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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
2017-EAB-1355

Hearing Decision 17-UI-96295 Affirmed ~ Disqualification
Hearing Decision 17-UI-96347 Modified ~ Overpayment, Penalties

PROCEDURAL HISTORY: On July 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with an employer on July 15, 2016 without good cause (decision # 83913). On July 10, 2017, the Department served notice of an administrative decision assessing a \$6,089 overpayment, a \$1,217.80 monetary penalty and 47 penalty weeks (decision # 193832). On July 15, 2017, claimant filed a timely request for hearing on both decisions. On October 26, 2017, ALJ Shoemake conducted a hearing regarding each decision, and on November 6, 2017, issued Hearing Decision 17-UI-96295, affirming decision # 83913, and Hearing Decision 17-UI-96347, modifying decision # 193832 and assessing a \$2,913 overpayment, a \$582.60 monetary penalty and 25 penalty weeks. On November 16, 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-96295 and 17-UI-96347. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1354 and 2017-EAB-1355).

FINDINGS OF FACT: (1) Rose Villa Inc. (RV) employed claimant as a project manager from June 1, 2015 to March 31, 2016. Claimant became frustrated with work-related issues pertaining to contractors not performing their work as expected and notified the employer of his concerns. The employer tried to correct the issue but did not and in February 2016, claimant gave the employer notice that he was quitting work, effective June 2016. However, rather than allow claimant to work through his notice

period, the employer discharged claimant, effective March 31, 2016, due to its “business needs.”¹ Exhibit 1.

(2) On April 1, 2016, claimant filed an initial claim for unemployment insurance benefits with the Department. The Department processed the claim as valid with a weekly benefit amount of \$397. The maximum weekly benefit amount in effect at the time was \$567. When claimant filed his initial claim, he certified to the Department that his employment with RV ended due to a lack of work.

(3) On June 5, 2016, Trackers Earth Oregon LLC (TEO) hired claimant to work at its southeast Portland location as a youth instructor. TEO paid claimant minimum wage.

(4) In early July 2016, another employer offered, and claimant accepted, work that was scheduled to begin at the end of August 2016 and was to pay him \$1,000 to \$2,000 per week on a piece rate basis depending on the number of cabinets claimant constructed.

(5) During the week of July 10 to 16, 2016, TEO notified claimant that he was being transferred from its southeast Portland location to its Beaverton location because it had too many employees and not enough work at its southeast Portland location. Claimant knew he had another job starting at the end of August, and because claimant was making minimum wage, his work hours were sporadic and the distance between his West Linn residence and the Beaverton location was greater than the distance to southeast Portland location, claimant decided to quit and did quit work, effective July 15, 2016.

(6) After claimant restarted his claim in late July 2016, he certified to the Department that he had not worked during the week ending July 9, 2016 (week 27-16) although he had worked 43 hours and generated \$524.23 in earnings working for TEO during that week. However, for the week ending June 11, 2016, claimant certified to the Department that he had worked 40 hours during that week and had earned \$520 in wages when, in fact, he had only worked 37 hours and earned \$356.70, based on employer records.² Similarly, for the week ending July 16, 2016 (week 28-16), claimant certified to the Department that he had worked 32 hours during that week and had earned \$395 in wages when, in fact, he had not worked at all or earned any wages during that week, based on employer records.³ Finally, for

¹ We take notice of these facts, which are contained in Employment Department records, specifically Hearing Decision 17-UI-96286, which was not appealed and became final as a matter of law on November 27, 2017. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

² We take notice of these facts, which are contained in Employment Department records, specifically Exhibit 2, which was offered into evidence by the Department but not admitted by the ALJ at hearing. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

³ We take notice of these facts, which are contained in Employment Department records, specifically Exhibit 2, which was offered into evidence by the Department but not admitted by the ALJ at hearing. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

the week ending July 16, 2016 (week 28-16), claimant certified to the Department that he had not quit a job during that week although he had quit his job with TEO on July 15, 2016.

(7) Each week from July 3, 2016 through August 27, 2016 (weeks 27-16 through 34-16), claimant filed weekly claims for benefits. Claimant having omitted true and accurate information about hours and earnings during week 27-16 and a potentially disqualifying work separation during week 28-16 from his claims filing, the Department erroneously overpaid claimant in benefits for those weeks in the total amount of \$2,913.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work with TEO without good cause and misreported his earnings during week 27-16 and work separation from TEO during week 28-16, and was overpaid \$2,913 in unemployment insurance benefits as a result. However, we disagree with the ALJ, in part, regarding misrepresentation penalties and conclude that claimant is liable for a \$436.95 monetary penalty, and is disqualified from receiving future benefits for a period of 21 weeks.

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. OAR 471-030-0038(5)(a), provides that if an individual leaves work to accept an offer of other work, good cause exists only if the offer is definite, the work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances, the offered work is reasonably be expected to continue and pay an amount equal to or in excess of the weekly benefit amount or an amount greater than the work left.

Claimant quit work with TEO on July 15, 2016 because he knew he had a new job starting at the end of August, he was making minimum wage, his work hours were sporadic and because the distance between his West Linn residence and the Beaverton location was greater than the distance to the southeast Portland location. To the extent claimant quit work in anticipation of his new job starting at the end of August, he failed to establish good cause for leaving work for that reason. Claimant’s new job was scheduled to begin more than a month after claimant left work on July 15, which claimant failed to show was the shortest length of time that could be deemed reasonable under his circumstances. Accordingly, under OAR 471-030-0038(5)(a), claimant did not quit work for that reason with good cause.

To the extent claimant quit work because he was making minimum wage, his work hours were sporadic and because the distance between his West Linn residence and the Beaverton location was greater than the distance to the southeast Portland location, claimant also failed to establish good cause for leaving work for those reasons. Claimant did not explain or establish how earning no wages instead of the

minimum wage for even sporadic hours or traveling to work approximately 20 miles⁴ instead of 15 miles⁵ created such grave circumstances for him that he had no reasonable alternative to quitting work immediately.

Claimant explained that he was told that the reason he was being transferred was that the employer had too many employees and not enough clients for the southeast Portland location. Audio Record (October 26, 2017 10:45 a.m. hearing) ~ 21:30 to 23:00. From that information it can reasonably be inferred that his sporadic work hours probably would have increased at the new location. And, viewing claimant's circumstances objectively, even though the drive may have taken more time, as claimant explained, his estimate that it would have taken him an hour and half to travel approximately 20 miles each way was not persuasive. Audio Record (October 26, 2017 10:45 a.m. hearing) ~ 23:00 to 24:30. Viewing the record as a whole, claimant failed to show that no reasonable and prudent person in his circumstances, interested in remaining employed, would have continued to work for his employer until shortly before his new, better paying job began at the end of August, 2016.

Claimant voluntarily left work with TEO without good cause, and is, therefore, disqualified from receiving unemployment insurance benefits on the basis of that work separation.

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 \$2,913 in benefits which, because he quit work with TEO without good cause and underreported his hours and earnings for week 27-16, he was not eligible to receive. He was, therefore, overpaid \$2,913. The Department paid benefits to claimant because, when he filed his initial claims for benefits in July 2016, he withheld information about his earnings with TEO during week 27-16 and failed to report that he voluntarily quit that job on July 15th. Claimant's failure to report his earning and work separation amounted to false statements or failures to disclose material facts. Regardless of claimant's knowledge or intent when withholding that information from the Department,

⁴ We take notice of the generally cognizable fact that the farthest reaches of Beaverton, OR, i.e. Aloha, OR, were located approximately 20 miles from claimant's residence. See <https://www.mapquest.com/directions/from/us/or/west-linn/97068-4416/1348-dollar-st-45.345522,-122.661421/to/us/or/aloha>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

⁵ We take notice of the generally cognizable fact that the SE Portland offices of TEO were located approximately 15.4 miles from claimant's residence. See <https://www.mapquest.com/directions/from/us/or/west-linn/97068-4416/1348-dollar-st-45.345522,-122.661421/to/us/or/portland/97202-4727/4617-se-milwaukie-ave-45.489354,-122.650905>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

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 material facts 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 47 penalty weeks and a \$1,217.80 monetary penalty and the ALJ modified the assessment to 25 penalty weeks and a \$582.60 penalty based on the ALJ's conclusion that claimant made three willful misrepresentations for the purpose of obtaining benefits. The ALJ reasoned,

When claimant filed his initial claim, he reported that he was separated from Rose Villa Inc. due to a lack of work. That representation was false. Claimant knew that he gave notice to quit work and that the employer subsequently discharged him during his notice period. When claimant restarted his claim, he certified that he was off work from Trackers Earth Oregon LLC due to a lack of work. That representation was false. Claimant quit the job for another job. When claimant claimed the week ending July 9, 2017, he certified that he had no work or earnings. Claimant actually had over \$500 in earnings that week so that representation was false . . . Information as to whether claimant quit a job or had earnings was material to whether or not claimant was eligible to receive unemployment benefits. Given the unlikelihood that claimant made an error twice on accurately reporting his work separations and the fact that he gave notice to both employers, I find that claimant willfully failed to report his separations in order to receive unemployment benefits. In addition, the fact that claimant did not report his separation or his earnings from Trackers Earth Oregon LLC, I further find that he willfully failed to do so in order to obtain benefits.

Hearing Decision 17-UI-93647 at 4. While we agree that the evidence shows that claimant probably misreported the nature of his work separation with TEO with the intent to obtain benefits, we disagree with the ALJ's conclusions with respect to claimant's intent regarding his reports of his work separation from RV and his earnings from TEO during week 27-16.

As a preliminary matter, because the Department originally paid claimant benefits it subsequently denied, the Department not only had the burden to establish that claimant received benefits to which he was not entitled, but the burden to establish that he willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

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 impliedly obvious in many instances of misrepresentation, it is not with regard to two of claimant's reports in this case.

First, in his testimony, claimant did not deny that the work separation from RV occurred or that it was placed in motion by his notice in February that he intended to quit in June. However the employer's witness agreed with claimant that claimant told him in February that he wanted to stay employed until June to support his family and that it was not claimant's choice to separate from the employment in

March. Audio Record (October 26, 2017 1:30 p.m. hearing) ~ 25:00 to 27:00. The employer also stated in writing that claimant's employment was ending in March due to the employer's "business needs." Exhibit 1. Accordingly, the Department's evidence that claimant's report to the Department that his employment with RV ended as a separation due to a lack of work was a misrepresentation made to obtain benefits was no more than equally balanced with claimant's evidence that shows that his report of the separation may not have been a misrepresentation at all, let alone one made to obtain benefits.

Second, while the Department met its burden to show that claimant's report of his earnings during week 27-16 was inaccurate, it failed to establish that claimant's inaccurate report was probably willful and made with the intent to obtain benefits. At hearing, claimant asserted that his misreport was a mistake based on his confusion with other weeks. Audio Record (October 26, 2017 1:30 p.m. hearing) ~ 35:00 to 35:35. Department records, which the Department offered into evidence but the ALJ failed to admit (Exhibit 2), provide support for claimant's explanation. Those records showed that claimant over reported his earnings for weeks 23-16 (\$520.00 vs \$356.70) and 28-16 (\$395.00 vs \$0.00) and did not claim benefits for week 24-16 although his actual earnings (\$356.70) did not exceed his weekly benefit amount of \$397 which made him eligible. Moreover, the records show that claimant rightly did not claim benefits for weeks 25-16 and 26-16 because his actual earnings in each of those weeks exceeded his weekly benefit amount. Viewing the record here along with the Department's records as a whole, the Department failed to establish substantial evidence of intent to defraud on the part of claimant with regard to his earnings report for week 27-16. Based on those records, it is plausible that claimant's misreport was no more than a mistake, making the evidence of a willful misrepresentation to obtain benefits no more than equally balanced. Therefore, the Department failed to meet its burden of proof regarding its contention that claimant was guilty of three misrepresentations made with the intent to obtain benefits. Having established only one, concerning his misreport of his work separation with TEO, the penalties assessed by the ALJ should be modified.

When the disqualifying acts under 657.215 relate to a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) of OAR 471-030-0052(1). OAR 471-030-0052(1)(a) provides that the number of penalty weeks is calculated by dividing the total overpayment (\$2,913) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying acts (\$567), rounding to the nearest two decimal places (5.14), multiplying the result by four (20.56), and rounding the result up to the nearest whole number (21). Claimant is also liable for a monetary penalty equal to 15 percent of the overpaid benefits because, each time he falsely reported a work separation (1), claimant made a false statement to the Department that counted as an "occurrence" for purposes of determining the penalty percentage for which he is liable. Because claimant had only one occurrence within five years, he is liable for a penalty of 15 percent of the total overpayment amount. Fifteen percent of \$2,913 is \$436.95, making claimant's total repayment liability \$3,349.95.

In sum, claimant was overpaid and must repay the Department \$2,913 in regular benefits, is liable for a \$436.95 monetary penalty, and is disqualified from receiving future benefits for 21 weeks.

DECISION: Hearing Decision 17-UI-96295 is affirmed. Hearing Decision 17-UI-96347 is modified, as outlined above.

J. S. Cromwell and D. P. Hettle.

DATE of Service: December 22, 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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