

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1196

Modified
Overpayment and Penalties

PROCEDURAL HISTORY: On October 6, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing an overpayment of \$2,090.00 in regular unemployment insurance (regular UI), \$3,399.00 in Pandemic Emergency Unemployment Compensation (PEUC), and \$1,200.00 in Federal Pandemic Unemployment Compensation (FPUC) that claimant must repay, a \$2,006.70 monetary penalty, and a 46-week penalty disqualification from future benefits (decision # 194204).¹ Claimant filed a timely request for hearing. On October 17, 2023, ALJ Kaneshiro conducted a hearing, and on October 19, 2023, issued Order No. 23-UI-239018, affirming decision # 194204. On October 24, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's argument in reaching this decision.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is a copy of Order No. 23-UI-235985, and has been marked as EAB Exhibit 1 and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portions of the order under review assessing an overpayment of \$2,090.00 in regular UI benefits,

¹ Decision # 194204 replaced earlier administrative decisions issued May 19, 2023, and September 25, 2023. Claimant's request for hearing on the earlier decisions was applied to decision # 194204.

\$3,399.00 in PEUC benefits, and \$1,200.00 in FPUC benefits that claimant must repay are **adopted**.² The rest of this decision addresses whether claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits and whether she is subject to a monetary penalty or penalty disqualification.

FINDINGS OF FACT: (1) On April 26, 2020, claimant filed an initial claim for unemployment insurance benefits. The Department determined the claim to be a monetarily valid claim for regular UI benefits with a weekly benefit amount (WBA) of \$471. The maximum WBA at that time was \$648. Claimant filed weekly claims for some of the weeks thereafter through the week of November 29, 2020, through December 5, 2020 (week 49-20) and was paid regular UI benefits and FPUC benefits for those weeks. Claimant also filed weekly claims for some of the weeks from December 6, 2020, through September 4, 2021 (weeks 50-20 through 35-21) and was paid PEUC and FPUC benefits for those weeks.

(2) On April 26, 2021, claimant filed a second initial claim for unemployment insurance benefits. The Department determined the claim to be a monetarily valid claim for regular UI benefits with a WBA of \$253. Claimant thereafter filed weekly claims for some of the weeks from September 5, 2021, through April 2, 2022 (weeks 36-21 through 13-22), and was paid regular UI benefits for those weeks.

(3) For a period including June 21, 2020, through December 31, 2021, claimant worked part-time for Hospitality Associates, Inc. Claimant reported earnings from this employer on her weekly claims, but she underreported or overreported her earnings for several weeks, in part because the employer did not have a working timeclock and it was difficult for claimant to track the number of hours worked. This resulted in claimant being underpaid or overpaid benefits on many weekly claims. For some of these weeks, claimant intentionally underreported her earnings to avoid a reduction in benefits or a denial of benefits.

(4) On April 24, 2022, claimant filed a third initial claim for unemployment insurance benefits. The Department determined the claim to be a monetarily valid claim for regular UI benefits with a WBA of \$308. Claimant thereafter filed weekly claims for some of the weeks from June 19 through October 29, 2022 (weeks 25-22 through 43-22), and was paid regular UI benefits for those weeks.

(5) From January 7 through October 29, 2022, claimant worked part-time for Chick-Fil-A. Claimant reported earnings from this employer on her weekly claims, but she underreported or overreported her earnings for some weeks. This resulted in claimant being underpaid or overpaid benefits on many weekly claims. In some instances where she underreported earnings, she intentionally did so to avoid a reduction in benefits.

(6) When claimant intentionally underreported her earnings, she did so because she was living with a person who “was into drugs,” took her money and property, destroyed her property, and was violent toward her. Transcript at 34. Claimant felt she needed the benefits she received from underreporting her

² The order under review contained scrivener’s errors as to the total amount of regular UI benefits paid (\$8,863) and the number of benefits to which claimant was entitled (\$7,943). Order No. 23-UI-239018 at 5, 9. It can be inferred from the table on pages 7 through 9 of the order that it intended to conclude that claimant was paid a total of \$15,851 in regular UI benefits, and that she was entitled to a total of \$13,758. These errors did not affect the assessment of the overpayment of \$2,090 in regular UI benefits. The relevant portions of Order No. 23-UI-239018 are adopted, as noted above, with this clarification.

earnings because this person “left her with nothing and she needed money to pay for rent.” Transcript at 34. Claimant willfully underreported her earnings to obtain benefits on at least seven occasions following her April 26, 2020, initial claim for benefits.

(7) On October 29, 2022, claimant voluntarily left working for Chick-Fil-A when they eliminated her position as a delivery driver and claimant declined to transfer to a different position with cashiering and janitorial duties because she did not believe she was physically able to perform the work.

(8) Claimant filed a weekly claim for benefits for the week of October 23 through 29, 2022 (week 43-22). In filing that claim, claimant was asked if she “quit” or was “fired or suspended” from a job during the week, to which claimant replied, “No.” Exhibit 3 at 58. Claimant answered “No” to these questions because she did not believe that she had quit her job with Chick-Fil-A, and did not know that she was supposed to report the separation since she did not believe she had quit.

(9) On June 20, 2023, the Department issued an administrative decision concluding that claimant was disqualified from receiving benefits because of the October 29, 2022, work separation. Claimant filed a request for hearing. On September 15, 2023, the Office of Administrative Hearings (OAH) issued Order No. 23-UI-235985, concluding that claimant voluntarily left working for Chick-Fil-A on October 29, 2022, with good cause and was not disqualified from receiving unemployment insurance benefits based on that work separation. Order No. 23-UI-235985 has since become final.

CONCLUSIONS AND REASONS: Claimant made a willful misrepresentation and failed to report a material fact to obtain benefits regarding her earnings and was therefore subject to a \$2,006.70 monetary penalty and 42-week penalty disqualification from future benefits. Claimant did not make a willful misrepresentation and fail to report a material fact regarding her October 29, 2022, work separation from Chick-Fil-A and was not subject to a monetary penalty or penalty disqualification on that basis.

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).

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.

The length of the penalty disqualification period and monetary penalty are determined by applying the provisions of OAR 471-030-0052 (January 11, 2018), which provides, in pertinent part:

- (1) An authorized representative of the Employment Department shall determine the number of weeks of disqualification under ORS 657.215 according to the following criteria:

(a) When the disqualification is imposed because the individual failed to accurately report work and/or earnings, the number of weeks of disqualification shall be determined by dividing the total amount of benefits overpaid to the individual for the disqualifying act(s), by the maximum Oregon weekly benefit amount in effect during the first effective week of the initial claim in effect at the time of the individual's disqualifying act(s), rounding off to the nearest two decimal places, multiplying the result by four rounding it up to the nearest whole number.

* * *

(d) When the disqualification is imposed because the disqualifying act(s) under ORS 657.215 relates to the provisions of 657.176 and a failure to accurately report work and/or earnings, the number of weeks of disqualification shall be the number of weeks calculated in the manner set forth in subsection (a) plus four weeks.

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(7) The department will review the number of occurrences of misrepresentation when applying the penalty as described in ORS 657.310(2). An occurrence shall be counted each time an individual willfully makes a false statement or representation, or willfully fails to report a material fact to obtain benefits. The department shall use the date the individual failed to report a material fact or willfully made a false statement as the date of the occurrence. For an individual subject to disqualification by administrative action under 657.215, the penalty will be:

(a) For the first or second occurrence within 5 years of the occurrence for which a penalty is being assessed, 15 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(b) For the third or fourth occurrence within 5 years of the occurrence for which a penalty is being assessed, 20 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(c) For the fifth or sixth occurrence within 5 years of the occurrence for which a penalty is being assessed, 25 percent of the total amount of benefits the individual received but to which the individual was not entitled.

(d) For the seventh or greater occurrence within 5 years of the occurrence for which a penalty is being assessed, 30 percent of the total amount of benefits the individual received but to which the individual was not entitled.

* * *

The order under review concluded that claimant made a willful misrepresentation and failed to report a material fact regarding her earnings to obtain benefits, and therefore was subject to a \$2,006.70 monetary penalty and 42-week penalty disqualification from future benefits. Order No. 23-UI-239018 at 18. The record supports this conclusion. The order under review also concluded that claimant made a willful misrepresentation and failed to report a material fact regarding her work separation from Chick-Fil-A to obtain benefits, and therefore was subject to an increase in penalty disqualification weeks from 42 to 46 weeks. Order No. 23-UI-239018 at 18. The record does not support this conclusion.

Misrepresentation regarding earnings. Claimant was overpaid a net total of \$6,689.00 in unemployment insurance benefits due to misreporting her earnings on numerous weekly claims from 2020 through 2022. Claimant testified that while employed at Hospitality Associates, Inc., the employer did not have systems in place to allow her to accurately track hours worked. Transcript at 29. It can be inferred from this testimony that claimant was suggesting that her wages from that employer, at least for some weeks, was inadvertently misreported for this reason. That claimant also *overreported* her earnings for several weeks, causing the Department to pay her *less* benefits than what she was entitled to, supports this suggestion. However, when asked at hearing why she underreported her earnings, she also testified, “I was living with a raging, 54-year-old drug addict who has drained everything that I have, everything, so I wasn’t trying to survive really, as much as I was just trying to be resilient enough to come through this, that’s what was really going on. It wasn’t just for me to survive. And I was more afraid of him than you [the Department], and that’s the truth[.]” Transcript at 29. Claimant testified that it was “correct” that she was “underreporting the hours so that [she] would continue to get the – the unemployment benefits so that [she] could survive this drug addict[.]” Transcript at 31. This testimony was consistent with an earlier statement claimant made to a Department investigator that claimant “didn’t report her earnings correctly when they increased because she was trying to survive.” Transcript at 34.

The record shows that some misreporting of earnings could be attributable to claimant’s confusion over the exact number of hours worked or amount of money earned at Hospitality Associates, Inc., given the relatively small amounts at issue and the frequency at which claimant overreported earnings. However, it can reasonably be inferred from claimant’s statements, as well as the amount underreported and the substantial effect of such underreporting on claimant’s benefits for a given week, that claimant’s underreporting for some weeks likely was willful. For example, for weeks 47-20, 07-21, 11-21, 12-21, 18-21, 40-21, and 47-21, claimant reported earnings of \$345.00, \$330.00, \$270.00, \$300.00, \$375.00, \$272.00, and \$400.00, respectively. Exhibit 2 at 3-5. Claimant actually earned \$540.00, \$472.50, \$757.50, \$600.00, \$565.95, \$573.32, and \$592.70 for those weeks, respectively. Exhibit 2 at 3-5. As a result of substantially underreporting these earnings, claimant was paid \$3,811 in benefits, when she would not have received any benefits had she accurately reported her earnings. Exhibit 2 at 3-5. Such misreporting was consistent with claimant’s statements that she willfully misrepresented her earnings to obtain benefits to which she was not entitled. Accordingly, claimant was subject to a penalty disqualification pursuant to ORS 657.215.

For reasons explained in greater detail below, the Department only established that claimant was subject to a disqualification under ORS 657.215 due to her failure to accurately report earnings, and not for

reasons related to ORS 657.176.³ Accordingly, the penalty disqualification is determined under the provisions of OAR 471-030-0052(1)(a) rather than OAR 471-030-0052(1)(d). Claimant was overpaid a total of \$6,689.00 in combined regular UI, PEUC, and FPUC benefits. The maximum WBA during the first week of claimant's first initial claim was \$648. Exhibit 2 at 3. Under the calculation set forth in OAR 471-030-0052(1)(a), \$6,689.00, divided by \$648.00 and rounded to the second decimal point, is 10.32. 10.32, multiplied by four and rounded up to the nearest whole number, is 42. Claimant therefore is disqualified from future benefits for a period of 42 weeks.

Further, because Claimant was disqualified from receiving benefits under ORS 657.215 for making a willful misrepresentation, she was also liable for a monetary penalty in an amount of at least 15, but not greater than 30, percent of the amount of the overpayment under ORS 657.310(2). The record shows that there were at least seven occurrences of willful misrepresentation following claimant's April 26, 2020, initial application for benefits. Under OAR 471-030-0052(7)(d), the penalty is therefore calculated at 30 percent of overpaid benefits.⁴ Accordingly, claimant was subject to a \$2,006.70 monetary penalty.

Misrepresentation regarding work separation. Claimant separated from her employment with Chick-Fil-A on October 29, 2022. Claimant filed a weekly claim for unemployment insurance benefits for the week of October 23, 2022, through October 29, 2022 (week 43-22). In that weekly claim, claimant denied that she "quit" or was "fired or suspended" from a job during the week. Exhibit 3 at 58. On June 10, 2023, claimant responded to a Department request for information, writing that she agreed with Chick-Fil-A's report that she "voluntarily left work," but explained the reason for the separation was that her "position as delivery driver was concluded." Exhibit 3 at 56. She wrote that she "thought [she] had" reported this on her claim but did not remember. Exhibit 3 at 56. However, at hearing, claimant testified that she did not quit her job at Chick-Fil-A. Transcript at 39. She further testified she "was unaware" that she had to report the separation under the circumstances, and "did not know" that her benefits would have stopped if she disclosed it. Transcript at 36.

The Department issued an administrative decision concluding that claimant quit work without good cause. EAB Exhibit 1 at 2. This decision was reversed on appeal by Order No. 23-UI-235985, which concluded that claimant voluntarily left work with good cause because Chick-Fil-A had eliminated claimant's position as a delivery driver, and she declined an alternative position they offered because she was physically unable to perform it. EAB Exhibit 1 at 4. Under these circumstances, that claimant viewed Chick-Fil-A as the party moving to end the employment relationship, presumably as a layoff for lack of delivery work, is understandable. It can be inferred that this view led claimant to answer on her weekly claim that she had not quit or been fired or suspended from work during the week. This suggests that her answers did not constitute a willful misrepresentation of fact, but instead reflected an attempt to properly characterize the separation, which was reasonable under the circumstances. Accordingly, the Department has not shown by a preponderance of evidence that claimant made a willful misrepresentation or failed to report a material fact with regard to the October 29, 2022, work separation, and claimant is not liable to have four weeks added to her penalty disqualification pursuant to OAR 471-030-0052(1)(d).

³ ORS 657.176 provides for disqualifications from benefits regarding work separations or failure to apply for or accept work.

⁴ $\$6,689.00 \times .30 = \$2,006.70$.

For these reasons, claimant made a willful misrepresentation and failed to report a material fact to obtain benefits only regarding her earnings, and not regarding the October 29, 2022, work separation. She therefore is subject to a \$2,006.70 monetary penalty and 42-week penalty disqualification from future benefits.

DECISION: Order No. 23-UI-239018 is modified, as outlined above.

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

DATE of Service: December 5, 2023

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

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

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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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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