

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0330

Affirmed
Overpayment and Penalties

PROCEDURAL HISTORY: On December 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$2,535.00 overpayment, a \$380.25 monetary penalty and 18 penalty weeks. (Decision # 192814). Claimant filed a timely request for hearing. On February 27, 2017, ALJ Meerdink conducted a hearing, and on March 1, 2017, issued Hearing Decision 17-UI-77915, affirming the Department's decision. On March 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) First Tech Credit Union employed claimant as an administrative associate from March 4, 2014 to October 18, 2016. On October 18, 2016, the employer notified claimant that she was being discharged for multiple errors in violation of a performance plan that resulted in the release of confidential information.

(2) On October 20, 2016, claimant filed an initial claim for unemployment insurance benefits. When claimant filed her initial claim, she reported to the Department that the reason for her work separation was "layoff due to permanent lack of work." Audio Record ~ 11:00 to 12:00. The Department determined that claimant's weekly benefit amount was \$507.00. The maximum benefit amount in effect at that time was \$590.

(3) Claimant filed weekly claims for benefits for the weeks including October 16 through November 26, 2016 (weeks 42-16 through 47-16), the weeks at issue. When claimant filed her weekly claim for benefits for the week ending October 22, 2016, she denied to the Department that she had been fired from a job that week. Audio Record ~ 12:00 to 12:45.

(4) Claimant had claim filing experience prior to filing her claim on October 20, 2016 that dated back to 2013. Claimant understood on that date that a discharge for misconduct would disqualify her from receiving benefits. Claimant knew that her reports were not accurate when she filed her benefit claims. Her false reports of her work separation were made for the purpose of obtaining benefits. Based upon claimant's weekly certifications that her reports were accurate, the Department paid claimant \$2,535.00 in benefits to which she was not entitled.

(5) After benefits were paid, the Department conducted an investigation regarding claimant's benefit claims for the weeks at issue. On December 1, 2016, it issued Decision #114204 which concluded the employer had discharged claimant for misconduct and which disqualified her from receiving benefits beginning the week of October 16, 2016. Although claimant requested a hearing on the decision, she subsequently failed to appear at the scheduled hearing and her hearing request was dismissed for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant was overpaid and must repay the Department \$2,535.00 in regular benefits, is liable for a \$380.25 monetary penalty, and as an additional penalty, is disqualified from receiving future benefits for a period of 18 weeks.

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.* 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 equal to from 15 to 30 percent of the amount of the overpayment. ORS 657.310(2).

Here, because the Department originally paid claimant benefits it subsequently denied, the Department had the burden to establish that claimant received benefits to which she was not entitled, and that she willfully made false statements or misrepresentations to obtain those benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, claimant asserted that on October 18, the employer escorted her to a meeting room at her place of employment and told her that she was being laid off, contrary to the employer's report to the Department that she had been discharged for multiple errors. Audio Record ~ 17:00 to 27:00. She also asserted she had a witness to the conversation, her "son", because she had him listening to the conversation on a speakerphone at the time. *Id.* However, she later testified that it was her husband who listened to the conversation on the speaker phone. When her husband testified at hearing, he initially asserted that he was in the same room as his wife in their home listening on a speakerphone when the employer told claimant she was being laid off. After a period of silence, he then modified that testimony to be consistent with claimant's. *Id.* Based upon the inconsistent testimony of both claimant and her husband, we concluded neither were credible and based our findings on the Department's reports of its conversation with the employer.

Viewing the record as a whole, the Department established that claimant received \$2,535.00 in regular benefits to which she was not entitled based upon her false, material statements regarding her work separation. Exhibit 1. Consequently, claimant is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to her under ORS chapter 657. Given claimant's prior claim's experience, her explanation for her actions and inconsistent testimony at hearing, we infer that she willfully misrepresented her work separation to the Department to obtain benefits and also is liable for penalties under ORS 657.215.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052 (July 1, 2008). When the disqualification relates to the provisions of 657.176, which includes the nature of the work separation, the number of weeks of disqualification is determined by dividing the total overpayment by the maximum weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding the result to two decimal places, multiplying by four, and rounding the result up to the nearest whole number. OAR 471-030-0052(1)(a). Claimant's total overpayment is \$2,535.00, divided by \$590 equals 4.30, multiplied by 4 equals 17.2, rounded up to the nearest whole number equals 18. Claimant's penalty disqualification period is 18 weeks. Claimant is also liable for a penalty in an amount equal to 15 percent of the amount of the overpayment because claimant's misrepresentation constituted one occurrence. ORS 657.310(2). 15% of claimant's overpayment of \$2, 535.00 is \$380.25.

In summary, claimant is required to repay to the Department, by deduction from future benefits or otherwise, \$2,535.00. Claimant is also subject to a \$380.25 monetary penalty and 18 penalty weeks.

DECISION: Hearing Decision 17-UI-77915 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: April 4, 2017

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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