

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0430

Order No. 19-UI-128097 - Reversed
No Disqualification
Order No. 19-UI-128130 - Modified
Overpayment; No Penalties

PROCEDURAL HISTORY: On March 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 120529). On March 12, 2019, the Department served notice of another administrative decision assessing an overpayment of \$6,628, a monetary penalty of \$1,325.60, and 43 penalty weeks based on decision # 120529 (decision # 195560). Claimant filed timely request for hearing on both decisions. On April 5, 2019, ALJ Snyder conducted a hearing on decision # 120529 at 9:30 a.m., and a hearing on decision # 195560 at 10:45 a.m., the employer failed to appear at both hearings. On April 12, 2019, ALJ Snyder issued two orders, the first affirming decision # 120529 (Order No. 19-UI-128097) and the second modifying decision # 195560 to assess an overpayment of \$6,628, but no penalties (Order No. 19-UI-128130). On May 1, 2019, claimant filed applications for review of both orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders 19-UI-128097 and 19-UI-128130. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0430 and 2019-EAB-0431).

EAB considered both hearing records. Claimant submitted written argument to EAB. EAB considered claimant's argument when reaching this decision, to the extent it was based on the record.

FINDINGS OF FACT: (1) Caring Transitions of Greater Portland employed claimant as a part-time sales associate, usually working only on Sundays, from around January 2018 until November 11, 2018. At the same time, claimant worked elsewhere, five days per week, at a fulltime job.

(2) Claimant had post-traumatic stress disorder (PTSD), anxiety, and depression. Claimant also had fibromyalgia. Claimant experienced significant anxiety about financial matters. When claimant was anxious, the pain and other symptoms she experienced from fibromyalgia intensified.

(3) While working for the employer claimant lived with four roommates in a leased house. The lease term ended in February 2019. The monthly rent was \$1,900, split among the roommates. Before moving in, the roommates also paid a \$2,800 security deposit and a nonrefundable cleaning deposit of \$400. Around September 2018, the owners told claimant and the roommates that the lease would not be renewed for another term because they planned to sell the house.

(4) On October 1, 2018, claimant's fulltime employer let her go. On October 4, 2018 (during week 40-18), claimant filed a claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$467. Claimant claimed and was paid benefits for the weeks thereafter, including weeks 43-18, and weeks 46-18 through 09-19, the weeks at issue.

(5) In the weeks that followed claimant's loss of her fulltime job, the employer was only able to give claimant a few hours of work in addition to her regular Sunday hours on two occasions. Claimant did not have much in savings. The combination of claimant's unemployment insurance benefits and her earnings from the employer did not meet her financial needs. Around October 2018, claimant spent \$1,955 in necessary car repairs.

(6) After claimant lost her fulltime job and incurred various expenses, including for the car repair, her savings were depleted. Claimant concluded that the income she earned from the employer combined with her unemployment benefits was not enough to sustain her financially. Claimant worried that she would not be able to arrange for adequate housing when her lease expired in February 2019 since she thought she was unable to afford the security and cleaning deposits on a new residence as well as first and last month's rent. Claimant also worried that financial concerns would trigger symptoms of anxiety and would exacerbate her fibromyalgia, both of which could prevent her from working. Claimant's concerns intensified because she had lost her health insurance coverage when her fulltime employer let her go, did not qualify for governmentally subsidized coverage and thought she would not be able to afford treatment if her health conditions were aggravated.

(7) By sometime around late October 2018, claimant decided to leave Oregon and move to Ohio, where her family lived. Because claimant could live with her parents in Ohio, she would not need to pay rent and utilities and many of her other living expenses would initially be subsidized, which would alleviate her financial concerns and allow her to seek work without undue worry. Claimant also had many friends and acquaintances in Ohio, which she thought would assist her in many ways, including looking for work, easing her emotional concerns and stabilizing her physical and mental health conditions. In late October or early November 2018, claimant notified the employer that she was going to quit work and move to Ohio. Claimant decided to leave work on November 11, 2018 to allow the employer to hire and train claimant's replacement in time for the upcoming holiday season. Claimant intended to move to Ohio during the first or second week of December 2018, which would also give claimant time in Oregon to organize and prepare for a cross-country move.

(8) For the week ending October 27, 2018, week 43-18, claimant reported that she earned \$75 from the employer and the Department paid her \$467 in benefits. The employer later reported that it had actually paid claimant \$157.50 for work in that week, which should have reduced claimant's weekly benefits to \$465. For week 45-18, claimant did not report any earnings from the employer. Sometime later, the Department sent claimant a letter stating that she would need to speak to a representative before making additional claims for benefits.

(9) On approximately November 11, 2018 (during week 46-18), claimant left work with the employer. In her weekly claim report for that and subsequent weeks, claimant did not indicate that she had quit a job. Claimant had inadvertently failed to enter that she had quit a job when making her online claim report, although she thought she had.

(10) On November 16, 2018 (during week 46-18), claimant spoke to a representative in response to the letter she received from the Department. In that call, claimant told the representative that she did not understand how to report her hours and earnings, and the representative's notes of that call indicated that claimant was "confused" about reporting hours and earnings. Audio at ~19:28. The representative's notes also indicated that claimant had told the representative that she was going to or had quit work to move to Ohio. The representative told claimant to be sure to indicate in her weekly claim report for the week in which she left employment that she quit a job in that week. For the week ending November 17, 2018 (week 46-18), claimant did not report that she had earnings and the Department paid claimant \$467 in benefits from that week. The employer later reported that it had paid claimant \$243.15 for work in that week, which should have reduced claimant's benefit amount to \$379. Claimant was paid \$467 in benefits for each of the weeks 47-18 through 49-18 and weeks 51-18 through 09-19. The Department did not pay claimant benefits for week 50-18, due to failing to make a timely report.

(11) Sometime shortly before Christmas 2018 (during week 52-18), claimant moved to Ohio. Claimant delayed her move from the early December time that she had initially planned because she had secured a job interview in Oregon in mid-December 2018. Claimant was not offered that job and subsequently left Oregon for Ohio.

CONCLUSIONS AND REASONS: Claimant voluntarily left work for good cause and is not disqualified from benefits. Claimant was overpaid \$90 in benefits, which she is liable to repay to the Department or have deducted from any future benefits otherwise payable to her. Claimant is not assessed penalties on the overpayment.

The Voluntary Leaving. 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) (December 23, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had PTSD, depression, anxiety and fibromyalgia, all of which appear to have been permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for her employer for an additional period of time.

Order No. 19-UI-128097 concluded that claimant left work for the employer without good cause. Although the order accepted that claimant faced a grave situation when financial concerns exacerbated her anxiety, which, in turn, exacerbated her fibromyalgia, it reasoned that claimant did not show good cause because she had reasonable alternatives to leaving work when she did. Order No. 19-UI-128097 at 2. In particular, the order noted that claimant "could have continued working any available shifts

through November of 2018 and until she relocated to Ohio” rather than leaving work on November 11. Order No. 19-UI-128097 at 3. The order also noted that claimant “could have waited [to leave for Ohio] until her lease actually expired in February 2019 ***and left work when and if she was unable to secure housing,” rather than leaving work on November 11. Order No. 19-UI-128097 at 2. Because Order No. 19-UI-128097 is not supported by substantial evidence, it must be reversed.

At the outset, the employer did not appear at the hearing and the only evidence on the factors that caused claimant to leave work was that which claimant presented. On this record, it was unrebutted that claimant suffered from various impairments, and that financial concerns significantly worsened those impairments. Because claimant’s loss of her fulltime job seriously impacted the state of her finances and her sense of financial security, and she had incurred significant unanticipated expenses that depleted her savings after she lost the fulltime job, it was reasonable for a person with claimant’s impairments to be concerned that her situation would aggravate her physical and mental health symptoms. Viewing the combined impacts of claimant’s health, her depleted finances, the loss of her main job and the upcoming loss of her residence, it appears likely that a reasonable and prudent person who suffered from the same impairments as claimant would have considered her situation grave. The issue is whether there were reasonable alternatives to leaving work.

While the order under review suggested that, as an alternative to leaving work when she did, claimant should have stayed until the expiration of her current residential lease in February 2019, the evidence does not support that such an approach was reasonable under the circumstances. From the evidence adduced at hearing, claimant’s financial concerns were broad-ranging if she stayed in Oregon, and it does not show that claimant reasonably would have been able to sustain herself financially in Oregon had she remained until the expiration of her current lease. Absent such evidence, staying until her current lease was over cannot be considered a reasonable alternative to leaving when she did.

With respect to not leaving work until a date closer in time to the date claimant planned to actually leave Oregon for Ohio, it appears that claimant initially planned to remain in Oregon for three or four weeks after she quit working for the employer. As a matter of common sense, that limited period does not appear unreasonable given that claimant needed some time to organize and make preparations for a permanent move of cross-country distance. The evidence in the record does not support that claimant reasonably should not quit work until closer in time to when she planned to actually leave for Ohio. On this record, working longer than November 11 was not shown to be a reasonable alternative to leaving work when claimant did.

Claimant had grave reasons for leaving work when she did, and it was not shown that there were reasonable alternatives to doing so. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation at issue.

The Overpayment. ORS 657.310(1) provides that an individual who receives any benefits to which the individual is not entitled because the individual, regardless of the individual’s knowledge or intent, made or caused to be made a false statement or misrepresentation of a material fact or failed to disclose a material fact is liable to repay the amount of the overpaid benefits or to have the amount deducted from any future benefits otherwise payable to the individual. ORS 657.215 and ORS 657.310(2), read together, provide for the assessment of penalties in addition to repaying the amount of overpaid benefits if the individual willfully made or caused to be made a false statement or misrepresentation, or willfully failed to report a material fact to obtain benefits.

ORS 657.150(6) provides that an eligible unemployed individual who has employment in any week shall have the individual's weekly benefit amount reduced by the amount of earnings paid or payable that exceeds the greater of ten times the minimum hourly wage in the state of one-third of the individual's weekly benefits amount. ORS 657.176(2)(c) provides that an individual who voluntarily leaves work without good cause is disqualified from receiving benefits after that work separation.

Where, as here, the Department paid benefits to claimant during the weeks at issue, the Department has the burden to show that claimant was not eligible to receive those benefits or was subject to penalty assessments. See *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 19-UI-128130 concluded that claimant was overpaid, respectively, \$2 and \$88 in benefits for weeks 43-18 and 46-18 due to having misreported the income she received from employment during those weeks. Order No. 19-UI-128130 at 4. It also concluded that claimant was overpaid \$467 in benefits for each of the weeks 47-18 through 49-18 and 51-18 through 09-19 because she was not entitled to receive benefits during those weeks due to having been disqualified from benefits as a result of having voluntarily left work without good cause. Each type of overpayment is considered in turn.

With respect to the earnings that the employer reported for claimant to the Department, claimant did not dispute their accuracy. Based on the employer's reports, Order No. 19-UI-128130 was correct in concluding that claimant was overpaid \$2 in benefits for week 43-18 and \$88 in benefits for week 46-18.¹ Even if claimant was not aware that she was misreporting her income during week 43-18 and 46-18, ORS 657.310(1) makes claimant liable to repay the \$90 she was overpaid.

However, claimant was not disqualified from receiving benefits for weeks 47-18 through 49-18 and 51-18 through 09-19 based on the work separation from the employer. Because this decision earlier reversed Order No. 19-UI-128097 and concluded that claimant voluntarily left work with the employer for good cause, it must also necessarily be concluded that claimant was not overpaid benefits arising from that work separation. Order No 19-UI-128130 is modified to eliminate claimant's liability to repay the \$6,538 in benefits she was paid for weeks 47-18 through 49-18 and 51-18 through 09-19.

Order No. 19-UI-128130 also concluded that claimant was not assessed penalties based on willful misrepresentations made to obtain benefits. The findings and analysis in that order with respect to that conclusion are adopted.

Claimant was overpaid \$90 in benefits which she is liable to repay to the Department or to have deducted from future benefits otherwise payable to her. Claimant is not assessed penalties.

DECISION: Order No. 19-UI-128097 is set aside, as outlined above. Order No. 19-UI-128130 is modified, as outlined above.

¹ The amount claimant was overpaid is calculated by applying ORS 657.150(6) as follows. As of the benefits weeks at issue, the minimum wage in metropolitan Portland, Oregon was \$12 per hour, which multiplied by ten, equals \$120. One third of claimant's weekly benefit amount of \$467 was \$155, making the latter the greater sum. <https://www.oregon.gov/boli/whd/omw/pages/minimum-wage-rate-summary.aspx>. For week 43-18, the \$157.50 that the employer reported claimant as having earned exceeded one third of claimant's weekly benefit amount of \$155 by \$2.50, which would reduce the benefits to which she was entitled to \$465. Since she was paid \$467 in benefits, she was overpaid \$2. For week 46-18, the employer reported claimant as earning \$243.15, which exceeded one-third of claimant's weekly benefit amount of \$155 by \$88, which would reduce the benefits to which she was entitled to \$379. Since claimant was paid \$467 in benefits, she was overpaid \$88 in benefits for that week.

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

DATE of Service: June 6, 2019

NOTE: This decision reverses an order (Order No. 19-UI-128907) that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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