

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0935

Order No. 21-UI-177753 Affirmed ~ Disqualification
Order No. 21-UI-177752 Affirmed ~ Ineligible Weeks 44-20, 48-20 through 50-20,
01-21 through 11-21, and 13-21 through 16-21
Order No. 21-UI-177833 Affirmed ~ Overpayment No Penalties

PROCEDURAL HISTORY: On July 23, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntary quit work without good cause and was disqualified from receiving unemployment insurance benefits effective September 6, 2020 (decision # 75532). Also on July 23, 2021, the Department served notice of an administrative decision concluding that claimant was not available for work for the weeks including September 6, 2020 through April 24, 2021 (weeks 37-20 through 16-21) and was therefore not eligible to receive benefits for those weeks and until the reason for the denial had ended (decision # 92111). On July 28, 2021, the Department served notice of an administrative decision, based in part on decision # 75532, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain unemployment insurance benefits, and assessing a \$8,650.00 overpayment of regular benefits, a \$5,100.00 overpayment of Federal Pandemic Unemployment Compensation (FPUC) benefits, a \$2,062.50 monetary penalty, and a 52-week penalty disqualification from future benefits. Claimant filed timely requests for hearing on decisions # 75532 and 92111 and the July 28, 2021 administrative decision.

On October 13, 2021, ALJ Schmidt conducted a hearing on decisions # 75532 and 92111. On October 20, 2021, ALJ Schmidt conducted a hearing on the July 28, 2021 administrative decision, at which the employer failed to appear. On October 21, 2021, ALJ Schmidt issued Order No. 21-UI-177753, affirming decision # 75532. Also on October 21, 2021, ALJ Schmidt issued Order No. 21-UI-177752, modifying decision # 92111 by concluding that claimant was not available for work and therefore not eligible for benefits for the weeks including October 25, 2020 through October 31, 2020 (week 44-20), November 22, 2020 through December 12, 2020 (weeks 48-20 through 50-20), January 3, 2021 through March 20, 2021 (weeks 01-21 through 11-21), and March 28, 2021 through April 24, 2021 (weeks 13-21 through 16-21). On October 22, 2021, ALJ Schmidt issued Order No. 21-UI-177833, modifying the July 28, 2021 administrative decision by concluding that claimant was liable for a \$8,304.00 overpayment of regular benefits and a \$5,100.00 overpayment of FPUC benefits but was not subject to a monetary penalty or a penalty disqualification from future benefits. On November 7, 2021, claimant filed an

application for review of Orders No. 21-UI-177753, 21-UI-177752, and 21-UI-177833 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-177753, 21-UI-177752, and 21-UI-177833. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2021-EAB-0934, 2021-EAB-0935, and 2021-EAB-0933).

Based on a *de novo* review of the entire record in these consolidated cases, and pursuant to ORS 657.275(2), Order No. 21-UI-177752, which concluded that claimant was not available for work and therefore not eligible to receive benefits for weeks 44-20, 48-20 through 50-20, 01-21 through 11-21, and 13-21 through 16-21 is **adopted**. The remainder of these decisions address the merits of Orders No. 21-UI-177753 and 21-UI-177833.

FINDINGS OF FACT: (1) On April 27, 2020, claimant filed an initial claim for unemployment insurance benefits. Claimant had never previously filed for unemployment insurance benefits.

(2) On June 15, 2020, claimant began working for the employer, Staton Companies, as a construction laborer. When claimant started the job, he informed the employer that he planned to return to college when the fall 2020 semester began.

(3) The nature of the employer's business was such that when they completed a project, business slowed until their next project began. Around the beginning of September 2020, the employer's business slowed due to being between construction projects. As a result, the employer did not schedule claimant for shifts for the week of August 30, 2020 through September 5, 2020. Claimant worked for the employer on September 8, 9, and 10, 2020 but was not scheduled for any shifts the next two weeks that followed.

(4) On September 11, 2020, claimant called his manager and mentioned that the employer was "slow with work" and that claimant was "going back to college soon[.]" October 13, 2020 Transcript at 22. Claimant then asked "if it would be helpful to [the employer] if [claimant] just . . . went to school and – and didn't come back to work . . . [and] would be able to claim unemployment." October 13, 2020 Transcript at 20. The manager agreed and the call ended. Claimant never again worked for the employer. If claimant had not stopped working for the employer, the employer would have scheduled him for shifts within three weeks after September 11, 2020.

(5) Thereafter, also on September 11, 2020, claimant filed a restart application for his unemployment insurance claim. Claimant indicated on the restart application that he had stopped working for the employer because they had laid him off due to a lack of work. Claimant believed this description was accurate because he had not been scheduled for shifts for the week of August 30, 2020 through September 5, 2020 and believed based on the conversation with his manager that the employer had approved of him reporting that he was laid off.

(6) On September 21, 2020, the fall 2020 semester began and claimant returned to college. Claimant was not required by law to attend college.

(7) Claimant claimed benefits for the weeks including August 30, 2020 through September 19, 2020 (weeks 36-20 through 38-20), October 25, 2020 through October 31, 2020 (week 44-20), and November 22, 2020 through April 24, 2021 (weeks 48-20 through 16-21). These are the weeks at issue.

(8) The Department paid claimant \$346.00 in regular benefits for each of weeks 36-20, 38-20, 44-20, and 48-20 through 16-21. The Department also paid claimant FPUC benefits in the amount of \$300.00 per week for weeks 53-20 through 16-21. The Department did not pay claimant regular benefits for week 37-20 because the earnings claimant reported for that week exceeded his weekly benefit amount. For the weeks at issue, claimant received a total of \$8,650.00 in regular benefits and \$5,100 in FPUC benefits.

(9) Claimant received regular benefits for weeks 38-20, 44-20, and 48-20 through 16-21 and FPUC benefits for weeks 53-20 through 16-21 because he stated on the restart application that the employer had laid him off due to a lack of work. If claimant had reported on the restart application that he had voluntarily quit, the Department would not have paid claimant for those weeks without first investigating the work separation.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without good cause. Claimant received \$8,304 in regular benefits and \$5,100 in FPUC benefits to which he was not entitled. Claimant is liable for an overpayment of \$8,304 in regular benefits to be repaid or deducted from future benefits otherwise payable under ORS Chapter 657. Claimant is also liable for an overpayment of \$5,100 in FPUC benefits to be deducted from future regular or FPUC payments to which claimant is otherwise entitled.

Nature of the 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) (September 22, 2020). 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (September 22, 2020).

The preponderance of evidence shows that claimant voluntarily quit work on September 11, 2020. The record indicates that on that date, more likely than not, claimant was unwilling to continue to work for the employer for an additional period of time, given his reference in the September 11, 2020 telephone conversation to “going back to college soon” and his proposal that he not “come back to work,” and then claim unemployment. October 13, 2020 Transcript at 22, 20. Continuing work was available to claimant on that date because, although claimant was not scheduled for shifts for the week of August 30, 2020 through September 5, 2020 or the two weeks that followed September 11, 2020, a continuing relationship between the employer and claimant existed. A continuing relationship between the employer and claimant existed because it was customary for the employer to not schedule employees for shifts when business slowed between projects and the employer would have scheduled claimant for shifts within three weeks after September 11, 2020. For these reasons, the record supports, more likely than not, that on September 11, 2020, “work,” as defined as a continuing relationship between the employer and claimant, was available to claimant but claimant was unwilling to continue to work for the employer for an additional period of time. The work separation was therefore a voluntary leaving that occurred on September 11, 2020.

Voluntary Leaving. 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). “[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work.” OAR 471-030-0038(4). 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. Per OAR 471-030-0038(5)(b), leaving work without good cause includes:

* * *

(D) Leaving to attend school, unless required by law[.]

The record reflects that the reason claimant quit working for the employer on September 11, 2020 was due to his intention to return to college when the fall 2020 semester began. Claimant was not required by law to attend college. Therefore, under OAR 471-030-0038(5)(b)(D), claimant quit work without good cause.

Accordingly, claimant quit work without good cause and is disqualified from receiving unemployment insurance benefits effective September 6, 2020.

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

When claimant stated on the restart application that the employer had laid him off due to a lack of work, he made a false statement that caused him to receive regular benefits for weeks 38-20, 44-20, and 48-20 through 16-21. Although claimant more likely than not mistakenly believed that describing himself as laid off was accurate, claimant is liable under ORS 657.310 regardless of his knowledge or intent in making the false statement that caused him to receive benefits to which he was not entitled. Claimant was not entitled to receive regular benefits for weeks 38-20, 44-20, and 48-20 through 16-21 because he voluntarily quit work without good cause on September 11, 2020, which disqualified him from receiving benefits effective September 6, 2020. However, with respect to week 36-20, the record does not show that claimant’s false statement on the restart application caused him to receive benefits to which he was not entitled for that week. This is because claimant’s voluntary quit without good cause rendered

claimant disqualified from receiving benefits effective September 6, 2020, which was after week 36-20 (the week including August 30, 2020 through September 5, 2020).

Accordingly, at the time claimant claimed regular benefits for weeks 38-20, 44-20, and 48-20 through 16-21, his voluntary quit without good cause rendered him disqualified from receiving benefits and, because he stated on his restart application that he was laid off for lack of work, received benefits to which he was not entitled. Claimant must repay the \$8,304.00 in regular benefits he received for weeks 38-20, 44-20, and 48-20 through 16-21 to the Department or have that amount deducted from any future benefits otherwise payable to him under ORS Chapter 657. Claimant is not liable to repay the \$346.00 he received for week 36-20.

The Department did not show that claimant willfully made a false statement or misrepresentation such as to subject him to penalty weeks under ORS 657.215 or a monetary penalty under ORS 657.310(2) when he indicated on his restart application that he had stopped working for the employer because they had laid him off due to a lack of work. At hearing, claimant testified that he believed that describing himself as laid off was accurate because he had not been scheduled for shifts for the week of August 30, 2020 through September 5, 2020 and he believed based on the September 11, 2020 conversation with his manager that the employer had approved of him reporting that he was laid off. October 20, 2021 Transcript at 26–27. The record supports that the employer’s failure to schedule claimant for shifts for the week of August 30, 2020 through September 5, 2020 could reasonably have caused claimant to mistakenly think there was a lack of work, particularly given that claimant was not scheduled for any shifts the two weeks after September 11, 2020. Further, although whether the employer approved of claimant reporting that he was laid off was irrelevant to whether that characterization of the work separation was accurate, the record shows that claimant was relatively unfamiliar with unemployment insurance because the initial claim he filed in this case was his first initial claim. Given this relative unfamiliarity, it was plausible for claimant to have mistakenly believed that it was appropriate to report that he was laid off due to a lack of work based on his belief that the employer approved of him doing so. Because the preponderance of evidence supports that claimant mistakenly but sincerely believed that his report was accurate, claimant’s false statement on the restart application was not willful. As such, claimant is not subject to a penalty disqualification from future benefits under ORS 657.215 or a monetary penalty imposed under ORS 657.310(2).

Overpayment of FPUC Benefits. Under the provisions of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020, Pub. L. 116-136, claimant also received \$5,100.00 in FPUC benefits to which he was not entitled because he did not qualify for benefits under state law, as explained above. Pursuant to Pub. L. 116-136, § 2104(f)(2), an individual who receives FPUC payments to which the individual was not entitled is liable to repay those benefits, unless the Department waives such repayment because it determines that the payment of those benefits was without fault on the part of the individual and such repayment would be contrary to equity and good conscience. The record does not show the Department has waived repayment here. Therefore, claimant is liable for the overpayment of \$5,100.00 in FPUC benefits he received during the weeks at issue. Under Pub. L. 116-136, § 2104(f)(3), the Department may recover the FPUC benefits by deduction from any future regular or FPUC payments to which claimant is otherwise entitled.

DECISION: Orders No. 21-UI-177753, 21-UI-177752, and 21-UI-177833 are affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: December 15, 2021

NOTE: You may appeal these decisions 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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