

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0599

*Order No 18-UI-110561 - Affirmed
Disqualification
Order No. 18-UI-110566 - Affirmed
Overpayment; No Penalties*

PROCEDURAL HISTORY: On February 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100643). On February 22, 2018, the Department served notice of an administrative decision assessing a \$2,360 overpayment, a \$354 monetary penalty and 16 penalty weeks based on decision # 100643 (decision # 194146). On March 13, 2018, decision # 100643 became final without a request for hearing having been filed and on March 14, 2018, decision # 194146 became final without a request for hearing having been filed. On March 22, 2018, claimant filed an untimely request for hearing on decision # 194146. On April 25, 2018, ALJ S. Lee convened a hearing on decision # 194146 and continued the hearing to allow claimant to file a request for hearing on decision # 100643. On April 25, 2018, claimant filed an untimely request for hearing on decision # 100643.

On April 30, 2018, ALJ Kangas issued Order No. 18-UI-108387, dismissing claimant's request for hearing on decision # 100643 as untimely filed, subject to renewing that request by completing and filing the Appellant Questionnaire enclosed with the decision within 14 days from the date the decision was mailed. On May 7, 2018, claimant filed a completed Appellant Questionnaire. On May 9, 2018, the Office of Administrative Hearings issued a letter order vacating Order No. 18-UI-108387 and returning the matter to the docket for the scheduling of a hearing to address the timeliness of claimant's request for hearing on decision # 100643 and, if appropriate, the merits of decision # 100643. On May 24, 2018, ALJ S. Lee conducted a consolidated hearing to address the issues relating to decisions # 100643 and # 194146. On June 1, 2018, ALJ Lee issued two orders, Order No. 18-UI-110561, allowing claimant's untimely request for hearing on decision # 100643 and affirming the merits of decision # 100643 and Order No. 18-UI-110566, allowing claimant's late request for hearing on decision # 194146 and modifying decision # 194146 to assess a \$1,770 overpayment, but no penalties. On June 12, 2018, claimant filed applications for review of Order No. 18-UI-110561 and Order No. 18-UI-110566 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-110561 and 18-UI-110566. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0598 and 2018-EAB-0599).

Claimant submitted a written argument, but failed to certify that she provided a copy of that argument to the other parties required by OAR 471-041-0080(2) (a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, but claimant did not explain why she was unable to present the information at the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that she was prevented from doing so by factors or circumstances beyond her reasonable control. For these reasons, EAB did not consider claimant's argument or the new information she sought to present when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusions in Order Nos. 18-UI-110561 and 18-UI-110566 that claimant's late requests for hearing are allowed, and in Order No. 18-UI-110566 that claimant is not liable for misrepresentation penalties, are **adopted**.

FINDINGS OF FACT: (1) On March 17, 2017, claimant filed a claim for unemployment insurance benefits. Claimant's claim was determined valid and had a weekly benefit amount of \$590. Thereafter, claimant claimed benefits for some benefit weeks.

(2) Sometime in June 2017, the Oregon State Board of Nursing (OSBN) issued a certified nursing assistant (CNA) 1 license to claimant. The license was valid for two years and could be renewed without re-testing if claimant performed 400 hours of specified CNA work during the two years her license was current. Claimant wanted to pursue training as a CNA 2. Claimant wanted to obtain employment that would enable her to develop technical skills as a CNA as well as allow her to accrue CNA hours for purposes of the renewal of her CNA 1 license.

(3) Sometime before June 30, 2017, claimant applied for a position with Capitol Manor, Inc., a retirement community. Claimant thought she was applying for a CNA 1 position. Later, claimant had an in-person interview with the employer's administrator. The administrator offered claimant an on-call position that paid approximately \$12 per hour. The administrator was offering claimant a position as a caregiver. Claimant accepted the position, was issued a uniform and badge and was scheduled for an orientation on June 30, 2017. Claimant continued to think the administrator had offered her a CNA position.

(4) On June 30, 2017, claimant attended an orientation for the position she had accepted with the employer. During the orientation, claimant learned that the employer had hired her for a caregiver position and not a CNA position. Claimant was unhappy because she thought she would not be practicing CNA skills or learning new CNA technical skills. Claimant was also concerned that if she did not work in a position that was titled as a CNA position she would not be able to accrue hours of CNA work that she needed to renew her CNA license without re-testing. Claimant was paid for attending the orientation.

(5) On July 2, 2017, claimant sent an email to the employer's administrator notifying the administrator that she was not going to continue working for the employer because she had learned that she would not be performing CNA work, but caregiving work. Claimant stated that she needed to work as CNA to be able to renew her CNA 1 license re-testing. Claimant also stated she would return the uniforms and badge the employer had provided to her. On July 3, 2017, the administrator responded to claimant's email. The administrator stated to claimant that, although the title of the position was not that of CNA, she would be practicing and learning skills that would be accepted by the OSBN as hours toward renewing her CNA license without re-testing. Claimant did not inquire further of the administrator about accruing hours toward the renewal of her CNA license.

(6) Claimant claimed unemployment insurance benefits for the weeks of July 2, 2017 through July 22, 2017 (weeks 27-17 through 29-17), the weeks at issue. Claimant was paid \$590 in benefits for each of the weeks at issue, for a total of \$1,770.

(7) When claimant filed her claim for benefits for week 27-17, the week in which July 2, 2017 fell, claimant answered "no" in response to the question, "Did you quit a job last week?" Transcript at 34. Claimant did not think her attendance at an orientation for a caregiving position with the employer meant that she had taken a job with the employer, particularly when she had thought she was applying for and had accepted a CNA 1 position. In the subsequent weeks at issue, claimant did not disclose she had left a job. Had claimant revealed that she had left on job on July 2, 2017, she would not have been paid benefits for weeks 27-27 through 29-17 unless and until a Department investigation determined that she had left work for good cause.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. Claimant was overpaid \$1,770 in benefits and is liable to repay those benefits or have them deducted from any future benefits otherwise payable to her.

The Work Separation. Claimant did not dispute that she was unwilling to work for the employer in any capacity other than as a CNA, and that after she learned at a paid orientation she had been hired for a caregiving position, she did not report for further work for the employer. However, claimant contended in essence that since she misunderstood the nature of the job with the employer she was never hired by the employer and a work relationship, or an employee-employer relationship, was never established. An "employee" means any person employed for remuneration or under any contract of hire, written or oral, express or implied by an employer. ORS 657.015.

It was not disputed that the employer thought it had offered to claimant a paying job as caregiver, which it thought claimant had accepted by accepting a badge and uniform and attending the orientation. While claimant might have been unilaterally mistaken about the nature of the job she was accepting, by her actions, she objectively manifested an intention to accept the caregiver job the employer offered to her. There was no evidence that the employer had actual knowledge or should have known of claimant's mistake, or that the employer's inequitable behavior caused claimant's mistake. On this record, an employment relationship was established between claimant and the employer on June 30, 2017. By claimant's stated unwillingness to work as a caregiver after July 2, 2017, claimant voluntarily left work. *See* OAR 471-030-0038(2) (August 11, 2011). Whether claimant was justified in refusing to work for the employer in any position other than as a CNA is properly considered in an evaluation of whether claimant had good cause to leave work as caregiver.

The Voluntary Leaving. 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). 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.

Claimant’s principal justification for refusing to work for the employer as a caregiver or in any capacity other than as a CNA was that, as a caregiver, she would not improve her CNA skills or accrue hours toward the 400 work hours she needed to allow her to renew her CNA license in June 2019 without re-testing. Transcript at 18-20. Claimant is correct that she is required, among other things, to accrue 400 hours of paid employment “within the CNA authorized duties” to avoid being re-tested. OAR 851-062-0070(c)(A) (January 1, 2015). “CNA authorized duties” appear to encompass many duties that a caregiver would perform, including, for example, communicating, interpersonal skills, hands on care, assisting in daily tasks, etc. OAR 851-063-0030(1)(a) (January 1, 2015). It appears that the employer’s witness and the employer’s administrator may have been correct when stating that hours spent in many caregiver tasks would count toward the 400 hours that claimant needed to accrue by 2019. Transcript at 27-28. On this record, claimant did not show that working as a caregiver constituted a grave situation because she would not have been able to accrue hours toward renewing her CNA license in 2019.

While caregiving would not have allowed claimant to perform more complex CNA duties, she did not dispute the employer’s testimony that many of its caregivers had CNA licenses when hired and had advanced from those caregiving positions to CNA positions. Transcript at 26. Aside from asserting that she desired immediate work as a CNA, claimant did not show that working for the employer as a caregiver for a period of time while waiting for the opportunity to be promoted to a CNA position constituted a grave situation. Given the substantial overlap between caregiver and at least some CNA duties, claimant also did not establish that work as a caregiver was not suitable for her due to her training and experience. ORS 657.190. On this record, claimant did not establish that beginning to work for the employer as a caregiver rather than a CNA constituted a grave situation from which she had no reasonable alternative other than to leave work. Claimant did not show good cause for leaving work when she did and is disqualified from receiving unemployment benefits based on that work separation.

Overpayment. An individual who leaves work without good cause is disqualified from receiving unemployment benefits. ORS 657.176(2)(c). An individual who is disqualified from benefits is not eligible to receive benefits based on that disqualifying event. ORS 657.155(e). An individual who receives benefits to which the individual is not entitled because the individual, regardless of the individual’s knowledge or intent, made or caused to be a false statement or misrepresentation of a material fact or failed to disclose a material fact is liable to repay the amount of those benefits or to have the amount of those benefits deducted from any future benefits otherwise payable to the individual. ORS 657.310(1).

Decision # 100643, which EAB upheld above, establishes as a matter of law that claimant voluntarily left employment with the employer without good cause, and is disqualified from benefits based on that work separation. Claimant necessarily, as a matter of law, failed to disclose a material fact when she did not report that work separation to the Department, regardless of her intention in failing to do so and even if she innocently believed that she had not quit a job with the employer. Claimant did not dispute that the Department would not have paid her \$1,770 in benefits for weeks 27-17 through 29-17 had she disclosed her work separation from the employer when claiming benefits. Under ORS 657.310(1), claimant is liable to repay \$1,770 to the Department or to have \$1,770 deducted from any future benefits otherwise payable to her.

DECISION: Order Nos. 18-UI-110561 and 18-UI-110566 are affirmed.

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

DATE of Service: July 16, 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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