

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0421

Order No. 20-UI-149087 Affirmed – Not Available Weeks 32-19 and 34-19
Order No. 20-UI-149088 Reversed – No Disqualification
Order No. 20-UI-149864 Modified – \$1,214 Overpayment, No Penalties

PROCEDURAL HISTORY: On March 17, 2020, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that claimant was not available for work from August 4, 2019 to August 10, 2019 and August 18, 2019 to August 24, 2019 (decision # 125654), and one concluding that the employer discharged claimant for misconduct and disqualifying claimant from benefits effective August 18, 2019 (decision # 130847). On March 18, the Department served notice of an administrative decision concluding claimant was overpaid and made misrepresentations to obtain benefits, and assessing a \$4,856 overpayment, \$971.20 monetary penalty, and 32 penalty weeks (decision # 191758). Claimant filed timely requests for hearing on all three decisions.

On April 14, 2020, the Office of Administrative Hearings (OAH) mailed notice of a consolidated hearing on decisions # 125654 and 130847 scheduled for April 28, 2020. On April 24, 2020, OAH mailed notice of a hearing on decision # 191758 scheduled for May 7, 2020. On April 28, 2020, ALJ Schmidt conducted the consolidated hearing on decisions # 125654 and 130847, and on May 1, 2020 issued Order No. 20-UI-149087, affirming decision # 125654, and Order No. 20-UI-149088, affirming decision # 130847 but concluding that claimant voluntarily left her job with the employer without good cause. On May 7, 2020, ALJ Snyder conducted the hearing on decision # 191758, and on May 15, 2020 issued Order No. 20-UI-149864, modifying decision # 191758 by assessing a \$4,856 overpayment, \$728.40 monetary penalty, and 32 penalty weeks.

On May 20, 2020, claimant filed timely applications for review on all three orders with the Employment Appeals Board (EAB). Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-149087, 20-UI-149088, and 20-UI-149864. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2020-EAB-0419, 2020-EAB-0420, and 2020-EAB-0421).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring 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).

FINDINGS OF FACT: (1) On March 20, 2019, claimant filed an initial claim for unemployment insurance benefits. Claimant's weekly benefit amount was \$607.

(2) From June 2019 to August 21, 2019, Infinity Rehab employed claimant. Claimant's training was as a pediatric occupational therapist. The employer hired claimant to work as an on-call adult occupational therapist.

(3) From June 24, 2019 to June 28, 2019, claimant attended an orientation primarily with physical therapists. She had negative experiences during the orientation and developed several concerns about the nature of the work, training, sanitation, and billing practices. After June 28, 2019, the employer did not contact claimant to assign on-call work to her.

(4) Sometime in July 2019, the employer contacted claimant to request feedback about her orientation experience. Claimant provided negative feedback. The employer offered claimant another orientation that was more suited to claimant's training, and claimant agreed. Claimant did not want to work for the employer, but accepted the offer of additional orientation because she needed income. The employer scheduled claimant to attend paid orientation on August 7, 2019. On August 7, 2019, claimant had a family emergency and called the employer to cancel the orientation.

(5) Claimant later filed a weekly claim for unemployment insurance benefits for the week of August 4, 2019 to August 10, 2019 (week 32-19). She certified to the Department that she had been available for work that week, and did not disclose that she had missed an opportunity for work. The Department paid claimant \$607 in benefits for that week based upon her report that she had been available for work.

(6) The employer re-scheduled claimant to attend paid orientation on August 19, 2019. Claimant had a conflict and called the employer to cancel the scheduled August 19, 2019 orientation. Claimant did not contact the employer to reschedule the orientation; instead she left it to the employer to contact her.

(7) Claimant later filed a weekly claim for unemployment insurance benefits for the week of August 18, 2019 to August 24, 2019 (week 34-19). She certified to the Department that she had been available for work that week, and did not disclose that she had missed an opportunity for work. The Department paid claimant \$607 in benefits for that week based upon her report that she had been available for work.

(8) After claimant canceled the August 19th orientation, the employer determined that claimant was not a reliable employee and was not a good fit. The employer also had a policy under which they terminated on-call employees unless they worked a minimum of 24 hours every 90 days. The employer concluded that claimant had violated that policy.

(9) On August 21, 2019, the employer decided to terminate claimant's employment. The employer did not notify claimant that they had terminated her employment. Claimant did not reach out to the employer to inquire about additional orientation or on-call work; after some "phone tag," claimant stopped hearing from the employer.

(10) Claimant subsequently claimed benefits for weeks 35-19 through 40-19, and received \$607 in benefits each week. The Department paid claimant \$3,642 in benefits for those weeks.

CONCLUSIONS AND REASONS: Claimant was not available for work during weeks 32-19 and 34-19, and was overpaid \$1,214 in benefits for those weeks. Claimant was not disqualified from receiving benefits based upon her work separation, however, and therefore was entitled to receive the \$3,642 in benefits she received for weeks 35-19 through 40-19. Claimant did not willfully make misrepresentations to receive any of the \$4,856 in unemployment insurance benefits she received for weeks 32-19 through 40-19.

Available for work. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For an individual to be considered “available for work” for purposes of ORS 657.155(1)(c), they must be:

* * *

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and

(c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time;

* * *

OAR 471-030-0036(3) (December 8, 2019). During weeks 32-19 and 34-19, claimant had one opportunity to work each week, and missed both opportunities. During week 32-19, claimant was not capable of accepting or reporting for a suitable work opportunity because of a family emergency. During week 34-19, claimant had a conflict and chose not to attend orientation, thereby imposing a condition that reduced claimant’s opportunities to return to work that week. Because claimant missed work opportunities during weeks 32-19 and 34-19, and despite having compelling personal reasons for doing so, claimant’s missed opportunities for work mean that she was not “available for work” as that term is defined for purposes of unemployment insurance benefits. Claimant therefore was not eligible for unemployment insurance benefits during weeks 32-19 and 34-19.

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).

Order No. 20-UI-149088 concluded that claimant voluntarily left her job with the employer. The order reasoned that, because claimant canceled orientation on August 7th and August 19th, and “continuing work was available at the employer had claimant chosen to accept it,” the work separation was a voluntary leaving.¹ The record does not support the conclusion that claimant quit her job.

¹ Order No. 20-UI-149088 at 2.

While Order No. 20-UI-149088 was correct that continuing work was available for claimant as of August 19, 2019, the work separation did not happen on that date, it happened two days later on August 21, 2019. In the meantime, claimant had canceled orientation due to an emergency and a conflict, but had not indicated to the employer explicitly or implicitly that she was quitting her job or planned to reject any further offers of work from the employer. Additionally, she subjectively felt willing to continue working for the employer, even though she had concerns about some of the employer's practices, because she needed the income. Claimant's decision to leave it up to the employer to contact her for additional work was not unreasonable given that she was working only on an on-call basis, and in the absence of evidence that the employer had communicated to claimant that she needed to contact the employer to reschedule, or that she otherwise understood the employer had that expectation.

It was the employer, not claimant, that decided to end claimant's employment on August 21, 2019. At hearing, and in written reports to the Department, the employer made it clear that they made the decision to end claimant's employment because the employer determined that she was not a reliable employee or a good fit for the employer. *See* 2020-UI-08181 Record, Exhibit 1, page 8; May 7, 2020 hearing, Transcript at 18. Because claimant was, ostensibly, willing to continue working for the employer as of August 21st, and the employer chose not to allow her to do so, the work separation was a discharge.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c).

To the extent the employer discharged claimant because she was not a good fit, the work separation was not for misconduct. Claimant's fit with the employer was not a willful or wantonly negligent violation of a reasonable employer expectation, particularly where, as here, claimant was a trained pediatric occupational therapist and the employer primarily offered her adult physical and occupational therapy work.

To the extent the employer discharged claimant because she was not reliable, the work separation was not for misconduct. The record does not show that the employer notified claimant that she had to maintain particular attendance standards or that it would violate the employer's expectations to cancel or reschedule orientations that conflicted with a family emergency or scheduled personal activity. In the absence of evidence that claimant was aware of the employer's expectations with regard to her attendance at, or rescheduling of, orientation, the record does not show that claimant's cancellations were willful or wantonly negligent acts on claimant's part.

The employer also concluded that claimant had failed the employer's 90-day probation period by failing to work at least 24 hours in a 90-day period. That was not misconduct on claimant's part, either. At the time of the August 21st work separation, claimant had not actually worked for the employer for 90 days. She had worked from June 2018 through August 21st, which was a period of approximately two months. Claimant therefore did not violate the employer's 90-day probation period as alleged.

For those reasons, claimant's discharge was not for misconduct, and she is not disqualified from receiving unemployment insurance benefits because of her work separation from the employer.

Overpayment. Only unemployed individuals who are available for work and not disqualified from benefits are eligible to receive unemployment insurance benefits. *See* ORS 657.155(1)(c) and (e).

The Department paid claimant \$4,856 in unemployment insurance benefits for weeks including week 32-19 through 40-19. During weeks 32-19 and 34-19, the Department paid claimant \$1,214 in benefits. However, claimant was not eligible for benefits during those two weeks because, for the reasons outlined above, claimant was not available for work. Claimant therefore was overpaid \$1,214 in benefits for those two weeks.

During weeks 35-19 to 40-19, the Department paid claimant \$3,642 in unemployment insurance benefits. Order No. 20-UI-149864 concluded that claimant was not entitled to those benefits because she was actually disqualified from receiving benefits during those weeks because of a disqualifying work separation.² As outlined above, however, claimant's work separation was not disqualifying. Claimant was therefore entitled to the \$3,642 in benefits she received during those weeks.

Repayment. 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.*

As previously established, the Department overpaid claimant, in total, \$1,214. The Department paid claimant those benefits because she incorrectly reported to the Department that she was available for work in weeks 32-19 and 34-19 even though she had refused work opportunities and was therefore not available for work in either week. Regardless of claimant's knowledge or intent when she incorrectly reported her availability to the Department, because she received the overpayment because of her own false statements about her availability, she is liable to either repay the \$1,214 overpayment or have it deducted from future benefits otherwise payable to her.

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

² Order No. 20-UI-149864 at 3.

greater than 30, percent of the amount of the overpayment. ORS 657.310(2). Penalties may only be assessed based upon “the total amount of benefits overpaid to the individual for the disqualifying act(s). See e.g. OAR 471-030-0052(1)(a) *et seq.*”

Order No. 20-UI-149864 concluded that claimant made willful misrepresentations to the Department when she claimed benefits for weeks 32-19 and 34-19, because she knew she had canceled two work opportunities with the employer when she reported to the Department that she was available for work, and was therefore liable for misrepresentation penalties.³ That order also concluded that claimant did not make a willful misrepresentation when she misreported the nature of her work separation to the Department because she did not believe she had been separated from work when she claimed benefits.⁴ Despite concluding that claimant obtained only two weeks of benefits by misrepresenting her eligibility, however, the order nevertheless erroneously calculated penalties in the amount of \$728.40 and 32 weeks based upon the entire amount of her overpayment instead of basing the misrepresentation penalties only upon the amount the order had concluded was based upon claimant’s willful misrepresentations.⁵

Order No. 20-UI-149864’s conclusion that claimant did not make a misrepresentation about her work separation was supported by the record. The employer terminated claimant’s employment without notifying her that they had, and claimant was unaware at all relevant times that she had been separated from that employment. Claimant’s failure to report a work separation that she did not know had happened is not attributable to her as a misrepresentation, and she is not liable for any penalties for failure to report the separation.

Order No. 20-UI-149864’s conclusion that claimant made willful misrepresentations about her availability is not supported by the record. Although claimant did misreport her availability during week 32-19 and 34-19, she did not do so willfully, intentionally, or to obtain benefits she would not otherwise have been entitled to receive. Rather, she reported as she did because she “didn’t realize that canceling or rescheduling shifts could make [her] ineligible for the entire week of benefits,” or that “a time conflict at any point during the week would then make me ineligible for the entire week due to any – that normally when you work a job you work your hours but you’re not working every single hour of every day. So, I didn’t realize . . .” May 7, 2020 hearing, Transcript at 21, 22.

Although information that might have helped claimant make an accurate report about her availability for work was available to her at the time she filed each claim for benefits, claimant’s failure to use those resources does not mean the mistakes she made while claiming were willful misrepresentations.⁶ In the

³ Order No. 20-UI-149864 at 5.

⁴ Order No. 20-UI-149864 at 6.

⁵ See Order No. 20-UI-149864 at 6. Had the order accurately concluded that claimant made misrepresentations about her availability, but not her work separation, the correct penalty disqualifications imposed would have been based solely on the \$1,214 overpayment claimant received due to her purported disqualifying acts or misrepresentations. The correct penalties under OAR 471-030-0052(1)(c) and (7)(a) would therefore have been \$182.10 (15% of \$1,214) and 8 weeks (\$1,214 overpayment due to disqualifying acts ÷ \$624 maximum weekly benefit amount in effect at the time = 1.94 x 4 = 7.76, rounded up = 8 weeks).

⁶ The Department representative testified that “if a person does not understand the question, there is also a – a little indicator right by the question, if need [*sic*] help you can click onto that need-help link, and it – it’ll explain exactly what that talked

absence of information suggesting that claimant was aware of how “available for work” was defined for purposes of unemployment insurance benefits claims, or the effect of reporting that she was not available for work could have on her claim, and willfully made a false report about her availability to get benefits she knew she would otherwise be ineligible to receive, the record does not support a conclusion that claimant should be liable for misrepresentation penalties based upon her misreports about her availability for work in weeks 32-19 and 34-19.

Conclusion. For the reasons explained herein, claimant was not available for work during weeks 32-19 and 34-19, misrepresented her availability to the Department, and received \$1,214 in benefits for those weeks that she is liable to either repay or have deducted from future benefits otherwise payable. However, she is not liable for misrepresentation penalties for those weeks. Likewise, claimant is not disqualified from benefits because of a work separation from the employer, was not overpaid benefits during the weeks of 35-19 to 40-19, is not liable to repay benefits for those weeks, and is not subject to misrepresentation penalties based upon her receipt of benefits during those weeks or a failure to report her work separation from the employer.

DECISION: Order No. 20-UI-149087 is affirmed, Order No. 20-UI-149088 is reversed, as outlined above, and Order No. 20-UI-149864 is modified, as outlined above.

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

DATE of Service: June 23, 2020

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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about, and it goes into depth about, you know, missing any work during that week you would not be considered to be eligible for unemployment insurance.” *See* May 7, 2020 hearing, Transcript at 11. While the availability of information by clicking a “need-help link” would be instructive for individuals who thought they did not understand the claim question, the “need-help link” would not help an individual who mistakenly thought they understood the claim question, as such an individual would not believe they needed help to understand the question and would not click that link.



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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

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