

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0639

Order No. 18-UI-110778 ~ Affirmed ~ Disqualification
Order No. 18-UI-110779 ~ Reversed ~ No Penalties

PROCEDURAL HISTORY: On April 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120510). On April 25, 2018, the Department served notice of an administrative decision concluding claimant willfully made a misrepresentation to obtain benefits and was disqualified from four weeks of future benefits (decision # 194005). Claimant filed timely requests for hearing on decisions # 120510 and # 194005. On June 5, 2018, ALJ Seideman conducted hearings on both administrative decisions, and on June 6, 2018 issued Order No. 18-UI-110778 affirming decision # 120510 and Order No. 18-UI-110779 affirming decision # 194005. On June 23, 2018, claimant filed applications for review with the Employment Appeals Board (EAB) regarding Order Nos. 18-UI-110778 and 18-UI-110779.

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order Nos. 18-UI-110778 and 18-UI-110779. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0639 and 2018-EAB-0640).

FINDINGS OF FACT: (1) Quality Builders Group employed claimant from December 2017 until February 28, 2018 performing quality control and construction work, and supervising employees installing siding.

(2) By February 2018, claimant had become dissatisfied with his wage rate and benefits because he did not believe his wages compensated him for all his work duties. Claimant proposed an increase in his wage and benefits to the owner. The owner offered to discuss the matter with claimant, but at times that claimant found inconvenient to talk. Other times when claimant raised the matter with the owner, the owner told claimant he was too busy to talk.

(3) On February 28, 2018, claimant sent the owner a text message stating, "Sorry that you think your profit margin would be better with someone else. I will collect my belongings from the job site tomorrow." Audio Record at 45:52 to 46:02.

(4) Claimant went to the job site the morning of March 1, 2018, and began removing his tools from the job site. While claimant was at the job site, the owner sent claimant a text message asking him to meet at lunchtime to discuss claimant's proposed benefit and wage increase. Claimant texted back that he was busy removing his tools from the job site. The owner then called claimant and claimant explained that he was going to continue removing his tools. The owner hung up on claimant, and claimant believed it was intentional because the owner did not call claimant back at that time. Claimant did not call the owner back and left the work site with his tools.

(5) The evening of March 1, 2018, the owner sent claimant a text message telling claimant to provide his unpaid hours that he had worked to date. The owner asked claimant to return the remainder of the employer's work implements.

(6) Claimant never told the employer that he was quitting. The owner never told claimant that the employer was discharging him or laying him off work. Neither the employer nor claimant contacted each other regarding additional work.

(7) On March 31, 2018, claimant filed an initial claim for unemployment insurance benefits. Claimant stated to the Department when he filed his initial claim online that the employer laid him off on March 1, 2018 due to a lack of work.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant voluntarily left work without good cause. We disagree with the ALJ that claimant willfully made misrepresentations to obtain benefits and is liable for penalties as a result.

Nature of the Work Separation. 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) (January 11, 2018). 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 parties disagreed as to the nature of the work separation. However, it is undisputed that claimant sent the employer a text message on February 28, 2018 stating he was dissatisfied with his wage rate and would be removing his tools from the job site. It is also undisputed that claimant refused to meet with the owner on March 1 and proceeded to remove his tools. Claimant testified that he intended to pressure the owner into giving him a higher wage by removing his tools on March 1, and intended to meet with the owner on March 2 instead of March 1 because he had the day off work on March 1. Audio Record at 29:21 through 32:55. However, viewed objectively, claimant's conduct and statements, and not those of the owner, initiated the work separation. The owner was willing to continue employing claimant as was shown by his offer to meet with claimant on February 28 to discuss his wage rate. Claimant did not contact the owner to tell him he would discuss his wage another time or otherwise show he was willing to continue working for the employer after his text to the owner on February 28. Although the owner sent claimant a text message asking for claimant's unpaid hours, he only did so after claimant refused to

meet with him and left the work site with his tools. The preponderance of the evidence shows that claimant was not willing to continue working for the employer without having received a raise by February 28. The work separation was, therefore, a voluntary quit.

Voluntary Quit. 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*, 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.

Although claimant asserted that the employer laid him off because it wanted to give claimant’s work to employees who required lower wages, we infer from the timing of claimant’s text message on February 28 and his refusal to meet with the owner on March 1 that claimant left work because he was dissatisfied that the employer did not respond to his request for a wage increase by February 28. The record does not show that claimant’s cost of working exceeded his remuneration or that quitting work improved his financial situation in any way. Moreover, although claimant was dissatisfied that the employer had not given him a raise by February 28 and wanted to meet with claimant to discuss a raise on March 1 when claimant was allegedly scheduled to be off work, the record does not show that either of these factors presented a grave situation for claimant. Absent such showings, we cannot find that no reasonable and prudent person in claimant’s situation would have continued to work for his employer for an additional period of time. Claimant quit work without good cause, and therefore is disqualified from receiving benefits based on his work separation from the employer.

Penalty Weeks. There is no overpayment in this case because the Department did not pay benefits. However, 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. By logical extension of the holding in *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976), a claimant who did not receive benefits during the weeks for which his eligibility is at issue has the burden to show that he was eligible to receive those benefits. Here, since the Department did not pay claimant benefits, claimant must show by a preponderance of the evidence that he did not willfully make a false statement or misrepresentation, or willfully fail to report a material fact to obtain benefits.

Because claimant voluntarily left work, claimant made a false statement to the Department when he certified to the Department that he was laid off from work with the employer. In Order No. 18-UI-110779, the ALJ found that the administrative decision concluding that claimant voluntarily left work was “binding,” not having been reversed by the ALJ, and summarily concluded that claimant’s misrepresentation was willful, noting only that claimant had ten prior unemployment benefit claims and “was familiar with the rules and the process.”¹ The Department’s witness asserted at hearing that willful misrepresentation was established because claimant certified that he agreed to an advisory stating that he understood the questions being asked and his answers were true to the best of his knowledge when he

¹ Order No. 18-UI-110779 at 3.

filed his initial claim, and because claimant had previously filed ten valid claims and completed a Department class about how to file claims. Audio Record at 6:48 to 8:55. We disagree that the record shows claimant's misrepresentation was willful.

Claimant testified consistently throughout the work separation and penalty week hearings that he did not intend to quit work on February 28 or March 1, 2018 and believed the employer had laid him off work when the owner asked him to report his unpaid hours on March 1. It follows that he sincerely thought his report to the Department that he had been laid off work was accurate, or at least that the circumstances of his work separation were ambiguous enough that his report that he had been laid off work was not willfully inaccurate. Moreover, claimant's "experience" in filing unemployment benefits claims would not necessarily enable him to determine the legal nature of his work separation. That the outcome of the work separation hearing was to affirm the administrative decision disqualifying claimant from benefits because he quit work without good cause does not show that claimant's version of events amounted to an intentional misrepresentation. The preponderance of the evidence shows claimant likely sincerely believed he had been laid off work due to a series of miscommunications with the owner and erroneous assumptions about the owner's reasons for disconnecting from his call or not calling him back after the disconnection. Therefore, his statement to the Department was not intentionally inaccurate and the record fails to support the assessment of penalties in this case. We therefore conclude that claimant is not liable for the assessment of penalty weeks.

DECISION: Order No. 18-UI-110778 is affirmed. Order No. 18-UI-110779 is reversed as outlined above.

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

DATE of Service: July 27, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.