

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1368

Hearing Decision 17-UI-96625 Reversed ~ No Disqualification
Hearing Decision 17-UI-96626 Modified ~ Overpayment, No Penalties

PROCEDURAL HISTORY: On October 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82224). On October 6, 2017, the Department served notice of an administrative decision assessing a \$2,935 overpayment, a \$587 monetary penalty and 20 penalty weeks (decision # 193447), based in part on decision # 82224. On October 10, 2017, the Department served notice of an administrative decision canceling decision # 193447, but instead assessing a \$2,935 overpayment, a \$587 monetary penalty and 24 penalty weeks (decision # 195652), again based in part on decision # 82224. On October 10, 2017, claimant filed a timely request for hearing on decisions #s 82224 and 195652.

On November 6, 2017, ALJ S. Lee conducted separate hearings regarding each decision, and on November 9, 2017, issued Hearing Decision 17-UI-96625, affirming decision # 82224, and Hearing Decision 17-UI-96626, modifying decision # 195652 by assessing a \$2,935 overpayment, without assessing any monetary penalty or penalty weeks. On November 27, 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-96625 and 17-UI-96626. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1368 and 2017-EAB-1369).

EAB considered claimant's written argument to the extent it was based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) On January 31, 2017, 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 \$413.

(2) On June 12, 2017, Phoenix School of Roseburg (PSR) hired claimant to work as its part-time maintenance coordinator, for 20 hours per week. During the first four days of his employment, June 12-15, claimant was trained by the prior maintenance coordinator and custodian who told him his job consisted of equipment repairs and general maintenance, both inside and outside, but that he was not responsible for repairs and maintenance work at the school nursery. Both the maintenance coordinator he was replacing and the custodian told him that his job duties would require more than 20 hours per week, as theirs did, but that he would not get paid for any extra hours that he worked. They told him that when he filled out his weekly time sheets, to not claim more than twenty hours and that any extra hours he worked would be on his own time.

(3) After June 15, 2017, when claimant began working on his own, he realized that his job duties did require more than 20 hours per week to complete. He also was asked by staff at the nursery to perform maintenance duties immediately although he already was working more than four hours per day. He further realized that he did not have the necessary equipment to perform some job duties and needed guidance from his supervisor on that issue as well. When he tried to personally confront his supervisor for clarification and guidance on these issues, his supervisor did not respond, asserting he was busy with other duties. Claimant then sent emails to the supervisor outlining his concerns on these issues on June 19, 21 and 23, without response. He left hard copies of the emails on the supervisor's desk, also without response. As a result, on June 20 and 23, claimant prepared written statements concerning these issues and placed them directly on his supervisor's desk. He specifically inquired about the hours in excess of 20 he was working and whether he would be paid for them. He also reaffirmed that he did not have the necessary equipment to complete certain tasks and that he ended up using his own \$120 tree trimmer which broke and was not repairable. Exhibit 1. Again he received no response. On June 26, 2017, having worked approximately 25 hours in excess of the 40 allotted for the two weeks employed, with no apparent prospect of being paid for those excess hours, claimant prepared a written resignation, effective immediately and placed it on his supervisor's desk along with his keys. Claimant quit because he was working over the allotted 20 hours per week without pay, was not provided with the necessary equipment to perform his job duties, and was not given clarification regarding whether he was to honor service requests from the nursery staff.

(4) After claimant restarted his claim in late June 2017, he certified to the Department that he had not worked during the weeks including June 11 through 24, 2017 (weeks 24-17 through 25-17) although he had worked and generated \$325 in earnings working for PSR during week 24-17 and had worked and generated \$406.25 in earnings working for PSR during week 25-17. Finally, for the week ending July 1, 2017 (week 26-17), claimant certified to the Department that he had not quit a job during that week although he had quit his job with PSR on June 26, 2017. However, claimant later realized he had mistakenly failed to report his earnings and work separation, and after claimant received his paycheck from PSR on July 11, he sent a copy of the check along with an explanation concerning his reporting mistakes to the Department in an effort to correct them all. Record Documents.

(5) Each week from June 11, 2017 through August 5, 2017 (weeks 24-17 through 31-17), claimant filed claims for and was paid his weekly benefit amount. Claimant, having originally omitted true and accurate information about hours and earnings during weeks 24-17 and 25-17 and a potentially disqualifying work separation during week 26-17 from his claims filing, the Department concluded it had erroneously overpaid claimant in benefits for those weeks in the total amount of \$2,935 and issued

Decision # 195652. \$2478 of the overpayment amount was attributed to benefits claimant received as a result of his work separation, which the ALJ concluded was without good cause.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with PSR with good cause and accordingly is not liable to repay \$2478 in benefits received as a result of his work separation. We agree with the ALJ that claimant originally misreported his earnings during weeks 24-17 and 25-17 and was overpaid \$457 in unemployment insurance benefits as a result, which he must repay, but is not liable for a monetary penalty or penalty weeks for any misrepresentations originally made.

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

In Hearing Decision 17-UI-96625, without finding that claimant had worked approximately 25 hours over the allotted 40 over the two weeks employed without pay, the ALJ concluded claimant left work without good cause, reasoning, that he had the reasonable alternative of continuing to work for the employer until his supervisor responded and that claimant had not established that that alternative was futile. Hearing Decision 17-UI-96625 at 3. We disagree.

The ALJ ignored that the two people who trained claimant essentially told him that he was expected to work more than 20 hours every week but only report 20 hours of work on his time card. After working on his own for several days, claimant realized that extra hours would, in fact, be necessary to complete his job duties and sought clarification about payment from his supervisor. Claimant also was put in a position where he lacked the tools needed to do his work and experienced a personal loss of equipment as a result. On this record, claimant made at least eight separate efforts to contact the supervisor and specifically told him about the working off the clock and the equipment issue, without any response.

Viewed objectively, being told that one was expected to work certain hours for free by trainers and getting no response from the supervisor in question when you question him about it repeatedly using several methods designed to get a response, amounts to a grave situation. More likely than not, given the admonitions of claimant’s trainers and his own experience over the period of his employment, the employer’s payroll practices violated ORS 652.120, which requires employers to “establish and maintain a regular payday, at which date the employer shall pay all employees the wages due and owing to them.” Given that claimant got no response despite substantial efforts to obtain clarification, on this record, claimant established that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working indefinitely for an employer who failed to pay him in accordance with state law on an ongoing basis, or even clarify the situation. *Compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute is not ongoing, and only the issue of back pay restitution continues to exist, claimant did not have good cause to quit work);

J. Clancy Bedspreads and Draperies v. Wheeler, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute was ongoing).

Accordingly, claimant voluntarily left work with good cause and is not disqualified from receiving unemployment insurance benefits on the basis of his 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.*

Because we have concluded that claimant voluntarily left work with good cause, the Department did not overpay claimant \$2,478 in benefits based on his work separation. However, we agree with the Department and ALJ that claimant underreported his hours and earnings for weeks 24-17 and 25-17, and received benefits he was not eligible to receive. He was, therefore, overpaid \$457 based on the Department's exhibit with which we agree. The Department paid benefits to claimant because, when he filed his initial two claims for benefits in June 2017, he withheld information about his hours and earnings with PSR. Claimant's failure to report his earnings amounted to false statements or failures to disclose material facts. 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.

We also agree with the ALJ that given claimant's letter to the Department on July 12, 2017 explaining that he had mistakenly claimed benefits, the record fails to show that claimant willfully failed to report those material facts to obtain benefits. Hearing Decision 17-UI-96626 at 6.

In sum, claimant was overpaid and must repay the Department \$457 in regular benefits, but is not liable for any monetary penalty or penalty weeks.

DECISION: Hearing Decision 17-UI-96625 is set aside, as outlined above. Hearing Decision 17-UI-96626 is modified, as outlined above.

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

DATE of Service: December 29, 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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