17 and 18, 2016. The manager did not schedule any additional shifts for claimant after November 18, 2016.

(6) On November 19, 2016, claimant filed an initial claim for unemployment benefits online. When claimant filed that claim, she marked on the application form that the reason she was no longer working was that she had been "discharged-fired or terminated" and further marked that she had been "laid off due to a permanent lack of work." Audio at 10:45 a.m. Hearing at ~12:17, ~13:44. Claimant's claim was determined valid with a weekly benefit amount of \$216. The maximum weekly benefit amount in effect at the time claimant filed her claim was \$590.

(7) Claimant claimed benefits for the weeks of November 13, 2016 through December 3, 2016 (weeks 46-16 through 48-16), the weeks at issue. Claimant received waiting week credit for week 46-16 and

was not paid benefits. Claimant was paid \$216 for week 47-16 and \$216 for week 48-16, for a total of \$432.

(8) On January 12, 2017, the ALJ held hearings on claimant's work separation and on whether she was overpaid benefits. That same day, the Office of Administrative Hearings (OAH) mailed Hearing Decisions 17-UI-72563 and 17-UI-74574 to claimant at her correct address of record. Sometime after January 12, 2017, claimant called the Department to inquire about the status of the pending unemployment matters and was told that decisions on them had been rendered and had been sent to her, but that the rulings could not be disclosed over the phone. When claimant did not shortly receive either decision, she called the Department, was told the decisions were not in her favor and that the paperwork had been sent to her. On January 23, 2017, the decisions OAH mailed to claimant were returned to OAH as undeliverable, with a notation on the envelope, "Return to sender. Attempted – not known. Unable to forward." Record Document, Returned Decision Envelope. On approximately February 10, 2017, claimant called the Department again because she still had not received the decisions. Claimant was told that the mailed decisions had been returned to OAH as undeliverable. Because the address to which the decisions were mailed was claimant's correct address, claimant asked for them to be sent to her again. Claimant then called the local post office and was told the mail carrier had been delivering all mail directed to her address. On approximately February 16, 2017, claimant finally received the hearing decisions, and on that date she filed applications for review of both hearing decisions.

CONCLUSIONS AND REASONS: The late application for review is allowed. Claimant voluntarily left work without good cause. Claimant was overpaid \$432 in benefits to which she was not entitled and is assessed a \$64.80 monetary penalty, which she is liable to repay or to have deducted from any future benefits otherwise payable to her. Claimant is also assessed four penalty weeks of disqualification from future benefits.

The Late Application for Review. An application for review is timely if it is filed within 20 days of the date that OAH mailed the decision for which review is sought. OAR 471-041-0070(1) (March 20, 2014). The 20 day filing period may be extended a "reasonable time" upon a showing of "good cause." OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing OAR 471-040-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0050(2)(b).

Claimant's applications for review of Hearing Decisions 17-UI-74563 and 17-UI-74574 were not filed on or before February 1, 2017, which was the final date for timely filings. Both decisions were mailed to claimant's correct address, but for unknown reasons were returned to OAH as undeliverable and not received by claimant. It was not unreasonable for claimant to have waited until approximately February 10, 2016, less than a month after the hearings were held, to contact OAH about her failure to receive the hearing decisions and her suspicion that the mailed decisions had been lost. That the decisions, although properly addressed, were not delivered to claimant's address and were not ever received by her was a factor or circumstance beyond her reasonable control that prevented her from filing applications for review by February 1, 2017. As of February 10, 2016, however, claimant knew that the decisions had been lost in the mail and had been told they were not in her favor, which is the earliest conceivable date on which the factors or circumstances that prevented that prevented the timely filing of applications for review could have ceased to exist. Since claimant filed her applications for review on February 16,

2017, six days after those factors or circumstances no longer existed, those applications were filed within the required “reasonable time.” Accordingly, claimant’s late applications for review are allowed.

The Work Separation. Claimant contended that the employer laid her off when, without explanation, it “cut” the hours she was scheduled to work. Audio of 9:30 a.m. Hearing at ~5:17,~13:03, ~16:00, ~17:38, ~17:57. However, the employer contended that claimant notified it on November 13, 2016 that she was quitting work due to her teenage daughter’s need to move and her desire to remain in close proximity to the daughter. Audio of 9:30 a.m. Hearing at ~23:51, ~25:12. The standard for characterizing the work separation is set out at OAR 471-030-0038(2) (August 3, 2011). 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).

Claimant did not dispute the testimony of the employer’s manager at hearing about the hours claimant was scheduled to work from September 2016 through mid-November 2016. While the hours that claimant actually worked in November 2016 were less than usual, those reductions were not the result of employer’s actions in reducing claimant’s hours, but due to claimant’s decisions not to report for work. Audio of 9:30 a.m. Hearing at ~27:05. As well, in response to the testimony of the employer’s manager that claimant told her she was quitting, claimant denied that she made that statement and then appeared to retreat from her position that the employer had unilaterally cut her hours in the weeks before she decided to quit, and focused instead on the fact that the employer did not schedule her to work during the week of November 21, 2016. Audio at 9:30 Hearing at ~13:03; Audio of 10:45 a.m. Hearing at ~34:24, ~35:09. However, on these facts, it is not clear that the manager’s actions in revising the work schedule for that week was anything more than a response to claimant’s November 14 and 15, 2016 announcements that she was quitting work. In addition, claimant’s testimony about whether she had decided to move to Beaverton by November 14, 2015 and about what she told the manager was inconsistent and, at times, appeared evasive, first stating that she had decided to move to Beaverton by that date, then stating that she did not recall what she had told the manager and then further stating that she had not told the manager that she was leaving for Beaverton when she spoke to her on either day. Audio of 9:30 a.m. Hearing at ~9:30, ~13:03, ~32:07; ~32:36; Audio of 10:45 a.m. Hearing at ~25:52; ~26:29, ~28:40. In regard to what claimant stated to the manager, the manager’s testimony is more reliable than claimant’s testimony since it was cogent, consistent and did not vary over time. Finally, claimant admitted she called the manager on November 14, 2016 to let her know what was “going on” and to discuss the work schedule. Audio of 9:30 a.m. Hearing at ~13:03, ~21:02, ~27:57. However, it does not make sense claimant would do so unless she wanted to notify the employer that she was quitting and to negotiate a mutually acceptable quit date. Based on the lack of reliable evidence supporting claimant’s contention that she was discharged by the cutting of her hours, and claimant’s lack of a persuasive rebuttal to the employer’s position that she voluntarily left work, claimant’s work separation was a voluntary leaving on November 14, 2016, when she notified the employer that she was quitting.

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.

Because claimant insisted the employer discharged her by involuntarily cutting her hours, she provided no reason for leaving work when she did. We can infer from the record that claimant might have decided to leave work when she did to enable her to move to Beaverton to remain in proximity to her daughter. However, claimant did not provide any evidence as to why it was necessary for her to live in the same city as her daughter, allowing her daily contact with the daughter, if the daughter was living with her father. Absent evidence showing that grave reasons motivated her to leave work when she did, claimant did not meet her burden to show that she had good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

Overpayment. ORS 657.310(1) states that if an individual receives benefits to which the individual was not entitled because the individual, *regardless of the individual's knowledge or intent*, made or cause to be made a false statement or misrepresentation of a material fact, the individual 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 the individual (emphasis added).

Claimant would not have received waiting week credit for week 46-16 or been paid \$432 in benefits for weeks 47-16 and 48-16 absent her statement when she filed her initial claim that the employer had laid her off and absent her failure to disclose that she had voluntarily left work. Audio of 10:45 a.m. Hearing at ~16:21. Even if claimant truly believed the employer had laid her off, and was not aware that she was making a misrepresentation to the Department when she characterized the cause of her work separation, ORS 657.310(1) still requires that she repay the \$432 in benefits she received or to have those overpaid benefits deducted from any future benefits otherwise payable to her. Claimant is liable to repay those benefits or have them deducted from any future benefits to which she would otherwise be eligible to receive.

Penalties. ORS 657.310(2) states that an individual who receives benefits to which the individual is not entitled due to the individual's willful misrepresentation of material facts or failure to disclose such material facts is liable to pay, in addition to repaying the overpaid benefits, a monetary penalty assessed at a rate between 15 and 30 percent of the amount of the overpaid benefits as prescribed by the Department's regulations.

The facts in this record about the work separation are not ambiguous. It is implausible that claimant believed when she filed her initial claim that the employer had laid her off, rather than that she had voluntarily left work. The only explanation for the misrepresentation claimant made to the Department when she filed her initial claim that makes any sense was that she wished to guarantee that she would receive benefits, and avoid a delay in receiving or a disqualification from benefits that would ensure if she correctly stated that she had voluntarily left work. Audio of 10:45 a.m. Hearing at ~32:45, ~33:30. Most likely, claimant willfully mischaracterized her work separation in order to receive benefits to which she was not entitled. OAR 471-030-0052(7) (February 23, 2014) provides that that the appropriate monetary penalty to assess for willful misrepresentations is based on the number of incidents of misrepresentation. Here, claimant made one willful misrepresentation about the work separation,

when she filed her initial claim for benefits. OAR 471-030-0052(7)(a) provides that the proper penalty assessment for incident of misrepresentation is 15 percent of the total amount of the benefits the individual received to which the individual was not entitled. 15 percent of the \$432 in benefits that claimant was overpaid is \$64.80. Claimant is assessed a monetary penalty of \$65.80.

ORS 657.215 provides that an individual who has received benefits to which the individual was not entitled based on a willful misrepresentation or failure to disclose material facts is subject to a disqualification from future benefits to which the individual would otherwise be entitled for a period as determined under the Department's regulations. OAR 471-030-0052(1)(b) provides that when the willful misrepresentation relates to a disqualification under ORS 657.176, the number of weeks of disqualification shall be determined in the same manner as for a failure to accurately report earnings or four weeks, whichever is greater. Because claimant's misrepresentation involved a characterization of the work separation it arose under ORS 657.176. Because four weeks of penalty disqualification is the greater disqualification period, claimant is assessed four penalty weeks.

DECISION: Hearing Decision 17-UI-74574 is affirmed.
Hearing Decision 17-UI-74563 is affirmed

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

DATE of Service: March 17, 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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