

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-1856**

*Affirmed*  
*Ineligible*  
*Overpayment, Penalties*

**PROCEDURAL HISTORY:** On August 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not actively seek work from June 15, 2014 through August 23, 2014 (weeks 25-14 through 34-14) (decision # 111123). On September 16, 2014, decision # 111123 became final without a request for hearing having been filed. On September 26, 2014, the Department served notice of an administrative decision assessing a \$1,260 overpayment, a \$378 monetary penalty and 10 penalty weeks (decision # 194595). On October 1, 2014, claimant filed a late request for hearing on decision #111123, and a timely request for hearing on decision # 194595. On November 26, 2014, ALJ Kirkwood conducted hearings and issued Hearing Decision 14-UI-29497, allowing claimant's late request for hearing and affirming decision # 111123, and Hearing Decision 14-UI-29510, affirming decision # 194595. On December 5, 2014, claimant filed applications for review of Hearing Decisions 14-UI-29497 and 14-UI-29510 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-29497 and 14-UI-29510. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 14-AB-1855 and 14-AB-1856). No adversely affected party applied for review of that portion of Hearing Decision 14-UI-29497 allowing claimant's late request for hearing regarding decision # 111123. EAB therefore did not review that determination.

**FINDINGS OF FACT:** (1) On December 26, 2013, claimant filed an initial claim for unemployment insurance benefits. Her weekly benefit amount was \$126. The maximum weekly benefit amount in effect was \$538.

(2) On February 11, 2014, the Department mailed claimant a letter stating that, as of February 23, 2014, she was required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer, for each week she claimed benefits.

(3) On March 31, 2014, the Department mailed claimant a letter stating she was required to seek work immediately if she was not returning to work within four weeks of a layoff date, and to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer, for each week she claimed benefits.

(4) On June 11, 2014, claimant was laid off work from her part-time job as a cafeteria worker with her regular employer, Sodexo. Sodexo informed claimant she would be laid off until the last week of August 2014. Claimant understood she would be laid off for more than four weeks.

(5) Claimant restarted her initial claim for benefits online, and claimed benefits for the weeks from June 15, 2014 through August 23, 2014 (weeks 25-14 through 34-14), the weeks at issue. The Department initially paid claimant benefits for those weeks. When claimant restarted her claim, she was advised online, "If you find that you will not be returning to work with your employer, or if you are going to be out of work for more than four weeks, you must advise [the Department] immediately and you must begin seeking full-time, part-time, permanent, and temporary work immediately." Transcript (Case # 29497) at 9.

(6) During the weeks at issue, claimant's labor market was the Coos Bay, Oregon area. Claimant sought food service work, including cafeteria, deli clerk and fast food work. The customary days and hours for the type of food service work claimant sought were all days, day shift and swing shift, from 6:00 a.m. to 1:00 a.m.

(7) During the weeks at issue, claimant was unwilling to accept work if the prospective employer required her to work after 1:00 p.m., or expected her to continue working after August 2014.

(8) During week 25-14, claimant engaged in five work seeking activities. She sought work on the internet and in a newspaper, and registered to search for work through the Department. Claimant made direct contact with two employers, Sodexo and Subway. Sodexo sometimes had temporary work during summer when employees were out sick or on vacation.

(9) During week 26-14, claimant engaged in four work seeking activities. Claimant sought work in a newspaper and worked on her resume. Claimant made direct contact with two employers, a yarn shop and Dairy Queen.

(10) During week 27-14, claimant engaged in five work seeking activities. Claimant sought work online at Crater Lake National Park and worked on her resume. Claimant made direct contact with three employers including Sodexo, Lucky Star and Subway. Claimant believed Sodexo might have work because one of its summer employees was on vacation.

(11) On July 1, 2014, the Department mailed claimant a letter stating she was required to seek work immediately if she was not returning to work within four weeks of her layoff date, and that she was required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer, for each week she claimed benefits.

(12) On July 10, 2014, the Department mailed claimant a letter advising her that the Department did not consider her to be on a temporary layoff.

(13) During week 28-14, claimant engaged in five work seeking activities. Claimant sought work online through The World newspaper, and made direct contact with four employers including Black Cat Antique Store, a yarn shop, Sodexo and Fred Meyer.

(14) During week 29-14, claimant engaged in two work seeking activities. Claimant sought work online and made direct contact with Sodexo.

(15) During week 30-14, claimant engaged in four work seeking activities. Claimant sought work online through The World newspaper, and made direct contact with three employers including Sodexo, Taco Bell, and Wendys.

(16) During week 31-14, claimant did not seek work.

(17) During week 32-14, claimant engaged in four work seeking activities. Claimant made direct contact with four employers including Sodexo, Edgewater Inn, Subway, and Dairy Queen.

(18) During week 33-14, claimant engaged in six work seeking activities. Claimant sought work online and through a newspaper, and made direct contact with four employers including Sodexo, Black Cat Antique Store, a yarn shop, and Subway.

(19) During week 34-14, claimant engaged in two work seeking activities. Claimant worked on her resume, and made direct contact with one employer, McDonalds.

(20) For each week at issue, claimant certified that she was temporarily laid off work for less than four weeks, actively seeking work, and available for work. Relying on claimant's certifications, the Department determined claimant eligible for benefits, and paid her \$1,260 in benefits for the weeks at issue. Exhibit 1.

(21) Claimant had filed 11 initial claims for unemployment benefits since 1999. Claimant received a claimant's benefits handbook each time she claimed benefits.

**CONCLUSIONS AND REASONS:** Claimant is ineligible for benefits for the weeks at issue, liable to repay the \$1,260 in benefits she received for those weeks, subject to a \$378 monetary penalty, and disqualified from 10 weeks of future benefits.

**Actively Seeking Work.** To be eligible to receive benefits, unemployed individuals must actively seek work during each week claimed. ORS 657.155(1)(c). OAR 471-030-0036(5)(a) (February 23, 2014) states that an individual typically must conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. For an individual on temporary layoff of four weeks or less with the individual's regular employer, if the individual had, as of the layoff date, been given a date to return to work, such individual is actively seeking work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. OAR 471-030-0036(5)(b)(A). For an individual on temporary layoff of more than four weeks with the individual's regular employer, such individual must immediately

seek work consistent with the requirements of OAR 471-030-0036(5)(a). OAR 471-030-0036(5)(c). Where, as here, the Department initially paid an individual benefits for the weeks at issue, it has the burden to establish by a preponderance of evidence that she is not eligible for benefits for those weeks. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

In the present case, claimant did not meet the requirements of OAR 471-030-0036(5)(b)(A) because she was on temporary layoff for more than four weeks, and was not given a definite return-to-work within four weeks of her layoff date. Claimant therefore was obligated to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. The Department argued at hearing that claimant's contacts with Sodexo were not work seeking activities because claimant knew Sodexo had no work for claimant during the summer. Transcript (Case # 14-UI-29497) at 36-37. However, claimant testified that she contacted Sodexo during the weeks at issue because it sometimes had temporary work due to employees' vacations and other absences. Transcript (Case # 14-UI-29497) at 38-39. Thus, although claimant knew she would not return to regular work until August 2014, the record shows she had a genuine belief Sodexo might have temporary work for her. Including her contacts with Sodexo, claimant conducted at least five work seeking activities, and thus actively sought work, during weeks 25-14, 27-14, 28-14 and 33-14. Claimant conducted fewer than five work seeking activities, and thus failed to actively seek work, during weeks 26-14, 29-14 through 32-14, and 34-14.

**Availability.** To be eligible to receive benefits, unemployed individuals also must be available for work during each week claimed. ORS 657.155(1)(c). 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 full time during all of the usual hours and days of the week customary for the work being sought, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.* Here, claimant was unwilling to accept work if the prospective employer required her to work after 1:00 p.m., or expected her to continue working after August 2014. Claimant therefore was unwilling to work full time during all of the usual hours and days of the week customary for the work she sought, and imposed conditions that limited her opportunities to return to work at the earliest possible time. She therefore was not available for work during the weeks at issue for purposes of ORS 657.155(c).

**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 her 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 her 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 from 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 from 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 to 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 received \$126 per week in benefits for the weeks at issue that she was not entitled to receive. She received those benefits because she made false statements about her availability for work and her work search, all of which were facts material to her eligibility for benefits. Regardless of claimant's knowledge or intent when she made those false statements, she is liable to repay the total amount of the overpayment, \$1,260.

Claimant testified at hearing that she was not willing to accept work if an employer required her to work after 1:00 p.m. because the work could interfere with her return to work at Sodexo. Transcript (Case # 14-UI-29497) at 29-30. However, when claimant claimed benefits for each week at issue, she answered "yes" when asked, "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. Absent a credible explanation for why claimant stated she was available for full time work when she was not, the preponderance of the evidence shows claimant willfully misrepresented her availability to work to qualify for benefits.

Similarly, the preponderance of the evidence shows claimant willfully made false statements that she was actively seeking work during weeks 26-14, 29-14 through 32-14, and 34-14 to obtain benefits. Claimant reported each week that she was on a temporary layoff, and testified that she believed she conducted an adequate work search. Transcript (Case # 14-UI-29497) at 21. However, claimant's testimony is not persuasive because the Department advised her repeatedly of the temporary layoff requirements, and her work search requirements when she did not qualify as being on a temporary layoff. Claimant knew as of her layoff date that she did not meet the temporary layoff requirements, and was thus required to conduct at least five work seeking activities per week. Even after the Department sent claimant a letter stating she did not meet the temporary layoff requirements, claimant failed to actively seek work every week. Absent a plausible reason for falsely reporting she was conducting at least five work seeking activities per week during weeks 26-14, 29-14 through 32-14, and 34-14, we conclude claimant willfully provided false information about her work search to qualify for benefits.

Based on claimant's willful misrepresentations to the Department to obtain benefits, she 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 657.155 (other than work or 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), or the number of weeks in which a disqualifying act occurred, whichever is greater. OAR 471-030-0052(1)(c). OAR 471-030-0052(1)(a) provides that the number of penalty weeks is calculated by dividing the total overpayment (\$1,260) by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying acts (\$538), rounding to the nearest two decimal places (2.34), multiplying the result by four (9.36), and rounding the result up to the nearest whole number (10), or the number of weeks in which the disqualifying acts occurred, whichever is greater. There are 10 weeks at issue. Claimant therefore is disqualified from unemployment insurance benefits for 10 weeks. Claimant is also liable for a penalty equal to 30 percent of the overpaid benefits because, each time she falsely stated that she was available for work or actively seeking work during the 10 weeks from 25-14 to 34-14, claimant made a false statement to the Department that counted as an "occurrence" for purposes of determining the penalty percentage for which she is liable. Because

claimant had seven or more occurrences within five years, she is liable for a penalty of 30 percent of the total overpayment amount. Thirty percent of \$1,260 is \$378, making claimant's total repayment liability \$1,638.

In sum, claimant was not available for work during weeks 25-14 through 34-14, and was not actively seeking work during weeks 26-14, 29-14 through 32-14, and 34-14. Thus, claimant is not eligible for benefits for weeks 25-14 through 34-14. Claimant was overpaid and must repay \$1,260, is liable for a \$378 monetary penalty, and is disqualified from 10 weeks of future benefits.

**DECISION:** Hearing Decisions 14-UI-29497 and 14-UI-29510 are affirmed.

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

**DATE of Service:** January 21, 2015

**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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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