

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1464

Hearing Decision 17-UI-97806 Affirmed
Disqualification
Hearing Decision 17-UI-97807 Affirmed
Overpayment Assessed

PROCEDURAL HISTORY: On June 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 95214). On July 12, 2017, decision # 95214 became final without claimant having requested a hearing. On October 10, 2017, the Department served notice of an administrative decision assessing a \$648 overpayment based on decision # 95214 (decision # 170433). On October 30, 2017, claimant filed a late request for hearing on decision # 95214 and a timely request for hearing on decision # 170433. On November 21, 2017, ALJ S. Lee conducted hearings, and on November 29, 2017 issued Hearing Decision 17-UI-97806 allowing claimant's late request for hearing on decision # 95214 and affirming that decision, and Hearing Decision 17-UI-97807 affirming decision # 170433. On December 19, 2017, claimant filed applications for review of Hearing Decisions 17-UI-97806 and 17-UI-97807 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-97806 and 17-UI-97807. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1463 and 2017-EAB-1464).

Based on a *de novo* review of the entire record and pursuant to ORS 657.275(2), the ALJ's findings and analysis in Hearing Decision 17-UI-97806 allowing claimant's untimely request for hearing on decision # 95214 are **adopted**.

FINDINGS OF FACT: (1) Bay House employed claimant as a bartender and a server from May 5, 2017 until May 28, 2017.

(2) The employer's owner recruited claimant to work in the employer's restaurant because claimant was likable and very experienced in serving restaurant customers. During claimant's employment, the employer was pleased with claimant's work performance. The restaurant the employer operated had a

small staff. The employer's owner generally notified claimant and other staff members daily if the employer needed them to work.

(3) Sometime around Wednesday, May 17, 2017, claimant was working as a server. Claimant informed the owner that a particular customer had requested some wine and pointed at the customer to identify her. The owner blocked claimant's hand and told claimant that it was inappropriate to point at customers. Claimant was offended that the owner had physically touched him.

(4) On Thursday, May 18, 2017, claimant had an angry verbal exchange with another server when that server tried to maneuver him out of a doorway in which he had stopped while conversing with other coworkers. Claimant was offended that the other server had tried to steer him out of the doorway.

(5) On Friday, May 19, 2017, claimant was standing in front the dish window to the kitchen speaking to the dishwasher who was in the kitchen. The same server with whom claimant had exchanged words the day before came up to the dish window intending to drop off an armload of dishes for washing. As that server pushed the dishes through the dish window, the server made contact with claimant's person. Claimant perceived that the other server had "grabbed" him. Transcript of 9:30 a.m. hearing (Transcript 1) at 17. Claimant was "livid" that the other server had touched him. Transcript 1 at 17. Claimant and the other server exchanged angry words and the owner told both to "knock it off." Transcript 1 at 17. The restaurant was busy and the owner intended to speak to claimant and the other server later about what had happened, but claimant left for home before the owner was able to speak with him.

(6) On Saturday, May 20, 2017, claimant called the restaurant and left a message stating that he was sick and not able to work that day. The owner called claimant back that day to check on him, but was not able to reach him. The owner then sent claimant a text message inquiring how claimant was feeling and asking claimant to contact him about working on Sunday.

(7) On Sunday, May 21, 2017, the owner sent claimant another text message to learn if his condition had improved. Claimant responded to that message, stated that he was better and that there were some things he wanted to discuss with the owner. Claimant then recounted at length his dissatisfaction with the behavior of the other server, mentioned that the owner had also offended him by once grabbing at his hand and stated, "I will completely understand if you would like [us] to go [our] separate ways." Transcript 1 at 42. The owner replied by text message at length. Among other things, the owner mentioned that "we should get together for a chat if you think that this is the team for you." Transcript 1 at 42-43. The owner expressed that he understood how claimant might have been upset at the other server having "nudged" him at the dish window, and that the other server sometimes had a temper. Transcript 1 at 43. The owner also stated that he could not recall having grabbed at or touched claimant, but apologized if he had done so. Transcript at 43. After addressing the complexities of managing the staff in the restaurant, the owner concluded that "if this is the place you want to work I'd be happy to get together to talk about it," "it's not easy and it's not for everyone," and "get back to me when you can so we can talk." Transcript 1 at 45. The owner also told claimant that he did not need to work that day since only four restaurant reservations had been made. Claimant did not promptly reply to the owner's final text message that day. The restaurant was closed on Monday and Tuesday, May 22 and 23, 2017.

(8) Three days later, on Wednesday, May 24, 2017, claimant called and left voicemail message for the owner asking "what's going on with work?" Transcript 1 at 21. The owner never received the message.

On Sunday, May 28, 2017, not having heard from the owner, claimant sent a text message to the owner, greeting him and stating that he was “getting in touch with you to see if I could bring by your aprons [i.e., work uniform],” inquiring about picking up his final check, and thanking the owner for providing him the “nice opportunity” to work. Transcript 1 at 47. Based on this text message the owner concluded claimant had left work because it was not a “good fit” for him. Transcript a 1 at 47.

(9) On May 29, 2017, claimant filed an additional claim for unemployment insurance benefits. When he made this claim, claimant represented to the Department that the employer had laid him off. Claimant’s additional claim was determined valid with a weekly benefit amount of \$216. Claimant claimed and was paid benefits for the weeks of May 29 through June 17, 2017 (weeks 22-17 through 24-17), the weeks at issue. Claimant was paid a total of \$648 for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. Claimant was overpaid \$648 in benefits for week 22-17 through 24-17 that he is liable to repay or to have deducted from any future benefits otherwise payable to him.

The Work Separation. Claimant contended that he did not quit work, but stopped reporting for work as of May 28, 2017 because he was under the impression that the employer had let him go. Transcript 1 at 16, 19, 30, 31. The employer’s owner contended that the employer had not discharged claimant and that, based on claimant’s May 28, 2017 text message, he thought that claimant had quit. Transcript 1 at 47, 48. Consequently, the first issue to be addressed is the nature of the work separation. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Neither party alleged that the employer’s owner ever told that claimant that he was discharged or fired, or that claimant ever stated outright to the employer that he was quitting. Transcript of 10:45 hearing (Transcript 2) at 7. Rather, both made inferences from the communications between claimant and the owner on May 21 and 28, 2017, and the owner’s failure to respond to the claimant’s May 24, 2017 voicemail message. At hearing, the owner credibly testified that if claimant left a voicemail message for him on May 24, 2017, he never received it. Transcript 1 at 46. Assuming claimant left a message that day inquiring about upcoming work, there was nothing in the owner’s communications with him prior to that day suggesting that the owner planned to, or would, discharge claimant. Indeed, in the May 21, 2017 text message exchange that most immediately preceded claimant’s May 24, 2017 voicemail, the owner expressed sympathy with claimant’s complaints, was conciliatory and repeatedly stated he was willing to speak with claimant if claimant still wanted to be “pursue a spot on the team.” Transcript 1 at 47. Viewed in this context, it was not reasonable for claimant to draw an unsupported inference from the owner’s alleged failure to respond to the May 24, 2017 voicemail message. However, also viewed in context, it was reasonable for the owner to conclude from claimant’s May 28, 2017 text message, in which he stated he was going to return his work attire and inquired in detail about receiving his final paycheck, that claimant was expressing that he had already decided to quit work. The first objective and unequivocal manifestation of an intention to sever the work relationship was by claimant in his May 28, 2017 text message to the owner. On this record, claimant’s work separation was a voluntary leaving on May 28, 2017.

Good Cause for 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 testified that sent the May 28, 2016 text message to the owner, which evidenced his intention to leave work, because he “assumed” he no longer had a job based on the owner’s alleged failure to respond to the voicemail message he left on May 24, 2017. Transcript 1 at 31. Claimant’s misunderstanding of the owner’s intentions was therefore the proximate cause of claimant’s decision to leave work. However, claimant could have but did not communicate with the owner to confirm whether or not the owner had actually received the voicemail message, whether or not the owner intended to discharge him or whether or not he had misunderstood the significance of the owner’s failure to respond to the May 24, 2017 voicemail message. A reasonable and prudent person in claimant’s circumstances would not have decided to leave work based solely on the owner’s non-response to one voicemail message when the owner had not previously communicated anything from which it could reasonably be inferred that the owner had reservations about claimant’s continued employment. Rather, a reasonable and prudent person would have confirmed whether the employer was unwilling to allow him to continue working before sending a communication like the May 28, 2017 text message.

Claimant did not show that he had good cause for leaving work when he did, and is disqualified from receiving unemployment insurance benefits.

Overpayment. If an individual received any benefits to which the individual is 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 or failed to disclose a material fact, the individual is liable to repay the amount of the benefits to the Department or to have that amount deducted from any future benefits otherwise payable to the individual.

Claimant agreed that he represented to the Department that the employer had laid him off when he applied for the unemployment insurance benefits that resulted in his receipt of \$648 in benefits for weeks 22-17 through 24-17. Transcript 2 at 7. Claimant also did not dispute that if he had informed the Department that he had quit, he would not have been paid those benefits. Transcript 2 at 6. While claimant genuinely might have not have known how to characterize the work separation when he applied for benefits, decision # 95214, which EAB affirmed in Appeals Board Decision 2107-EAB-1463, establishes as a matter of law both that claimant’s work separation was a voluntary leaving without good cause, and that claimant’s representation that he was laid off was false. Even if claimant’s error in characterizing the work separation was innocent, it was nonetheless an error that resulted in him receiving benefits to which he was not entitled. Thus, under ORS 657.310(1), claimant is liable to repay the \$648 he received based on that error or to have that amount deducted from any future benefits otherwise payable to him.

DECISION: Hearing Decisions 17-UI-97806 and 17-UI-97807 are affirmed.

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

DATE of Service: January 23, 2018

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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