

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0123

Hearing Decision 18-UI-101280 Affirmed – Disqualification
Hearing Decision 18-UI-101299 Modified – Overpayment, No Penalties

PROCEDURAL HISTORY: On May 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 143236). On May 31, 2016, the Department served notice of another administrative decision assessing a \$2,652 overpayment, \$397.80 monetary penalty and 19 penalty weeks (decision # 200342). On June 2, 2016, decision # 143236 became final without claimant having filed a timely request for hearing. On June 20, 2016, decision # 200342 became final without claimant having filed a timely request for hearing. On November 21, 2017, claimant filed a late request for hearing on decisions # 143236 and 200342. On November 30, 2017, ALJ Kangas reviewed claimant's request and issued Hearing Decision 17-UI-97923, dismissing claimant's late request for hearing on decision # 143236, and Hearing Decision 17-UI-97921, dismissing claimant's late request for hearing on decision # 200342, both subject to claimant's right to renew the requests by responding to an appellant questionnaire by December 14, 2017. On December 6, 2017, claimant responded to the questionnaires. On December 14, 2017, the Office of Administrative Hearings (OAH) mailed letter stating that Hearing Decisions 17-UI-97923 and 17-UI-97921 were canceled. On January 12, 2018, ALJ Seideman conducted hearings on both decisions, and on January 19, 2018 issued Hearing Decision 18-UI-101280, allowing claimant's late request for hearing on decision # 143236 and affirming that decision, and Hearing Decision 18-UI-101299, allowing claimant's late request for hearing on decision # 200342 and affirming that decision. On February 1, 2018, claimant filed a timely application for review of Hearing Decisions 18-UI-101280 and 18-UI-101299 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 18-UI-101280 and 18-UI-101299. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0123 and 2018-EAB-0126).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portions of the hearing decisions under review in which the ALJ allowed claimant's late requests for hearing are **adopted**. The remainder of this decision therefore focuses only on claimant's work separation and the overpayment and penalties issues.

FINDINGS OF FACT: (1) On January 4, 2016, claimant filed an initial claim for unemployment insurance benefits.

(2) Portland Commercial Coatings LLC employed claimant as a painter beginning February 29, 2016. Claimant last worked for the employer on March 12, 2016. During the week ending March 12, 2016, claimant worked 37.5 hours for the employer.

(3) Claimant wanted to continue working after March 12th but believed he received a text message from the owner stating that there was no more work. The owner believed claimant sent him a text message on March 15th or March 16th stating that he was leaving work to move to Washington. Claimant did not intend to leave work and did not move to Washington. At the time, however, the owner had continuing work available for a painter, and had to hire a new person to replace claimant after claimant stopped working.

(4) Claimant filed weekly unemployment insurance claims from March 13, 2016 to May 7, 2016. He reported to the Department that he was unemployed because Portland Commercial Coatings LLC had laid him off work effective March 12, 2016. Based in part upon claimant's reported layoff, the Department paid claimant \$2,652 in unemployment insurance benefits during that period.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause. We also agree with the ALJ that claimant was overpaid \$2,652 in unemployment insurance, but disagree that he made misrepresentations and is liable for penalties as a result.

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).

The events in this case occurred approximately two years prior to the hearing. Neither claimant nor the employer possessed record of the text messages they exchanged in March 2016 or read those messages into the record, and the events occurred far enough in the past that it appeared during the hearing that neither party had a precise recollection of what happened. The most definitive evidence in the record about the availability of continuing work after March 12, 2016 were the employer's pay stub records showing that the employer had 37.5 hours of work available to claimant during the last week he worked, and the employer's recollection that he had to hire a new painter to replace claimant after claimant stopped working. The fact that the employer had nearly full time work for claimant during his final week of work and had to replace him strongly suggest that the employer had continuing work available to claimant such that he could have continued to work for the employer for an additional period of time after March 12, 2016. The work separation was, therefore, a 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). 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 left work because he believed the employer did not have any additional work for him and had laid him off work. The employer testified that he had additional work for claimant and did not lay him off work. In Hearing Decision 18-UI-101280, the ALJ suggested that the employer was more credible than claimant in this case, and implied that claimant's testimony was not truthful. *See* Hearing Decision 18-UI-101280 at 3. We disagree. We have reviewed the hearing record in its entirety and found no reason to believe or disbelieve the testimony of either party over the other. It is more likely than not that the discrepancies in their testimony occurred either because the parties misunderstood or miscommunicated with each other about the availability of continuing work in March 2016, or because the length of time that has passed since the events at issue occurred resulted in both parties failing to recollect exactly what happened to end claimant's employment. Either way, there was nothing about either party's testimony that made either party inherently more or less credible than the other, and the evidence about what happened to cause claimant to leave work was, at best, equally balanced. Where the evidence is equally balanced, claimant, the party with the burden of persuasion, has failed to show that he voluntarily left work with good cause. We therefore conclude that claimant voluntarily left work without good cause, and is subject to disqualification from receiving benefits.

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.* An individual who willfully made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation is liable for a penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2). In an overpayment case, the Department has the burden to prove by a preponderance of the evidence that claimant was overpaid and made a misrepresentation. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Having previously concluded that claimant voluntarily left work with the employer without good cause, he was therefore disqualified from receiving unemployment insurance benefits because of that work separation. However, the record shows that the Department paid claimant \$2,652 in unemployment insurance benefits, making claimant overpaid. The Department paid claimant those benefits based upon his report to the Department that he had been laid off work by the employer; we have concluded that he voluntarily left work, however, making claimant's report that he was laid off false. Regardless of claimant's knowledge or intent in making that false report to the Department, he is liable to either repay those benefits to the Department or have the overpayment deducted from any future benefits otherwise payable to him.

However, in Hearing Decision 18-UI-101299, the ALJ wrote that "[c]laimant knew that he voluntarily left work, rather than being laid off, and misrepresented that fact." The ALJ therefore concluded that claimant's overpayment was the result of an intentional misrepresentation on claimant's part that

subjected him to a monetary penalty and penalty weeks. *See* Hearing Decision 18-UI-101299 at 4. We disagree.

Claimant sincerely and candidly testified throughout two hearings that he believed the employer had laid him off work. It follows that he sincerely thought his report to the Department that he had been laid off work was accurate. The fact that claimant and the employer did not agree about how the employment relationship ended when testifying about the end of that relationship two years after-the-fact, without documentary evidence or contemporaneously-made statements to refresh their recollections, does not mean that claimant's version of events amounted to an intentional misrepresentation. We find it just as likely as not that claimant reported his separation as a layoff because of a miscommunication or misunderstanding as it is that he did so with the intent to make a misrepresentation in order to obtain benefits he was otherwise not entitled to receive. Because the preponderance of the evidence does not establish that claimant was overpaid because he made a misrepresentation, the record fails to support the assessment of penalties in this case. We therefore conclude that although claimant was overpaid benefits that he is liable to repay or have deducted from future benefits, he is not liable for a monetary penalty or the assessment of penalty weeks.

DECISION: Hearing Decision 18-UI-101280 is affirmed. Hearing Decision 18-UI-101299 is modified, as outlined above.

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

DATE of Service: March 5, 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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