

## **EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0140**

**PROCEDURAL HISTORY:** On August 5, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #153705). Decision #153705 became final without a request for hearing having been filed. On September 3, 2013, claimant filed a late request for hearing. On December 16, 2013, ALJ Shoemake conducted a hearing, and on January 2, 2014 issued Hearing Decision 14-UI-07506, dismissing claimant's request for hearing. On January 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On February 24, 2013, the EAB issued EAB Decision 2014-EAB-0139, adopting Hearing Decision 14-UI-07506.

On August 12, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision (#194433), issued in two parts, assessing an \$18,266 overpayment with \$2,739.90 in monetary penalties, a \$325 overpayment with \$48.75 in monetary penalties, and imposing 52 penalty weeks. Claimant filed a timely request for hearing. On December 16, 2013, ALJ Shoemake conducted a hearing, and on January 2, 2014 issued Hearing Decisions 14-UI-07551 and 14-UI-07530, affirming the Department's decision. On January 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-07551 and 14-UI-07530. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0141 and 2014-EAB-0140).

In Hearing Decision 14-UI-07551, the ALJ addressed the issues of whether claimant had remuneration payable during weeks 10-12 and 11-12 that would reduce his weekly benefits, and whether claimant willfully made a false statement or misrepresentation regarding remuneration payable during those

weeks.<sup>1</sup> We did not address these issues because our conclusions on these issues would not affect the outcome of this decision.

**FINDINGS OF FACT:** (1) On October 2, 2008, claimant filed an initial claim for unemployment insurance benefits, with a weekly benefit amount of \$300. The maximum weekly benefit amount in effect at that time was \$482. Claimant filed another initial claim on March 20, 2012 with a weekly benefit amount of \$294.

(2) Claimant claimed benefits for the week June 6 to June 12, 2010 (week 23-10) on his first claim, and for the weeks March 4, 2012 to May 25, 2013 (weeks 10-12 to 21-13) on his second claim. Those are the weeks at issue.

(3) Claimant worked for AAA Oregon (employer) from June 7, 2010 to March 14, 2012. He earned \$10.65 per hour. The employer reported earnings of \$403.82 of regular pay for claimant during his first week of employment, week 23-10. Exhibit 1. Claimant reported no earnings for that week because he wanted to ensure that he received unemployment insurance benefits for that week to be able to pay his rent until he received his first paycheck from his employer. When claimant received his first paycheck from the employer, he did not contact the Department to correct his earnings for week 23-10.

(4) Based on claimant's certification that he had no earnings during week 23-10, the Department paid claimant \$325 in unemployment insurance benefits for that week.

(5) On March 14, 2012, claimant's employer discharged him. Claimant understood the employer terminated him due to his chronic tardiness for work, and his sales performance. Exhibit 1.

(6) When claimant filed his initial claim for benefits on March 20, 2012, he certified he was laid off due to a lack of work. When claimant claimed benefits for weeks 10-12 and 11-12, he certified that he was not fired or suspended from a job during those weeks.<sup>2</sup>

(7) Relying on claimant's report that he was laid off due to lack of work, and that he was not suspended or fired during week 10-12 or 11-12, the Department determined claimant was eligible for benefits and paid claimant \$18,266 in benefits for weeks 10-12 to 21-13 as detailed in the Schedule of Adjustments contained in the Department's Administrative Decision #194433. Exhibit 1.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant received \$18,591 in benefits to which he was not entitled. He is liable to repay those benefits or have them withheld from future benefits otherwise payable. Claimant willfully made false statements to the Department to obtain unemployment benefits. Claimant received remuneration during week 23-10 that eliminated his weekly benefit amount. Claimant is liable for a \$2,788.65 penalty and 52 penalty weeks.

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<sup>1</sup> Hearing Decision 14-UI-07551 at 4 and 5.

<sup>2</sup> The employer decided to terminate claimant on March 8, 2012, but claimant did not report to work that day due to illness, so the employer postponed the termination date to March 14, 2012.

ORS 657.150(6) provides that an eligible individual who has employment in any week shall have his weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the Oregon minimum hourly wage or one-third of his weekly benefit amount. An individual is not entitled to benefits for any week in which his earnings exceeded his weekly benefit amount. *See* ORS 657.100.

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. Pursuant to Pub. L. 110-252, § 4005(b), 122 Stat. 2356-2357, an individual who was overpaid EUC is liable to repay those benefits in accordance with state law. ORS 657.310(1) 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. 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). The Department had the burden to establish that claimant received benefits to which he was not entitled, and that he willfully made a false statement or misrepresentation to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

**Week 23-10.** Claimant reported no earnings for week 23-10, and as a result, the Department overpaid claimant \$325 in benefits. Claimant testified at hearing that he reported no earnings during week 23-10 because it was his first week working with the employer and he wanted to ensure he would have income to pay his rent until he received his first paycheck from the employer. The Department established that claimant willfully misrepresented his earnings for week 23-10 to obtain benefits, and that he is therefore subject to penalty weeks under ORS 657.215 and a monetary penalty of \$48.75 (15% of \$325) under ORS 657.310(2).

**Weeks 10-12 Through 21-13.** Claimant was paid \$18,266 in benefits for weeks 10-12 through 21-13 to which he was not entitled because he falsely reported to the Department that he was laid off due to a lack of work during week 10-12. Appeals Board Decision 2014-EAB-0139 affirmed Hearing Decision 14-UI-07506 dismissing claimant's late request for hearing regarding his work separation from the employer. Claimant's report that he was laid off due to a lack of work was false as a matter of law, and caused him to receive \$18,266 in benefits for weeks 10-12 through 21-13 to which he was not entitled. Claimant therefore is liable to either repay the \$18,266 or have it deducted from any future benefits.

The next issue is whether claimant willfully reported that he was laid off due to a lack of work to obtain benefits. At hearing, and in his written statement to the Department on August 2, 2013, claimant stated that the employer terminated his employment due to claimant's tardiness and poor sales performance.<sup>3</sup> The record does not show claimant had a basis to believe the employer discharged him due to a lack of work. Absent a credible explanation for why claimant stated he was discharged due to lack of work, and based on claimant's admissions showing he knew the employer ended his employment due to his

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<sup>3</sup> Exhibit 1.

tardiness and poor performance, we conclude claimant willfully misrepresented the reason for his work separation to qualify for benefits. Under ORS 657.215 and OAR 471-030-0052(b), claimant is disqualified from the receipt of benefits for a period of 52 weeks. Under ORS 657.310(2), claimant is liable for a \$2,739.90 penalty for weeks 10-12 through 21-13.

In sum, for all the weeks at issue, claimant was overpaid a total of \$18,591 in regular and EUC benefits that he is liable to repay. Claimant willfully made false statements or misrepresentations to obtain benefits. He is disqualified from the receipt of benefits for 52 weeks, and is liable for a \$2,788.65 penalty.

**DECISION:** Hearing Decisions 14-UI-07551 and 14-UI-07530 are affirmed.

Susan Rossiter and D. E. Larson;  
Tony Corcoran, not participating.

**DATE of Service:** February 25, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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