

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0621

Affirmed
Late Request for Hearing Allowed
Disqualification
Overpayment Assessed

PROCEDURAL HISTORY: On November 6, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits effective March 1, 2020 (decision # 132100). On November 30, 2020, decision # 132100 became final without claimant having filed a request for hearing. On March 30, 2022, the Department served notice of an administrative decision, based in part on decision # 132100, concluding that claimant received benefits to which he was not entitled and assessing an overpayment of \$10,368 in regular unemployment insurance (regular UI) benefits and \$9,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department via offset of future benefits (decision # 141752). On April 12, 2022, claimant filed a late request for hearing on decision # 132100 and a timely request for hearing on decision # 141752. On May 10, 2022, ALJ Ramey conducted separate hearings on decisions # 132100 and 141752. On May 12, 2022, ALJ Ramey issued Order No. 22-UI-193569, concluding that claimant had good cause to file the late request for hearing on decision # 132100 and affirming that decision on the merits, and Order No. 22-UI-193540, affirming decision # 141752. On May 31, 2022, claimant filed applications for review of Orders No. 22-UI-193569 and 22-UI-193540 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-193569 and 22-UI-193540. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0621 and 2022-EAB-0622).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 22-UI-193569 concluding that claimant had good cause to file the late request for hearing on decision # 132100 is **adopted**. The remainder of this decision addresses the merits of Orders No. 22-UI-193569 and 22-UI-193540, concerning whether claimant voluntarily quit work with good cause and, if so, whether he was overpaid benefits as a result.

FINDINGS OF FACT: (1) Jackson Hewitt employed claimant in a temporary position as a tax preparer from January 1, 2020 until March 4, 2020. Claimant was assigned to work at the employer's location within a Wal-Mart store, and his position was originally scheduled to end on or around April 15, 2020.

(2) On March 1, 2020, claimant was "slightly injured" in a motor vehicle accident. Transcript at 20. Claimant did not seek medical treatment for the injuries, and they did not impact his ability to perform his work for the employer. Nevertheless, claimant did not report to work after March 1, 2020.

(3) On March 4, 2020, claimant contacted his supervisor and informed her that he had been in an accident. The supervisor requested that claimant provide a doctor's note, which claimant furnished to them. The employer contacted the doctor listed on the note and found that the listed doctor had retired several months earlier. When the employer asked claimant to explain the discrepancy, claimant voluntarily quit work.

(4) When claimant quit on March 4, 2020, he told his supervisor that he was doing so because of the accident he had been in on March 1, 2020. However, claimant actually quit because he was concerned about exposure to COVID-19 at work, though he did not mention this to his supervisor. Prior to resigning, claimant did not speak to the employer about his concerns about being exposed to COVID-19, did not seek any type of accommodations from the employer or otherwise inquire into alternatives to quitting. Had he done so, the employer would have considered claimant's concerns and attempted to address them if possible. This might have included the possibility of claimant taking a short leave of absence from work while the employer implemented safety protocols related to the pandemic. The employer implemented such protocols—in particular, encouraging customers to drop off their tax preparation materials in order to limit face-to-face interactions with employees—around the middle of March 2020.

(5) At the time that he quit, claimant was not ill with COVID-19, was not subject to a mandatory quarantine, had not been advised by a healthcare provider to self-quarantine, did not have to stay home to care for a member of the household who was ill with COVID-19, and did not have to stay home to care for a child due to the closure of a school or other facility. At the time that he quit, the employer had not ceased or curtailed their operations due to COVID-19.

(6) On October 27, 2019, claimant filed an initial application for unemployment insurance benefits. The Department determined that claimant's weekly benefit amount was \$648. Claimant subsequently claimed benefits for each of the weeks including March 29, 2020 through July 18, 2020 (weeks 14-20 through 29-20). These are the weeks at issue. For each of the weeks at issue, the Department paid claimant his weekly benefit amount of \$648 in regular UI benefits and an additional \$600 in FPUC benefits. In total, the Department paid claimant \$19,968 in combined regular UI and FPUC benefits for the weeks at issue.

(7) On November 6, 2020, the Department determined that claimant had voluntarily quit working for the employer without good cause, and that claimant was therefore disqualified from receiving benefits effective March 1, 2020. The Department had paid claimant for the weeks at issue, without first determining whether his separation from the employer was disqualifying, because of the high workload that the Department was facing at the time due to the COVID-19 pandemic. Had the Department

determined whether claimant's work separation was disqualifying prior to issuing payment for the weeks at issue, they would not have paid claimant for the weeks at issue.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without good cause. Claimant was overpaid \$10,368 in regular UI benefits and \$9,600 in FPUC benefits that he is liable to repay to the Department via offset of future benefits to which he is otherwise entitled.

Voluntary quit. ORS 657.176(2)(c) requires a disqualification from unemployment insurance benefits if a claimant voluntarily leaves (quits) work without good cause. *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) (September 22, 2020). "[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.

However, Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. *Former temporary* OAR 471-030-0070(2)(b) (effective March 8, 2020 through September 12, 2020) provides that an individual who quits work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under *former temporary* OAR 471-030-0070(1), a COVID-19 related situation includes the following:

- (a) A person is unable to work because they are ill with the novel coronavirus;
- (b) A person is unable to work because they have been potentially exposed to the novel coronavirus and have been subjected to a mandatory quarantine period;
- (c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus;
- (d) A person is unable to work because their employer has ceased or curtailed operations due to the novel coronavirus, including closures or curtailments based on the direction or advice of the Governor or of public health officials;
- (e) A person is unable to work because they have to stay home to care for a family member, or other person with whom they live or for whom they provide care, who is suffering from the novel coronavirus or subject to a mandatory quarantine;
- (f) A person is unable to work because they have to stay home to care for a child due to the closure of schools, child care providers, or similar facilities due to the novel coronavirus; and

(g) A person is being asked to work when it would require them to act in violation of a mandatory quarantine or Governor's directive regarding the limitation of activities to limit the spread of the novel coronavirus.

Claimant voluntarily quit work on March 4, 2020 due to concerns about contracting COVID-19 at the store where he was assigned to work. As a preliminary matter, while claimant's decision to quit was directly informed by the COVID-19 pandemic, the record does not show that claimant quit due to a "COVID-19 related situation" as that term was defined under *former temporary* OAR 471-030-0070(1).¹ Therefore, the question of whether claimant voluntarily quit for good cause must be analyzed under OAR 471-030-0038(4).

Claimant has not met his burden to show that he quit for a reason of such gravity that he had no reasonable alternative but to quit. While claimant was understandably concerned about exposure to COVID-19 at work, he did not offer evidence to show that he faced a higher risk of infection, or a higher risk of complications from infection, than the general population. Similarly, claimant did not show that he lived with or had regular, close, unavoidable contact with any persons who were at heightened risk, such that the possibility of claimant becoming infected at work and passing it along to them could pose a substantial risk of serious illness. In short, claimant has failed to show that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

Further, even if claimant's situation was grave, claimant did not seek reasonable alternatives before he quit, because he neither sought any sort of accommodation or modification of his duties, nor even brought his concerns to the employer, prior to quitting. The record shows that, had claimant done so, the employer could have granted him a short leave of absence from work while they implemented safety protocols designed to limit face-to-face contact with customers. Because claimant did not quit for a reason of such gravity that he had no reasonable alternative but to quit, claimant voluntarily quit work without good cause, and therefore is disqualified from receiving benefits effective March 1, 2020.

Overpayment of regular UI benefits. ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

Claimant was not eligible to receive benefits for the weeks at issue because, as discussed above, he voluntarily quit work without good cause and therefore was disqualified from receiving benefits effective March 1, 2020 and until he earned at least four times his weekly benefit amount in a subsequent period of employment.² Because the Department paid claimant \$10,368 in regular UI

¹ The provisions of *former temporary* OAR 471-030-0070 took effect on March 8, 2020. As claimant's separation from work occurred the week before that rule took effect, it is not clear whether the rule would apply to weeks of benefits that claimant claimed starting on or after March 8, 2020. Because claimant did not voluntarily quit for a COVID-19 related reason, however, it is not necessary to resolve that question here.

² An individual found to have voluntarily quit work without good cause shall be disqualified from the receipt of benefits until the individual has performed service in employment subject to ORS Chapter 657 or the equivalent law of another state or

benefits for the weeks at issue, claimant was overpaid and therefore is liable to repay those benefits. However, the record shows that claimant was overpaid benefits because the Department paid him before determining that he was eligible to receive those benefits. Likewise, the record does not show that the Department's decision to do so was the result of claimant having made a false statement or misrepresentation of material fact, or having failed to disclose a material fact.

Instead, the Department's decision to pay claimant benefits prior to making a determination on the work separation was due to the Department's workload. The overpayment resulted from an initial decision to pay benefits that was subsequently reversed by a decision finding the individual was not eligible for the benefits, as contemplated under ORS 657.315(1). Therefore, while claimant is liable to repay the \$10,368 in regular UI benefits that he was erroneously paid, the repayment need only be made by way of deductions from future benefits otherwise payable to him. Claimant is therefore not required to make any direct payments to the Department in order to satisfy the overpayment of regular UI benefits.

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 \$9,600 in FPUC benefits to which he was not entitled because he did not qualify for benefits under state law, as explained above. Pursuant to § 2104(f)(2) of the CARES Act, an individual who receives FPUC payments to which they were 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.³ Therefore, claimant is liable for the overpayment of \$9,600.00 in FPUC benefits he received during the weeks at issue unless he applies for and is granted a waiver. 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 during the three-year period after the date that he received the payments of FPUC benefits.

DECISION: Orders No. 22-UI-193569 and 22-UI-193540 are affirmed.

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

DATE of Service: August 25, 2022

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.

Canada or as defined in ORS 657.030 (2) or as an employee of the federal government, for which remuneration is received that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred. ORS 657.176(2).

³ As noted below, claimant may request a waiver of overpayment recovery for both regular UI and FPUC benefits.

NOTE: This decision affirms an order regarding an overpayment of benefits. The Department may defer recovery or completely waive the overpaid amount if certain standards are met. **To make a request for Waiver of Overpayment Recovery, call 503-947-1995, go online to www.workinginoregon.org/opay, or email OED_Overpayment_unit@employ.oregon.gov.**

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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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 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 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.

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