

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0735

Affirmed
Ineligible Week 16-19
Disqualified Effective Week 16-19
Overpayment & Penalties

PROCEDURAL HISTORY: On May 30, 2019, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not available for work from April 14, 2019 to April 20, 2019 because he missed two days of work (decision # 155219), and the other concluding claimant voluntarily left work and was disqualified from benefits effective April 14, 2019 (decision # 140240). On June 7, 2019, the Department served notice of another administrative decision, based upon decisions # 155219 and 140240, assessing a \$3,666 overpayment, \$549.90 monetary penalty, and 24 penalty weeks (decision # 193542). Claimant filed a timely request for hearing on all three decisions. On July 17, 2019, ALJ Shoemake conducted three hearings, and on July 18, 2019 issued Order Nos. 19-UI-133592, affirming decision # 155219, 19-UI-133623, affirming decision # 140240, and 19-UI-133628, affirming decision # 193542. On August 6, 2019, claimant filed applications for review of all three orders with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (May 13, 2019), EAB consolidated its review of Orders No. 19-UI-133592, 19-UI-133623, and 19-UI-133628. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2019-EAB-0733, 2019-EAB-0734, and 2019-EAB-0735).

FINDINGS OF FACT: (1) Effective February 14, 2019, claimant filed an initial claim for unemployment insurance benefits. His weekly benefit amount was \$611. The maximum weekly benefit amount in effect at the time was \$624. Claimant filed weekly claims for benefits from April 14, 2019 through June 1, 2019 (weeks 16-19 through 22-19), the weeks at issue.

(2) Bend Metropolitan Park employed claimant as a landscaper from April 8, 2019 to April 17, 2019.

(3) On April 15, 2019 and April 16, 2019, the employer scheduled claimant to work. Claimant notified the employer that he would be absent both days, and he did not work. Claimant did not work those days because he had back pain that left him physically incapable of performing his landscaping job.

(4) On April 16, 2019, claimant called the Department and asked an employee what would happen if he quit a job he had held for one week. The employee told claimant that the work separation would be reviewed, and it would take about four weeks to investigate. Exhibit 1.

(5) On April 17, 2019, claimant reported to the workplace late and out of uniform. As he approached his supervisor he held out his work keys and said the work was not for him; claimant could not perform certain core functions of his job without those keys. The supervisor accepted the keys and told claimant he was sorry to hear that, and asked claimant about returning his work uniforms. Continuing work was available for claimant until he turned in his keys, effectively quitting work.

(6) On April 22, 2019, claimant restarted his unemployment insurance claim by telephone and the call was recorded. He reported to the Department employee with whom he spoke that he was unemployed because his work with the employer was a temporary seasonal job.

(7) On April 23, 2019, claimant filed a weekly claim for benefits for April 14, 2019 to April 20, 2019 (week 16-19). He reported to the Department that he had not quit or been discharged from a job that week. He also reported to the Department that he was physically capable of working each day that week.

(8) Based upon claimant's weekly claims and reports while claiming week 16-19, and his failure to report at any time that he had quit his job with the employer, the Department paid claimant \$611 per week for each of the weeks at issue, for a total of \$3,666.00.

(9) On May 14, 2019, claimant spoke with a Department investigator who asked him if it was true that he quit work without notice. Claimant responded that he had not planned to quit without notice. When asked why he quit, claimant responded that he had done so to seek work in his chosen field.

(10) On May 28, 2019, a Department employee listened to the recording of claimant's April 22, 2019 call with a Department employee and confirmed that claimant had initially reported that his separation from the employer was for a temporary seasonal reason.

CONCLUSIONS AND REASONS: Claimant was not available for work during week 16-19, voluntarily left work without good cause, was overpaid \$3,666 due to willful misrepresentations about his availability and work separation, and is liable for a \$549.90 monetary penalty and 24 penalty weeks.

Available for work. Based on a *de novo* review of the entire record in Case No. 2019-UI-97201, and pursuant to ORS 657.275(2), the portion of Order No. 19-UI-133592, concluding that claimant was not available for work during week 16-19, is adopted. Claimant is not eligible for benefits during that week.

Work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Claimant disputed that he quit his job, but the preponderance of the evidence suggests that he did. He reported to work out of uniform, and walked toward the supervisor extending keys he needed to perform core functions of his job toward the supervisor as if to return them. Multiple individuals heard claimant state that the work was not for him. When it was clear that the supervisor thought claimant was quitting his job, nothing in the record suggests that claimant told the supervisor that he was not or contradicted the supervisor's belief. On May 14th, after the separation, claimant tacitly confirmed to a Department employee that he quit work. For any of those reasons, it is more likely than not that claimant could have continued to work for the employer for an additional period of time after April 17th, but chose not to do so by returning his keys and quitting his job effective that day. Claimant therefore quit work.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). Quitting suitable work to seek other work is not good cause. OAR 471-030-0038(5)(b)(A). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Claimant denied having quit his job, and therefore did not suggest at hearing a reason for leaving. The record viewed as a whole suggests that claimant might have quit because he thought working as a landscaper was not suitable work for him, however, or that he needed to quit work to seek other work. Neither reason for leaving amounted to good cause. The record does not contain sufficient evidence suggesting the work was not suitable.¹ Although claimant had back pain resulting from about a week of working as a landscaper, absent evidence that claimant lacked the physical fitness to do landscaping work or that doing such work imposed a heightened degree of risk to claimant's health or safety, his back pain did not make the work itself unsuitable. Nor would back pain resulting from performing landscaping work necessarily suggest a grave situation that left claimant with no reasonable alternative but to quit work when he did absent a showing that claimant discussed the effect the landscaping work had on his health and asked the employer whether or not alternatives existed that would allow him to continue working for the employer without experiencing back pain or injury. Finally, to the extent claimant quit work to seek other work, quitting suitable work to seek other work is not good cause. Claimant therefore left work without good cause, and he is disqualified from receiving unemployment insurance benefits because of his work separation effective April 14, 2019.

Overpayment. 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.*

¹ In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, 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.

Claimant was not entitled to receive benefits during weeks 16-19 through 22-19 because he was not eligible during week 16-19 and was disqualified from receiving benefits during the entirety of the weeks at issue. He received \$3,666 in benefits for those weeks that he was not entitled to receive. The reason claimant received those benefits is that he reported to the Department he was available for work when he was not, and because he reported his work separation as being for seasonal reasons instead of reporting that he quit his job. Regardless of claimant's knowledge or intent when making those reports to the Department, because his false reports caused him to be overpaid, claimant is liable to repay the \$3,666 overpayment to the Department or have it deducted from future benefits otherwise payable.

Misrepresentation penalties. 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 of at least 15, but not greater than 30, percent of the amount of the overpayment. ORS 657.310(2).

Claimant's false reports to the Department in this case were willfully made to obtain benefits. Although claimant alleged his false reports were the result of accidents entering information into the system or misunderstandings, the evidence strongly suggests otherwise. For example, claimant quit his job on April 17th but reported to the Department on April 23rd that he had not quit. Claimant suggested that the supervisor fired him, but reported to the Department on April 23rd that he had not been fired from a job. Notably, claimant had called the Department the day before he quit his job to ask what effect that would have on his benefits, and, after being told that reporting a quit would result in a four-week investigation, claimant chose to report his separation as being for seasonal reasons instead of reporting he quit. Claimant reported his separation as being seasonal, but when asked by the Department why he quit he confirmed he had. Additionally, when asked whether he was physically able to work and capable of working during week 16-19, claimant answered "Yes" even though he knew he had called in sick twice during that week because his back hurt. Claimant's actions and knowledge of events that occurred during week 16-19 with respect to his availability and work separation are irreconcilably different than his reports to the Department, and he made false reports to the Department about those things with knowledge that reporting truthfully would have adverse consequences on his ability to obtain benefits. The record therefore establishes it is more likely than not that claimant willfully made false statements to the Department to obtain benefits, and he is liable for penalty weeks and a monetary penalty.

The length of the penalty disqualification period is determined by applying the provisions of OAR 471-030-0052(1) (January 11, 2018), which provides, in pertinent part, that when the disqualification is imposed because of disqualifying acts under ORS 657.155 and ORS 657.176, the number of weeks of disqualification is determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), 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 act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number. Claimant's overpayment was \$3,666, divided by the maximum weekly benefit amount in effect at the time of \$624 equals 5.87, multiplied by four equals 23.48, rounded up to the nearest whole number equals 24. Claimant's penalty disqualification period therefore totals 24 weeks.

The monetary penalty amount is based upon the number of occurrences of misrepresentation made by claimant; an occurrence is counted each time claimant willfully makes a false statement to obtain benefits. OAR 471-030-0052(7). For the first or second occurrence within five years, the penalty equals 15 percent of the total overpayment. OAR 471-030-0052(7)(a). Claimant made two misrepresentations, first when reporting that he did not quit a job during week 16-19 even though he knew he had, and second when reporting that he was physically capable of working every day during week 16-19 when he knew he had called in sick to his job on two occasions. Claimant is therefore liable for a penalty equal to 15% of his \$3,666 overpayment. 15% of \$3,666 equals \$549.90.

Conclusion. Claimant was not available for work during week 16-19. Claimant voluntarily left work for the employer without good cause and is disqualified from receiving benefits effective April 14, 2019. Claimant was overpaid \$3,666 and, as a result of making two willful misrepresentations to the Department, he is liable for a \$549.90 monetary penalty and 24 penalty weeks.

DECISION: Order Nos. 19-UI-133592, 19-UI-133623, and 19-UI-133628 are affirmed.

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

DATE of Service: September 10, 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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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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

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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