

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0363

Modified
Reduced Overpayment and Penalties

PROCEDURAL HISTORY: On February 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for Olympic Security, LLC on March 21, 2014 without good cause (decision # 131859). Claimant filed a timely request for hearing. On March 19, 2015, ALJ Vincent conducted a hearing and on March 24, 2015, issued Hearing Decision 15-UI-29405, concluding that Olympic Security, LLC discharged claimant on March 21, 2014, not for misconduct. On April 13, 2015, Hearing Decision 15-UI-29405 became final without application for review having been filed with the Employment Appeals Board (EAB).

On February 11, 2015, the Department served notice of an administrative decision assessing a \$4,598 overpayment, a \$1,379.40 monetary penalty, and 39 penalty weeks (decision # 194375). Claimant filed a timely request for hearing. On March 19, 2015, ALJ Vincent conducted a hearing, and on March 24, 2015 issued Hearing Decision 15-UI-35650, concluding claimant was overpaid \$4,598, and assessing a monetary penalty of \$985.80, and 39 penalty weeks. On March 31, 2015, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) On January 22, 2014, claimant filed an initial claim for unemployment insurance benefits, with a weekly benefit amount of \$242. The maximum weekly benefit amount was \$538. Claimant filed weekly claims for benefits for the periods March 16, 2014 to May 24, 2014 (weeks 12-14 through 21-14), and June 1, 2014 to October 11, 2014 (weeks 23-14 through 41-14), the weeks at issue.

(2) During week 12-14, Olympic Security, LLC discharged claimant. When filing her weekly claim for benefits for week 12-14, claimant was required to respond to a question asking if she quit a job or was fired or suspended from a job during that week. Exhibit 1. Claimant knew a work separation could affect her eligibility for benefits, and therefore did not report her work separation from Olympic Security, LLC to the Department.

(3) During weeks 17-14 through 21-14, and 23-14 through 41-14, claimant worked for U.S. Bank National Association. Claimant earned \$230.40 during week 17-14. Exhibit 1. Claimant earned more than her weekly benefit amount during each of weeks 18-14 through 21-14, and 23-14 through 41-14, in the amounts shown on the Schedule of Adjustments for those weeks. Exhibit 1.

(4) When filing her weekly claims for benefits for the weeks at issue, claimant was required to answer the following question: “If you worked last week, or received or will receive vacation or holiday pay for the week, fill in the number of hours and your gross earnings (before deductions).” Exhibit 1. For week 17-14, claimant reported earnings of \$170. For weeks 18-14 through 21-14, and 23-14 through 41-14, claimant reported earnings of \$190 each week. The Department therefore overpaid claimant \$13 for week 17-14, and \$143 for each of weeks 18-14 through 21-14, and 23-14 through 40-14. Exhibit 1. Claimant’s benefits ran out in week 41-14, and she was overpaid \$79 for that week. Exhibit 1.

(5) Claimant knew how many hours she worked each week when she filed her weekly claim for benefits. Claimant intentionally reported earning less than \$200 each week because she thought she might not receive benefits if she reported earning more than \$200 each week.

CONCLUSIONS AND REASONS: Claimant had earnings which affected her weekly benefit amount, was overpaid \$3,238 in benefits that she must repay, is disqualified for 29 weeks of future benefits, and subject to a \$971.40 monetary penalty.

Overpayment. An individual is not “unemployed,” and therefore not eligible for benefits, for any week in which the remuneration paid or payable to the individual for services performed during the week is greater than the individual’s weekly benefit amount. *See* ORS 657.100(1), ORS 657.150(6), ORS 657.155(1)(f). An eligible unemployed individual’s weekly benefit amount is subject to reduction by the amount of earnings paid or payable that exceeds the greater of ten times the minimum hourly wage, or one-third the individual’s weekly benefit amount. ORS 657.150(6). 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. That provision 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. *Id.*

In the present case, claimant earned \$230.40 during week 17-14, but reported that she earned \$170 that week. Under ORS 657.150(6), claimant’s weekly benefit amount is subject to reduction by the portion of \$230.40 that exceeds one-third her weekly benefit amount. Claimant therefore was entitled to \$150 in benefits for week 17-14, and was overpaid \$13 in benefits for that week. Claimant earned more than her \$242 weekly benefit amount during each of weeks 18-14 through 21-14, and 23-14 through 41-14. She was thus not unemployed, is not eligible for benefits during those weeks, and was overpaid \$143 for each of weeks 18-14 through 21-14, and 23-14 through 40-14. Claimant was overpaid \$79 for week 41-

14. Claimant therefore was overpaid \$3,238 in benefits for the weeks at issue. Regardless of claimant's knowledge or intent, she is liable to either repay the benefits or have the \$3,238 deducted from any future benefits otherwise payable to her under ORS chapter 657.

Misrepresentation. 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 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)(d). 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 testified that she was not sure why she did not report her work separation from Olympic Security, LLC, and that she realized she should have reported it, but decided not to do so. Audio Record at 26:35 to 27:17, 19:49 to 20:45. Claimant did not claim that she failed to report the separation inadvertently or because of a mistake, and, given her awareness that she should have reported it and willful decision not to, absent some reasonable explanation for failing to report her work separation during week 12-14, we find it likely that claimant willfully failed to report her separation to obtain benefits. Regarding her earnings from U.S. Bank International, claimant testified at hearing that she reported \$190 and 20 hours of work each week, even when she was working full time, because U.S. Bank International told her before she began work that she would work 20 hours per week for \$9.00 per hour. Audio Record 22:48 to 23:28. However, claimant knew how many hours she worked, and that she earned \$12 per hour, each week when she filed her weekly claim for benefits. Claimant also admitted at hearing that she knew she might not receive benefits if she reported all her earnings, so she reported earnings of less than \$200 each week to continue receiving benefits. Audio Record at 26:02 to 26:21. The preponderance of the evidence shows claimant willfully failed to report all her earnings during weeks 17-14 through 21-14, and 23-14 through 41-14, so she would continue to obtain 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 is imposed because the disqualifying acts under ORS 657.215 relate to the provisions of 657.176 (work separation) and a failure to accurately report 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 (\$3,238) 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 (\$538), rounding off to the nearest two decimal places (6.02), multiplying the result by four (24.08), and rounding it up to the nearest whole number (25), plus four weeks (29). Claimant therefore is disqualified from benefits for 29 weeks.

Claimant is also liable for a penalty equal to 30 percent of the overpaid benefits. For the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, the monetary penalty will be 30 percent of the total amount of benefits the individual received but to which the individual was not entitled. OAR 471-030-0052(7)(d). Claimant's failure to report her work separation,

and each failure to accurately report her hours and earnings when she claimed each of weeks 17-14 through 21-14, and 23-14 through 41-14, counted as “occurrences” for purposes of determining the penalty percentage for which she is liable. Thirty percent of \$3,238 is \$971.40, making claimant’s total repayment liability \$4,209.40.

In sum, claimant was overpaid and must repay \$3,238 in benefits, is liable for a \$971.40 monetary penalty, and disqualified from benefits for 29 weeks.

DECISION: Hearing Decision 15-UI-35650 is modified, as outlined above.

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

DATE of Service: May 20, 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 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.