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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0073

Order No. 21-UI-182174 ~ Affirmed ~ Disqualification
Order No. 21-UI-182188 ~ Affirmed ~ Overpayment, No Penalties

PROCEDURAL HISTORY: On August 25, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 72111). On August 26, 2020, the Department served notice of an administrative decision, based in part on decision # 72111, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a $2,265 overpayment of regular unemployment insurance benefits, a $9,000 overpayment of Federal Pandemic Unemployment Compensation (FPUC), a $339.75 monetary penalty, and 14 penalty weeks. On September 14, 2020, decision # 72111 became final without claimant having filed a request for hearing. On September 15, 2020, the August 26, 2020 administrative decision became final without claimant having filed a request for hearing.

On February 18, 2021, claimant filed late requests for hearings on decision # 72111 and the August 26, 2020 administrative decision. On August 20, 2021, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on September 1, 2021 to consider claimant's late requests for hearings on decision # 72111 and the August 26, 2020 administrative decision and, if allowed, the merits of those decisions. On September 1, 2021, ALJ Scott conducted a hearing. On September 8, 2021, ALJ Scott issued Order No. 21-UI-174250, allowing claimant's late request for hearing on decision # 72111 and reversing decision # 72111 by concluding that claimant was discharged, not for misconduct, and was not disqualified from receiving benefits. Also on September 8, 2021, ALJ Scott issued Order No. 21-UI-174279, allowing claimant's late request for hearing on the August 26, 2020 administrative decision and reversing that decision by concluding that claimant did not willfully make a misrepresentation or fail to report a material fact to obtain benefits, and was not liable for an overpayment, penalty weeks, or a

monetary penalty. On September 27, 2021, the employer filed applications for review of Orders No. 21-UI-174250 and 21-UI-174279 with the Employment Appeals Board (EAB). On November 3, 2021, EAB issued EAB Decisions 2021-EAB-0771 and 2021-EAB-0772, adopting that portion of Orders No. 21-UI-174250 and 21-UI-174279 that allowed claimant's late requests for hearing, but reversing Orders No. 21-UI-174250 and 21-UI-174279, and remanding for further development of the record to determine: (1) the nature of the work separation between claimant and the employer; (2) if claimant was discharged, whether the discharge was for misconduct connected with work; (3) if claimant quit work, whether claimant quit work without good cause; (4) if claimant was discharged for misconduct or quit work without good cause, whether claimant received an overpayment of benefits and, if so, whether claimant willfully made a misrepresentation or failed to report a material fact to obtain the benefits, and (5) if so, whether he should be subject to penalty weeks and a monetary penalty.

On December 15, 2021, ALJ Scott conducted a consolidated hearing. On December 17, 2021, ALJ Scott issued Order No. 21-UI-182174, modifying decision # 72111, by concluding that claimant quit work without good cause and was disqualified from receiving benefits effective March 29, 2020.[1] Also on December 17, 2021, ALJ Scott issued Order No. 21-UI-182188, modifying the August 26, 2020 administrative decision by concluding that claimant was liable for a $2,265[2] overpayment of regular benefits and a $9,000 overpayment of FPUC benefits, but was not subject to a monetary penalty or a penalty disqualification from future benefits. On January 6, 2022, claimant filed applications for review of Orders No. 21-UI-182174 and 21-UI-182188 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-182174 and 21-UI-182188. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0072 and 2022-EAB-0073).

WRITTEN ARGUMENT: EAB considered claimant's written argument when reaching this decision.

Based on a *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), Order No. 21-UI-182188, concluding that claimant was liable for a $2,265 overpayment of regular benefits and a $9,000 overpayment of FPUC benefits is **adopted**. The remainder of this decision addresses the merits of Order No. 21-UI-182174.

FINDINGS OF FACT: (1) Liberty Spine & Pain Center PC employed claimant, last as a medical assistant (MA), beginning October 25, 2019. At the time of his hire as an MA, the employer considered claimant to be a temporary MA and created the position for him so that claimant could work. During his period of employment, claimant was a full-time student and his MA job was his main source of income for living and school expenses. Claimant also provided after hours cleaning services to the employer through his commercial cleaning business called "Deluxe Maintenance Services" (Deluxe).

[1] Although Order No. 21-UI-182174 stated that it *affirmed* decision # 72111, it *modified* that decision by changing the effective date of the disqualification from March 22, 2020 to March 29, 2020. Order No. 21-UI-182174 at 7.

[2] Order No. 21-UI-182188 stated that claimant was liable for a "$2,285" overpayment of regular benefits. Order No. 21-UI-182188 at 6. However, the record shows that the Department's August 26, 2020 administrative decision assessed a "$2,265" overpayment of regular benefits. Exhibit 1 at 4. The discrepancy in order No. 21-UI-182188 is presumed to be a scrivener's error and that Order No. 21-UI-182188 meant to assess a $2,265 of regular benefits.

(2) From February 3, 2020 to March 16, 2020, claimant worked as an MA for the employer on Mondays, Wednesdays, and Fridays, anywhere from 20 to 27 hours per week.

(3) On March 17, 2020, "R", who had previously been employed by the employer as an MA, returned to work for the employer as an MA. Prior to "R's" return, the office manager had discussed with claimant the temporary nature of claimant's job, the impending nature of "R's" return, and that "R's" return would impact the amount of hours the employer would have available for claimant.

(4) On March 20, 2020, claimant and the office manager met to discuss the employer's anticipation that claimant's hours would need to be reduced due to "R's" return to work and the anticipated impact of COVID-19 on the number of patients the employer received. At that time, claimant indicated to the employer that he might be better off financially if the employer laid him off and he pursued unemployment insurance (UI) benefits; however, claimant was unsure if he could qualify for UI benefits. From March 16, 2020 to March 20, 2020, claimant worked approximately 35 hours for the employer as an MA.

(5) From March 24, 2020 through March 27, 2020 claimant worked approximately 22 hours for the employer as an MA. At the conclusion of his shift on March 27, 2020, claimant had a conversation with the office manager. During the conversation, the office manager raised concerns about the poor cleaning performance of Deluxe. The conversation also included discussion about claimant's MA hours and whether claimant "wanted to quit or . . . get unemployment because he didn't know [if he qualified]." Transcript at 101. Claimant did not work for the employer again as an MA after March 27, 2020. Claimant filed an initial claim for UI benefits and indicated on his claim that the employer had laid him off due to lack of work. The employer was unaware that claimant had filed a claim for benefits.

(6) On March 31, 2020, claimant initiated a telephone conversation with the office manager to discuss the cleaning services provided by Deluxe. During the conversation, the parties agreed to terminate the Deluxe cleaning agreement. Claimant then raised numerous grievances related to his work as an MA for the employer, including a lack of hours. The office manager clarified with claimant that he was a temporary employee and that due to R's return "his hours would be changed" but that the office manager would "make hours for him." Transcript at 36. Claimant told the employer that based on the grievances he had indicated, "[H]e didn't want to work [for the employer] anymore." Transcript at 15.

(7) After the conversation and consistent with her normal practice in situations involving "a termination or an incident with an employee," the office manager prepared notes so that she would not forget the details of the conversation. Transcript at 6. The office manager also prepared a letter, later provided to claimant, which summarized their March 31, 2020 discussion and noted that claimant had elected to end the work relationship by his "own free will." Exhibit 6 at 14. Appended to the letter were two checks reflecting payment of final wages for MA work claimant had performed and a check for work performed by Deluxe. Claimant reconciled the three checks the same day, however, claimant never responded to the letter. The employer believed they were legally obligated to provide a check for final wages the same day of any work separation.

(8) The work separation left the employer "in [a] lurch" because the office manager and their bookkeeper had to cover claimant's hours with the bookkeeper being paid overtime to do so. Transcript at 46.

(9) On or About April 26, 2020, the office manager completed a Form 220 to provide work separation information for the Department. On that form, the office manager indicated that claimant's separation date from the employer was "3/27/2020." Exhibit 4 at 12. The office manager misread the question and her entry of "3/27/2020" was a mistake. Transcript at 11.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without good cause.

Nature of the work separation. The first issue in this case is the nature of claimant's 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) (December 23, 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 preponderance of the evidence shows that claimant voluntarily quit working for the employer as an MA during a conversation with the office manager on March 31, 2020 and that his decision to do so was based on a list of grievances claimant had with the employer, with the paramount grievance being his perceived reduction in work hours. This conclusion is corroborated by several pieces of evidence in the record. First, the record show that in the two weeks preceding March 31, 2020, the employer's office manager and claimant discussed that claimant's hours might be reduced due to both the return of "R" as an MA and from the impact of COVID-19. Furthermore, the record shows that claimant's MA work hours did reduce from 35 hours during the period of March 16 to March 20, 2020, to 22 hours during the period of March 24 to March 27, 2020. Second, the record shows that consistent with her business practice, the office manager prepared contemporaneous notes of the March 31, 2020 conversation, which included her notation that claimant was "choosing not to return to work even if work is available because he is not happy working here." Exhibit 6 at 13. Likewise, the record shows that the office manager prepared a contemporaneous letter for the claimant memorializing the substance of their March 31, 2020 conversation, which included his decision to leave the employer on that day of his "own free will." Finally, the record shows that claimant's decision to leave on March 31, 2020 left the employer "in a lurch," which required the office manager and the bookkeeper to cover the MA hours claimant would have otherwise covered had he not left work when he did.

Notwithstanding this evidence, claimant testified that the employer laid him off on March 27, 2020 after he approached the office manager over concerns that he was not receiving 40 hours of MA work per week as he believed he had been promised and the office manager then told him that the employer did not need him anymore. Transcript at 68-69. However, while the record shows that this March 27, 2020 conversation likely included discussion about claimant's MA hours reduction, the preponderance of the evidence shows that the employer did not lay off claimant during that discussion. The record shows that prior to the March 27, 2020 conversation, the employer anticipated that claimant might undergo an hours reduction and discussed the matter with him and the reasons why it might happen. However, the record also demonstrates that the anticipated impact from "R's" return and from COVID-19 was not as the employer expected and that they "had more work than we thought we were going to have." Transcript at 102. Thus, this evidence, coupled with the fact that the employer had to use their office manager and bookkeeper to cover the hours claimant would have otherwise covered had he not left work, shows that, more likely than not, claimant was not laid off on March 27, 2020 because the employer needed claimant to continue working.

Moreover, the record shows that the office manager had a business practice of contemporaneously documenting "a termination . . . with an employee." Yet, the office manager only prepared contemporaneous notes (and a letter to claimant) after the March 31, 2020 conversation where claimant told the office manager he did not want to work for the employer anymore and not after the March 27, 2020 conversation where claimant contended that the office manager had laid him off. Because the office manager did not prepare contemporaneous notes on March 27, 2021, but did so on March 31, 2020, it is more likely than not that claimant was not laid off on March 27, 2020. Likewise, the record shows that the employer provided final paychecks to claimant on March 31, 2020 because they believed they were legally obligated to provide a check for final wages the same day of any work separation. Because these final checks were provided by the employer on March 31, 2020 and not March 27, 2020, it is more likely than not that claimant was not laid off on March 27, 2020.

Finally, claimant asserted in his written argument that corroboration that he was laid off on March 27, 2020 exists in the record in the form of the employer's assertion on the Department's Form 220 that claimant's separation date was "3/27/2020". Written Argument at 1; Exhibit 4 at 12. However, in light of the previously discussed evidence showing that the employer did not lay off claimant on March 27, 2020, but that claimant voluntarily left the employer on March 31, 2020, the office manager's testimony that her "3/27/2020" entry on the Form 2020 was the result of a "mistake" is credible. Transcript at 11. Because the preponderance of the evidence shows that claimant was not laid off on March 27, 2020, but voluntarily left on March 31, 2020, and because at the time he voluntarily left continuing work remained available, the nature of claimant's work separation was a voluntary leaving that occurred on March 31, 2020.

Voluntary leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has 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 their employer for an additional period of time.

Claimant voluntarily left his job as an MA on March 31, 2020, without good cause. The record shows that during his March 31, 2020 conversation with the office manager, claimant provided a list of work-related grievances, which formed the basis for his decision to quit. However, the totality of the record shows that his primary grievance at the time he quit was related to a reduction in his work hours as an MA. OAR 471-030-0038(5)(e) provides that a claimant who leaves work due to a reduction in hours "has left work without good cause unless continuing to work substantially interferes with return to full time work or unless the cost of working exceeds the amount of remuneration received." Here, the record shows that in the multiple weeks leading up to claimant's decision to quit, he had not been working full-time, but rather as a temporary employee averaging anywhere from 20 to 35 hours a week. Claimant did not show that continuing to work for the employer substantially interfered with a return to full time work because, as far as the record shows, the employer did not intend claimant to be a full time employee given that claimant had not been working full time and was a temporary employee whose position was

created for him while he attended school full time. Thus, more likely than not, claimant's reduction in hours during his last week of employment did not substantially interfere with a return to full time work because it was not contemplated that claimant would ever work full time. Furthermore, claimant presented no evidence that suggested that the cost of his work as an MA exceeded the amount of the remuneration he received and he therefore failed to meet his burden to show that he had good cause to leave work when he did due to a reduction in hours.

To the extent claimant left his job as an MA on March 31, 2020 due to other grievances he addressed with the office manager during their conversation, claimant failed to meet his burden to show that he had no reasonable alternatives but to leave work. The record shows that upon hearing claimant's other grievances, the office manager was "surprised" and thought that the issues had been previously addressed to claimant's satisfaction. Transcript at 16. For example, claimant raised a prior incident during the March 31, 2020 conversation where a coworker had insulted him and "got away with it." Exhibit 6 at 13. However, the office manager testified that, to the contrary, the office manager reprimanded the coworker over the insult and that claimant later confirmed to her that he was never insulted again. Furthermore, claimant testified that with respect to many of his grievances he had decided he was "not going to say anything . . . . I'm just going to go with it." Transcript at 75. This record evidence suggests that claimant did not always bring his grievances to the attention of the employer, but when he did, given the evidence that the employer reprimanded the coworker claimant complained of, the employer took action to address those grievances. As such, the preponderance of the evidence shows that claimant had the reasonable alternative of approaching his employer about his grievances prior to March 31, 2020, and that had he done so, his grievances would have likely been addressed. Because claimant voluntary quit his job as an MA on March 31, 2020, despite the availability of reasonable alternatives, claimant quit work without good cause and he is therefore disqualified from receiving benefits effective March 29, 2020.

DECISION: Order No. 21-UI-182188 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: <u>February 16, 2022</u>

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。 如果您不明白本判決， 請立即聯繫就業上訴委員會。 如果您不同意此判決，您可以按照該判決結尾所寫的說明， 向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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