

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0722

Order No. 19-UI-133360 Reversed – No Disqualification
Order No. 19-UI-133647 Reversed – No Overpayment and Penalties

PROCEDURAL HISTORY: On June 3, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was disqualified from receiving benefits because she failed without good cause to accept an offer of suitable work on December 16, 2017 (decision # 135531). On June 4, 2019, the Department served notice of another administrative decision, based on decision # 135531, assessing a \$7,028 overpayment, a \$1,054.20 monetary penalty, and a 47-week penalty disqualification from benefits (decision # 195653). On June 21, 2019, claimant filed timely requests for hearing on both decisions. On July 12, 2019, ALJ Murdock conducted a hearing on decision # 135531, and on July 15, 2019, issued Order No. 19-UI-133360, affirming that decision. On July 12, 2019, ALJ Murdock conducted a separate hearing on decision # 195653, and on July 19, 2019, issued Order No. 19-UI-133647, affirming that decision. On August 5, 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 Order Nos. 19-UI-133360 and 19-UI-133647. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2019-EAB-0722 and 2019-EAB-0723, respectively).

Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), that portion of Order No. 19-UI-133647 concluding that claimant was not overpaid benefits for week 50-17 due to underreporting her hearings for that week is **adopted**.

FINDINGS OF FACT: (1) Raven Inn, Inc. employed claimant as a bartender for an unspecified period time prior to 2007. In 2007, however, claimant began working as a bookkeeper and office manager for

other employers, and did so until approximately September 2017, when she last became separated from work.

(2) On September 17, 2017, claimant filed an initial claim for unemployment insurance benefits. The Department determined that claimant's initial claim was valid with a weekly benefit amount of \$502.

(3) In December 2017, claimant randomly came into contact with the employer's owner (TWP). TWP offered claimant a position as an "on call bartender" to perform some bartending and bookkeeping work in the case of "an emergency" if the employer's bar manager (TY), whose parent was suffering from dementia in another country, suddenly had to leave for an indeterminate period of time. Transcript, July 12, 2019 9:30 a.m. hearing at 25. Exhibit 2, 2019-UI-97312, Notice of Claim Filed at p 4. Claimant agreed, and on December 8 and 9, 2017 received some training as a bartender and bookkeeper for the employer. When claimant asked the manager if she could receive additional training by working some additional weekends with her, the manager responded that such an option was unlikely because it "was slow" and TWP would not want to pay "double payroll." Transcript, July 12, 2019 9:30 a.m. hearing, at 18.

(4) On December 15, 2017, however, claimant worked for the employer as a bartender at a Christmas party. TWP observed claimant work as a bartender that day, and on December 16, 2017, spoke with claimant about possible regular work. She mentioned that the employer was not "completely happy" with a bartender who reportedly was slow and sometimes rude to customers. Transcript, July 12, 2019 9:30 a.m. hearing, at 21. When discussing the possibility of regular work with claimant, TWP did not specify the number of days per week, the days and hours of the work, or a start date for the work. Claimant told TWP that she would "think about it" but did not call the employer back because she expected to hear from the employer if and when the bartender's employment ended. Transcript, July 12, 2019 9:30 a.m. hearing, at 22, 25.

(5) Claimant filed weekly claims for benefits for the weeks from December 10, 2017 through March 17, 2018 (weeks 50-17 through 11-18), the weeks at issue. During the week ending December 16, 2017 (week 50-17), claimant certified to the Department that she had not refused an offer of work during the week. The Department paid claimant her weekly benefit amount of \$502 for each of the weeks at issue for a total of \$7,028 in benefits for weeks 50-17 through 11-18.

(6) On or about March 14, 2018, TWP contacted claimant, told her that the bartender whom they had not been happy with previously had quit. She asked claimant if she was interested in regular work taking over that person's shift. TWP mentioned to claimant at that time that TY had told TWP that claimant appeared somewhat "intimidated" by customers, and then told claimant, "I want you to take a couple of days and think about this if you want to bartend," which claimant agreed to do. Transcript, July 12, 2019 9:30 a.m. hearing at 9. Claimant did not respond to TWP. When discussing the possibility of regular work with claimant on March 14, 2018, TWP did not specify a start date for the work.

CONCLUSIONS AND REASONS: Claimant did not refuse an offer of work from the employer on or about December 16, 2017 and is not disqualified from receiving benefits for that reason. Accordingly, claimant was not overpaid benefits, she is not assessed an overpayment, and she is not liable for penalties.

Job Refusal. ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if an individual failed without good cause to accept suitable work when offered. OAR 471-030-0038(6)(a) (December 23, 2018) defines “good cause” as “such that a reasonable and prudent person, exercising ordinary common sense, would refuse to * * * accept suitable work when offered by the employer.” Factors to consider when determining whether work is “suitable” include, in pertinent part, “the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual.” ORS 657.190.

In a job refusal case, the burden of proof is on claimant to establish that a valid offer of work made by an employer was not suitable, or that claimant had good cause to refuse the offer. *Vail v. Employment Department*, 30 Or App 365, 567 P2d 129 (1977) (a claimant who is unemployed and who refuses an offer of employment has the burden of showing that the work offered is not suitable). However, the employer must first establish that it made claimant a *bona fide* offer of suitable work and that claimant refused it, thus making a *prima facie* showing that claimant was not entitled to benefits. To establish that it made a “bona fide” offer of employment, the employer must show that claimant understood the “[t]he details of the job (type of work, duties, hours and days, rate of pay, start date, etc.)” Oregon Employment Department, UI Benefit Manual §450 (Rev. 04/01/10). Only if the employer meets that burden, does it then shift to claimant to show the offer of work was not suitable, or show claimant had good cause for refusing it.

Order No. 19-UI-133360 concluded that claimant failed without good cause to accept the employer’s offer of suitable work on December 16, 2017, reasoning:

Claimant was offered work by Raven Inn as a bartender...Claimant asserted that she did not recall the offer being made in December 2017 and she only recalled the offer in March 2018. However, the owner’s testimony was clear and logical. Claimant’s testimony was inconsistent in that she asserted that she was excited about the job and would have accepted it, yet, when the same offer was made a second time, she did not accept it at that time, either.

Order No. 19-UI-133360 at 3. However, the record fails to show that the employer made a *bona fide* offer of work to claimant on December 16, 2017, which claimant then refused. Although TWP testified that she “offered” claimant a part-time bartending job on December 16, 2017, TWP admitted that she “just [wasn’t] sure what days and we weren’t really sure if it was going to be one day, two days, three days,” but that regardless, claimant refused the offer when she failed to call the employer back. Transcript, July 12, 2019 9:30 a.m. hearing, at 25-29. Because the offer, as described by TWP, did not specify the days, hours or start date of the position, the employer failed to meet its burden to show that it made a *bona fide* offer of employment to claimant, in accordance with the Department’s interpretation of that term. Moreover, on February 28, 2018, when TWP responded to the Department’s benefit earnings audit regarding claimant for the period October 1, 2017 through January 28, 2018, TWP was asked “Did the claimant refuse any offer of work?” and TWP responded, “No.” Exhibit 2, 2019-UI-97312, Benefit Earnings Audit at p. 2. TWP’s response at that time was consistent with claimant’s testimony at hearing that she did not recall being offered work “on a regular basis” in December 2017. Transcript, July 12, 2019 9:30 a.m. hearing, at 8.

Because the employer failed to meet its burden to show that it made a *bona fide* offer of work to claimant on or about December 16, 2017, claimant may not be disqualified from receiving unemployment insurance benefits for failing without good cause to accept suitable work when offered.

Overpayment and Penalties. 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. Read together, ORS 657.215 and ORS 657.310(2) provide that if an individual has received any benefits to which the individual is not entitled because the individual has willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits, the individual is liable to pay a monetary penalty and to have a penalty period of benefit disqualification imposed.

The Department concluded, and Order No. 19-UI-133647 agreed, that on the basis of decision # 135531, claimant was disqualified from receiving the \$7,028 in regular benefits paid to her for weeks 50-17 through 11-18, and that because she received those benefits based upon a willfully false certification to the Department that she had not refused an offer of suitable work during week 50-17, she was liable to repay those benefits to the Department, and subject to a monetary penalty of \$1,054.20 and a penalty disqualification period of 47 weeks. Order No. 19-UI-133647 at 5. However, having concluded that claimant did *not* refuse an offer of suitable work without good cause during week 50-17, it is further concluded, for that reason, that claimant was not disqualified from receiving benefits for weeks 50-17 through 11-18, and, as such, was not overpaid \$7,028 in benefits or subject to a monetary penalty or a penalty disqualification period.

DECISION: Order Nos. 19-UI-133360 and 19-UI-133647 are set aside, as outlined above.¹

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

DATE of Service: September 12, 2019

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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¹ This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.



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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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

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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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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