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

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MC 010.05

<p>EMPLOYMENT APPEALS BOARD DECISION 2014-EAB-0782</p>
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Affirmed
Ineligible Weeks 33-13 through 1-14
Disqualification
Overpayment, Penalties

PROCEDURAL HISTORY: On January 21, 2014, the Oregon Employment Department (the Department) served notice of three administrative decisions concluding that claimant was not available for work from August 11, 2013 through January 4, 2014 (decision #160358) and voluntarily left work without good cause (decision #154106), and assessing a \$3,743 overpayment, a \$1,122.90 monetary penalty, and 33 penalty weeks (#195092). On January 26, 2014, claimant filed timely requests for hearing on decisions #160358, #154106 and #195092. On April 15, 2014, ALJ Vincent conducted a consolidated hearing, and on April 23, 2014 issued Hearing Decisions 14-UI-15800, 14-UI-15804 and 14-UI-15803, affirming decisions #160358, #154106 and #195092. On May 5, 2014, claimant filed applications for review of Hearing Decisions 14-UI-15800, 14-UI-15804 and 14-UI-15803 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-15800, 14-UI-15804 and 14-UI-15803. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 14-AB-0782, 14-AB-0780 and 14-AB0781).

The ALJ marked, but failed to admit, Exhibit 1 during the hearing. When the ALJ asked the parties at hearing if there were objections to Exhibit 1, no party objected to Exhibit 1 being admitted into the record. Audio Record ~ 24:50 to 24:58. Under OAR 471-041-0090(1), Exhibit 1 is received into evidence to complete the record.

FINDINGS OF FACT: (1) On May 30, 2013, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$197. The maximum weekly benefit amount in effect was \$524.

(2) Claimant claimed unemployment insurance benefits for the weeks from August 11, 2013 through January 4, 2014 (weeks 33-14 through 1-14). The Department paid claimant benefits for those weeks.

(3) Claimant sought food service and bartending work. Claimant's labor market area was Medford, Oregon and the surrounding area. In claimant's labor market, food service and bartending work was performed during all hours and days of the week.

(4) During weeks 33-14 through 1-14, claimant was not willing to work full time.

(5) Wingmen (employer) employed claimant from November 22, 2013 to December 10, 2013 as a bartender.

(6) Claimant and the employer agreed at hire that claimant would work six-hour shifts, three days per week, because she was breastfeeding her infant. From November 22, 2013 to November 30, 2013, claimant worked part time while the employer trained her for the bartending position. Claimant began bartending on December 1, 2013, and the employer scheduled claimant to work from 3:00 p.m. to 1:30 a.m., six days per week. During December 1 through 7, 2013, claimant worked the schedule the employer gave her, but told her managers that she was not willing to work more than three six-hour shifts per week. The employer gave claimant the same full time schedule for December 8 through 14, 2013.

(7) Before December 10, 2013, claimant accepted an offer of work from a different employer to begin on December 27, 2013, working two night shifts per week.

(8) On December 10, 2013, claimant quit work because she was dissatisfied with her work schedule, and because her new job started on December 27, 2013.

(9) Claimant had earnings from the employer. Claimant earned \$75.93 during week 47-13, \$265.76 during week 48-13, \$265.76 during week 49-13, and \$113.91 during week 50-13. Claimant reported no hours worked and no earnings to the Department for weeks 47-13 through 50-13 when she claimed benefits for those weeks.

(10) Claimant did not report to the Department that she quit a job during the week ending December 14, 2013 (week 50-13) when she claimed benefits for that week.

(11) Relying on claimant's reports that she was available to work during weeks 33-14 through 1-14, that she had no hours or earnings during weeks 47-13 through 50-13, and that she did not quit a job during week 50-13, the Department determined claimant eligible for benefits and paid claimant \$3,743 in regular unemployment insurance benefits. Exhibit 1. Claimant was entitled to no benefits for those weeks.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was not available for work during weeks 33-13 through 1-14, and that claimant voluntarily left work without good cause. We also agree with the ALJ that claimant is liable to repay \$3,743, is liable for a \$1,122.90 monetary penalty, and is disqualified from 33 weeks of future benefits.

Availability. An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those

requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

Notwithstanding the provisions of 471-030-0036(3), an individual who is the parent of a child under 13 years of age, who is not willing to or capable of working a particular shift because of a lack of care for that child acceptable to the individual, shall be considered available for work if the work the individual is seeking is customarily performed during other shifts in the individual's normal labor market area and the individual is willing to and capable of working during such shift(s). OAR 471-030-0036(4).

Claimant was not willing to work full time because she was breastfeeding an infant. Claimant's need to care for her infant does not excuse her from the requirement that she be willing to work full time. Under OAR 471-030-0036(4), that exception only applies to individuals who are unavailable to work "a particular shift." Claimant was not available to work full time, and thus limited her availability to work based on the number of hours she was available to work, and not based on unavailability for a particular shift. Claimant therefore was not available for work during weeks 33-13 through 1-14, and thus was not eligible for unemployment insurance benefits for those weeks.

Voluntary Quit. 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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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. Where an individual quits work to accept an offer of other work, good cause may exist only if the offered work is to begin in the shortest length of time as can be deemed reasonable under the individual circumstances. OAR 471-030-0038(5)(a).

Claimant quit work, in part, because her employer did not accommodate her request to work a part time schedule when she began her bartending duties. Claimant told her employer at hire she was not willing to work full time, and reminded her managers again when they scheduled her to work full time during her first week performing bartending duties. Claimant quit work when she saw that the employer scheduled her for full time work again during her second week performing bartending duties. However, the record does not show the employer refused to allow claimant to work part time. The employer had agreed at hire to give claimant part time work, and claimant testified that the employer may have mistakenly scheduled claimant for full time work because the employer was disorganized. Transcript at 7. Even if the employer required claimant to work full time, claimant did not show that she was unable to work full time, only that she preferred to work part time. The record does not show that claimant's infant was sick or suffering any significant harm due to claimant's full time schedule. Claimant failed to show she faced a situation so grave that she had no reasonable alternative but to quit work on December 10, 2013. Claimant had the reasonable alternative of continuing to work for the employer at least until her new job began with a schedule more suited to her family's needs.

Claimant also quit work, in part, because she was offered other work to begin on December 27, 2013. Claimant failed to show she could not have continued working for the employer for an additional period

of time after December 10, 2013 before beginning her new job seventeen days later. Claimant therefore failed to establish that the work was to begin in the shortest length of time as can be deemed reasonable under the individual circumstances.

Claimant quit work without good cause, and is disqualified from the receipt of unemployment insurance benefits for a period beginning December 8, 2013.

Overpayment and Penalties. ORS 657.310(1) provides that an individual who received benefits to which she was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from future benefits otherwise payable to him under ORS chapter 657. That provision applies if the individual received the benefits because she made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of his knowledge or intent. ORS 657.310(1). An individual who willfully makes a false statement or misrepresentation, or willfully fails to report a material fact to obtain benefits, may be disqualified for benefits for a period not to exceed 52 weeks. ORS 657.215. The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (February 23, 2014). In addition, an individual who has been disqualified for benefits under ORS 657.215 for making a willful misrepresentation and who has seven or more “occurrences” within five years is liable for a penalty in an amount equal 30 percent of the total amount of benefits the individual received but to which the individual was not entitled to receive. ORS 657.310(2); OAR 471-030-0052(7). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. OAR 471-030-0052(7).

Claimant was not willing to work full time during weeks 33-14 through 1-14, all the weeks at issue, due to caring for her infant. Transcript at 23. However, when claimant claimed benefits for each week, claimant answered “yes” when asked each week, “Each day last week were you willing to work and capable of accepting and reporting for full-time, part-time and temporary work?” Exhibit 1. Claimant testified at hearing that she did not know how to answer the Department’s question. Transcript at 23. However, the question is clear, and thus claimant’s reason for falsely answering that she was available to work full time when she was not, is not plausible. Absent a credible explanation for why claimant stated she was available for full time work when she was not, and based on claimant’s admissions at hearing that she was not willing to work full time, the preponderance of the evidence shows claimant willfully misrepresented her availability to work to qualify for benefits.

Claimant testified at hearing that she knew she “messed up” when she told the Department she did not quit a job during week 50-13. Transcript at 23. Claimant offered no other explanation for why she did not report quitting her job with the employer during that week. Absent a credible explanation for why claimant stated she did not quit a job during week 50-13, and based on claimant’s testimony at hearing that she quit her job with the employer, we conclude claimant willfully failed to report her work separation from the employer to obtain benefits.

Similarly, the preponderance of the evidence shows claimant willfully failed to report her earnings for weeks 47-13 through 50-13 to obtain benefits. Claimant testified that she believed she was supposed to report her earnings when she received the earnings, not when she earned them. Transcript at 24. Claimant’s testimony is not credible because she did not report the earnings when she received them, either. Exhibit 1. Nor did claimant report having worked any hours during weeks 47-13 through 50-13,

although she worked during all four weeks, and worked full time during at least week 49-13. Absent another plausible reason for having failed to report any hours or earnings for weeks 47-13 through 50-13, we conclude claimant willfully failed to report her earnings from the employer to qualify for benefits.

Based on claimant's willful misrepresentations to the Department to obtain benefits, claimant is subject to penalty weeks and a monetary penalty. When the disqualification from unemployment insurance benefits is imposed because the disqualifying acts under 657.215 relate to the provisions of ORS 657.176 (work separation) and a failure to accurately report work and earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in OAR 471-030-0052(1)(a), plus four weeks. OAR 471-030-0052(1)(d). OAR 471-030-0052(1)(a) provides that the number of penalty weeks is calculated by dividing the total overpayment (\$3,743) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim at the time of the disqualifying act (\$524), rounding off to the nearest two decimal places (7.14), multiplying the result by four (28.56), and rounding it up to the nearest whole number (29), or four weeks, or the number of weeks in which the misrepresentations occurred, whichever is greater. Pursuant to OAR 471-030-0052(1)(d), four weeks are added to that number. Claimant therefore is disqualified from benefits for 33 weeks. Claimant is also liable for a penalty equal to 30 percent of the overpaid benefits because, each time she reported she was available for full time work during the 21 weeks from 33-13 to 1-14, claimant made a willful misrepresentation to the Department that counted as an "occurrence" for purposes of determining the penalty percentage for which she is liable. Where, as here, claimant had seven or more occurrences within five years, she is liable for a penalty of thirty percent of the total overpayment amount. *See* ORS 657.310(2); OAR 471-030-0052(7). Thirty percent of \$3,743 is \$1,122.90, making claimant's total repayment liability \$4,865.90.

DECISION: Hearing Decisions 14-UI-15800, 14-UI-15804 and 14-UI-15803 are affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 10, 2014

NOTE: You may appeal these decisions by filing Petitions 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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