EO: 200
BYE: 202040

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

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MC 010.05

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0646

Order No. 23-UI-224894 ~ Affirmed - Late Request for Hearing on Decision # 123215 Dismissed
Order No. 23-UI-224939 ~ Modified - Overpayment, No Penalties

PROCEDURAL HISTORY: On December 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective October 6, 2019 (decision # 123215). On January 6, 2021, decision # 123215 became final without claimant having filed a request for hearing. On January 11, 2021, claimant filed a late request for hearing on decision # 123215. ALJ Kangas considered claimant's request, and on January 21, 2021 issued Order No. 21-UI-159543, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 4, 2021. On January 27, 2021, claimant filed a timely response to the appellant questionnaire. On March 10, 2021, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 21-UI-159543 was vacated and that a hearing would be scheduled to determine whether claimant had good cause to file his late request for hearing and, if so, the merits of decision # 123215.

On March 10, 2021, the Department served notice of an administrative decision, based in part on decision # 123215, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of $10,391 in regular unemployment insurance (regular UI) benefits, $1,552 in Pandemic Emergency Unemployment Compensation (PEUC) benefits, and $9,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department, a $1,558.65 monetary penalty, and a 52-week penalty disqualification from future benefits. Claimant filed a timely request for hearing on the March 10, 2021 administrative decision.

On May 15, 2023, ALJ Fraser conducted hearings on both matters, and on May 15, 2023 issued Order No. 23-UI-224894, dismissing claimant's request for hearing on decision # 123215 as late without good cause and leaving decision # 123215 undisturbed. On May 16, 2023, ALJ Fraser issued Order No. 23-UI-224939, modifying the March 10, 2021 administrative decision by concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of $10,088 in regular UI benefits, $1,552 in PEUC benefits, and $9,600 in FPUC benefits that claimant was required to repay to the Department, a $1,513.20 monetary penalty, and a 52-week

penalty disqualification from future benefits.[1] On June 5, 2023, claimant filed applications for review of Orders No. 23-UI-224894 and 23-UI-224939 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-224894 and 23-UI-224939. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-0645 and 2023-EAB-0646).

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because he did not include a statement declaring that he provided a copy of his argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) On October 4, 2019, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant had a valid claim with a weekly benefit amount of $388.

(2) Unequalled Janitorial Co. Inc. employed claimant as a cleaner on either October 6, 2019, or October 7, 2019. Claimant worked two hours that day at a location in Oregon, and was given a regular work schedule of two hours per day, five days per week. Claimant did not perform work for the employer other than on this single day.

(3) During this day of work, the employer inquired if claimant was available to work in Olympia, Washington on an upcoming date, and claimant requested time to consider the inquiry. Claimant believed he left a message for the employer at some point prior to the proposed Olympia trip declining the opportunity but expressing a willingness to continue working at the Oregon location in accordance with the previously agreed upon schedule. The employer did not receive this message. Each party believed that they called the other about claimant continuing with the scheduled work in Oregon, but received no response. Claimant did not report to work again. The two parties did not communicate with each other again until 2020, when claimant inquired if work was available.

(4) Claimant believed that when he did not hear from the employer again after declining to work in Olympia, that the employer "got mad that I couldn't go to Olympia and he didn't call me back[.]" Transcript at 25. Claimant did not believe that he quit the employment by failing to show up to work after the first day, due to this lack of communication. Claimant also did not believe that he had been discharged. The employer considered claimant to have been discharged when he failed to show up for work as scheduled after the first day or communicate with the employer thereafter.

(5) Claimant filed a weekly claim for benefits for the week of October 6, 2019 through October 12, 2019 (week 41-19). In it, he stated that he had not quit or been discharged from work during that week.

(6) Claimant made weekly claims for benefits for the weeks including October 6, 2019 through November 2, 2019 (weeks 41-19 through 44-19) and January 12, 2020 through July 18, 2020 (weeks 03-20 through 29-20). These are the weeks at issue. For weeks 41-19 through 44-19 and 03-20 through 24-

[1] Although Order No. 23-UI-224939 stated that it affirmed the March 10, 2021 administrative decision, it modified that decision by changing the amounts of the regular UI overpayment and monetary penalty assessed.

20, the Department paid claimant $388 in regular UI benefits each week, with the exception of week 03-20 for which he was paid $211 in regular UI benefits, and week 06-20 for which he was paid $262 in regular UI benefits. For week 25-20, claimant was paid $303 in regular UI benefits. In total, the Department paid claimant $10,088 in regular UI benefits for the weeks at issue. For weeks 26-20 through 29-20, the Department paid claimant $388 in PEUC benefits each week, totaling $1,552. Additionally, for weeks 14-20 through 29-20, the Department paid claimant $600 in FPUC benefits each week, totaling $9,600.

(7) On December 17, 2020, the Department issued decision # 123215, concluding that claimant voluntarily quit working for the employer without good cause and was therefore disqualified from receiving unemployment insurance benefits effective October 6, 2019.[2]

CONCLUSIONS AND REASONS: Order No. 23-UI-224939 is modified. Claimant received $10,088 in regular UI benefits, $1,552 in PEUC benefits, and $9,600 in FPUC benefits to which he was not entitled. Claimant is liable to repay the $10,088 in regular UI benefits or have it deducted from any future benefits otherwise payable to claimant during the five-year period following the date the March 10, 2021 administrative decision becomes final. Claimant is also liable for an overpayment of $1,552 in PEUC benefits and $9,600 in FPUC benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment. Claimant is not liable for a monetary penalty or penalty weeks.

Order No. 23-UI-224894. EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), Order No. 23-UI-224894, which dismissed claimant's request for hearing on decision # 123215 as late without good cause, is **adopted**. The rest of this decision addresses Order No. 23-UI-224939.

Order No. 23-UI-224939 – Misrepresentation. 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.

With the exception of the provisions of ORS 657.221(2)(a), the date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a) (September 22, 2020). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). 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). 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. 23-UI-224939 concluded that claimant willfully made a false statement to the Department in order to obtain benefits because claimant did not report separating from work on his claim for week 41-19, and claimant knew or should have known that he had separated from work during that week. Order No. 23-UI-224939 at 8. The record does not support this conclusion.

[2] Decision # 123215 is therefore final, subject to claimant's right to appeal EAB's decision to the Court of Appeals.

Claimant separated from employment during week 41-19 when he worked during that week, did not return to work after his first day of work, and was not in communication with the employer after the first day. The record shows that as of October 12, 2019, the final day of week 41-19, neither party considered the employment relationship to be intact as evidenced by the lack of communication between the parties following claimant's first day of work. Claimant was asked when filing his claim for week 41-19 whether he had quit or been discharged from any employment during that week. Claimant answered that he had not quit or been discharged because, according to his testimony, he believed that he had not quit and had not been discharged, since he did not know what the status was of his employment during that week. Transcript at 25-27. Given the brevity of the employment at issue and the ambiguous circumstances under which it ended, claimant's testimony suggested that he was unable to make a distinction between whether he quit or was discharged, and likely did not understand that he must report the work separation as either a discharge or voluntary leaving on his claim even if he felt that neither option was precisely applicable to his situation. Under these circumstances, the Department has not established by a preponderance of evidence that claimant misrepresented that he had not quit work, or failed to report the material fact that he separated from work, willfully, rather than as a result of a misunderstanding of the characterization of the work separation or a misunderstanding that he had separated from work at all.[3] Accordingly, claimant is not liable for a penalty disqualification under ORS 657.215.

Overpayments and Repayment of Regular UI 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.* 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).

Order No. 23-UI-224939 concluded that claimant was overpaid $10,088 in regular UI benefits, $1,552 in PEUC benefits, and $9,600 in FPUC benefits for the weeks at issue. Order No. 23-UI-224939 at 8. The record supports this conclusion.

The Department issued decision # 123215, concluding that claimant was disqualified from receiving unemployment insurance benefits due to a work separation effective October 6, 2019. That decision has not been disturbed on appeal. The record does not show that claimant had sufficient subsequent earnings to requalify for benefits on or before July 18, 2020. Accordingly, claimant was not entitled to receive benefits for the period including October 6, 2019 through July 18, 2020. The record shows that for the weeks at issue, each of which occurred during this period, the Department paid claimant $10,088 in regular UI benefits, $1,552 in PEUC benefits, and $9,600 in FPUC benefits. Claimant was therefore overpaid these amounts and is liable to repay them. Because claimant is not liable for a penalty disqualification for willfully making a misrepresentation under ORS 657.215 for the reasons stated above, claimant is not liable for a monetary penalty under ORS 657.310(2).

[3] *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid).

The cause of this overpayment was claimant's report during the filing of his claim for week 41-19 that he did not quit and was not discharged from employment during that week. In fact, claimant worked for the employer on either October 6, 2019 or October 7, 2019, and did not return to work or communicate with the employer thereafter, despite the initial intentions of the parties that the employment would be ongoing. The employment relationship was therefore severed during week 41-19, and claimant separated from employment at that time. Accordingly, claimant's failure to disclose this material fact, by failing to report that he either quit or was discharged from the employment during the week through responding accurately to the questions on the claim form, caused him to be overpaid benefits. He is therefore liable under 657.310(1)(c) to repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to claimant during the five-year period following the date the March 10, 2021 administrative decision becomes final.

Repayment of PEUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9025, claimant received $1,552 in PEUC benefits to which he was not entitled because he was not eligible for benefits under state law as explained above. Pursuant to 15 U.S.C. § 9025(e)(2), an individual who receives PEUC 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 $1,552 in PEUC benefits he received during the weeks at issue. Under 15 U.S.C. § 9025(e)(3), the Department may recover the PEUC benefits by deduction from any future PEUC payments payable to him or from any future unemployment compensation payable to him under any state or federal unemployment compensation law administered by the Department during the three-year period following the date he received the PEUC benefits to which he was not entitled.

United States Department of Labor guidance documents elaborate that while a PEUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies "must recover the amount of PEUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State." U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 17-20 (April 10, 2020) (UIPL 17-20), at I-11. "After three years, a State may continue to recover PEUC overpayments through means other than benefit offsets, according to State law." UIPL 17-20 at I-11; *see also* U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 17-20, Change 1 (May 13, 2020) at I-8 ("[15 U.S.C. § 9025(e)(3)] requires benefit offset as one method of recovery, but states can also use other means to recover PEUC overpayments as allowable under state or Federal law[.]"). Accordingly, because the provision of state law governing claimant's regular UI overpayment is ORS 657.310(1), claimant is liable to repay the amount of his PEUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the March 10, 2021 administrative decision becomes final.

Repayment of FPUC Benefits. Under the provisions of the CARES Act, 15 U.S.C. § 9023, claimant also received $9,600 in FPUC benefits to which he was not entitled because he was not eligible for benefits under state law as explained above. *See* U.S. Dep't of Labor, Unemployment Insurance

Program Letter No. 15-20 (April 4, 2020) at I-7 ("If an individual is deemed ineligible for regular compensation in a week and the denial creates an overpayment for the entire weekly benefit amount, the FPUC payment for the week will also be denied. And the FPUC overpayment must also be created."). Pursuant to 15 U.S.C. § 9023(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.

Claimant therefore is liable for the overpayment of $9,600 in FPUC benefits received during the weeks at issue. Under 15 U.S.C. § 9023(f)(3)(A), the Department may recover the FPUC benefits by deduction from any future FPUC payments payable to claimant or from any future unemployment compensation payable to claimant under any state or federal unemployment compensation law administered by the Department during the three-year period following the date he received the FPUC benefits to which he was not entitled.

United States Department of Labor guidance documents elaborate that while an FPUC overpayment may be offset by other State and Federal unemployment benefits payable during this three-year period, State agencies "must recover the amount of FPUC to which an individual was not entitled in accordance with the same procedures as apply to recovery of overpayments of regular [UI] paid by the State." U.S. Dep't of Labor, Unemployment Insurance Program Letter No. 15-20 (April 4, 2020) (UIPL 15-20), at I-7. "After three years, a State may continue to recover FPUC overpayments through means other than benefit offsets, according to State law." UIPL 15-20 at I-7. Accordingly, because the provision of state law governing claimant's regular UI overpayment is ORS 657.310(1), claimant is liable to repay the amount of his FPUC overpayment or have it deducted from any future benefits otherwise payable to claimant under ORS Chapter 657 during the five-year period following the date the March 10, 2021 administrative decision becomes final.

For these reasons, Order No. 23-UI-224939 is modified. Claimant is liable for an overpayment of $10,088 in regular UI benefits and is liable to repay the benefits or have the amount of the benefits deducted from future benefits payable during the five-year period following the date the March 10, 2021 administrative decision becomes final. Claimant is also liable for overpayments of $1,552 in PEUC benefits and $9,600 in FPUC benefits to be recovered in accordance with the same procedures as apply to recovery of claimant's regular UI overpayment. Claimant is not liable for a monetary penalty or penalty weeks.

DECISION: Order No. 23-UI-224894 is affirmed. Order No. 23-UI-224939 is modified as outlined above.

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

DATE of Service: <u>July 13, 2023</u>

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.

NOTE: 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 or email OED_Overpayment_unit@employ.oregon.gov . You must submit waiver applications that correspond to the program for which you were overpaid benefits. If you were overpaid benefits under both state and federal benefits programs, you will need to file two separate waiver applications. To access a State UI Overpayment Waiver application go online to https://unemployment.oregon.gov/waivers and click the link for "State UI Overpayment Waiver". To access a Federal Program Overpayment Waiver application go online to https://unemployment.oregon.gov/waivers and click the link for "Federal Program Overpayment Waiver".

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل 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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