

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
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DENISE A BILTON, Employee

UNEMPLOYMENT INSURANCE
DECISION AND ORDER

Soc. Sec. No. ***-**-3871
Hearing Nos. 13605766MW
13605682MW

H&R BLOCK EASTERN ENTERPRISES INC, Employer
% TALX ER SERVICES

Dated and mailed:

JAN 09 2014

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SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued two appeal tribunal decisions in this matter. The employee timely petitioned for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employee worked for approximately six years as a tax preparer for the subject employer, H & R Block, an income tax preparation service provider. The employee generally worked full-time each year from January 1 through April 20. The other eight months of the year she worked part-time. The employee's last day of work for the subject employer was on or about January 8, 2013 (week 2).

The employee attended an orientation meeting of M T Tax Group, LLC, an income tax preparation service provider, on Saturday, January 19, 2013 (week 3). The employee was hired by M T Tax Group after that meeting to work in two capacities: as a tax preparer (paid by commission) and as a tax return checker (paid hourly at the rate of \$10.50). The employee was in the office on January 23 (week 4) from 10:30 a.m. to 2:00 p.m. and on January 30 (week 5) from 11:15 a.m. to 2:45 p.m. for training with the LLC's managing member.

The employee filed her weekly claim certification for week 4 of 2013 on January 27, 2013. She reported that she had worked 8 hours in that week and earned \$80. The employee had received a check from the subject employer in that amount. She was not sure why the money was sent to her but thought that she needed to report it.

When the employee filed her weekly claim certification for week 5 of 2013 on February 3, 2013, she reported that she did not work and did not receive any wages. February 3, 2013, she reported that she did not work and did not receive any wages.

The wife of the managing member of M T Tax Group processes the LLC's payroll. Payroll is done every two weeks. The managing member's wife asked the employee to fill out time sheets showing the time she spent in the office between January 20 and February 2, 2013. The employer issued a payroll check to the employee on Tuesday, February 7, in the amount of \$230.70.¹ The employee was paid \$73.50 for 7 hours of work, plus \$130.55 in commission. She was also paid \$21 for travel. The employee received her payroll check from the employer on February 9.

The employee called the department on February 11, 2013, to discuss the check she had received and to inquire as to how to report commission wages on her weekly claims. The employee was given a specific number to call, and, on February 13, the employee spoke with someone from the Milwaukee Benefits Center. Department records show that the employee explained that she began training with M T Tax Group on January 19, 2013, and started working for commission during week 6 of 2013.

Claimants who file for unemployment insurance benefits are responsible for correctly and completely reporting information for each week they claim benefits, because benefits are initially paid based on the information claimants provide. Claimants who conceal information from the department when filing for benefits may be subject to overpayments and penalties. For unemployment insurance purposes, conceal means "to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation."²

A claimant who conceals work performed or wages earned when filing a weekly claim certification is ineligible to receive benefits for the week claimed.³ In addition, the claimant is ineligible for benefits in an amount equivalent to two, four, or eight times the claimant's weekly benefit rate for each act of concealment.⁴ This ineligibility is applied against benefits and weeks of eligibility for which the claimant would otherwise be eligible after the week of concealment.⁵ Furthermore, consistent with federal directives, the department assesses a penalty against the claimant in an amount equal to 15 percent of the benefits erroneously paid to the claimant as a result of one or more acts of concealment.⁶

On April 6, 2013, the department issued a determination finding that, when filing for benefits for weeks 4 and 5 of 2013, the employee concealed work performed and wages earned from M T Tax Group, LLC. As a result, her benefit amount was to be reduced by \$1,452 for benefits payable through March 30, 2019.

¹ Wages of \$73.15 were earned in week 4 of 2013. Wages of \$130.55 were earned in week 5.

² Wis. Stat. § 108.04(11)(g).

³ Wis. Stat. § 108.05(3)(d).

⁴ Wis. Stat. § 108.04(11)(b) and (be).

⁵ Wis. Stat. § 108.04(11)(bm).

⁶ Wis. Stat. § 108.04(11)(bh).

On July 11, 2013, the department issued a second determination finding that, when filing for benefits for weeks 4 and 5 of 2013, the employee concealed work performed and wages earned from M T Tax Group, LLC. This decision resulted in an overpayment of \$692 and an overpayment penalty of \$103.80.

The employee appealed the department's determinations. The employee and the managing member of M T Tax Group, LLC appeared at the hearing before the ALJ. The employee explained that she did not report work performed and wages earned from M T Tax Group, LLC on her weekly claim certifications for weeks 4 and 5 of 2013 because she did not think that she would be paid for training. The employee testified briefly that she had formerly worked for the subject employer, H & R Block, and had never been paid for training. The ALJ curtailed the employee's testimony on the issue, ruling that it was irrelevant because it was too remote in time.

The managing member of M T Tax Group, LLC testified that he could not recall whether he talked to the employee about being paid for training hours. She was the only new tax preparer he had hired for 2013. The employee was not paid for the orientation she attended on January 19, 2013, where new tax laws, changes with the IRS, and computer software issues were discussed. The managing member admitted that he "probably did not tell" the employee that she would be paid for the hours she spent training on how to perform the duties of a review checker. He testified that the employee was still learning the employer's tax software and only observed tax returns as they were being prepared during weeks 4 and 5 of 2013, even though she was paid in week 5 for some commissions.

The employee testified that the \$80 check she received from the subject employer in week 4 of 2013 was issued to compensate her for a check in 2012 on which she had been shorted. There is no other evidence in the record concerning the \$80 payment.

The ALJ affirmed the department's determinations, finding that the employee concealed work performed and wages earned from M T Tax Group, LLC, on her weekly claim certifications for weeks 4 and 5 of 2013. The ALJ found that the employee knew, or should have known, from the completion of time sheets for the LLC that were used by the employer for payroll purposes that she would be paid for the time she recorded on her time sheets and for receipts she submitted for preparing tax returns. The ALJ rejected the employee's testimony that, after receiving a check for the hours she spent in training, she had reported to the department her work and wages for weeks 4 and 5 on February 10 and 13, 2013. The ALJ found that the "employee's statement that she had reported the work and wages is insufficient detail for the Department to ascertain if she reported the work and wages timely and accurately."

The employee petitioned for commission review. The issue before the commission is whether, when filing benefit claims for weeks 4 and 5 of 2013, the employee concealed from the department work performed and wages earned.

The burden to establish that a claimant concealed information is on the department.⁷ As a form of fraud, concealment must be proven by clear, satisfactory, and convincing evidence.⁸ Concealment will not be found where a claimant makes an honest mistake or misinterprets information received from the department.⁹ Concealment requires an intent or design to receive benefits to which the claimant knows he or she is not entitled.¹⁰

After reviewing all of the evidence in this case, the commission is not satisfied that concealment was established. Both witnesses at the hearing – the employee and the managing member of M T Tax Group, LLC -- testified that the employee was not told that she would be paid for the hours she spent in training. The employee's testimony that she did not believe that she would be paid for training because she had not been paid for tax preparation training in the past was relevant. Wisconsin Stat. § 904.01 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The employee's testimony concerning whether she was paid by a past employer for similar training went directly to the issue of whether the employee intended to receive benefits to which she knew she was not entitled.

The employee testified that, when she received the unexpected payroll check, she contacted the department. The employee's statements concerning what was said in the conversations she had with the department were not inherently incredible. Comments typed into the department's computer system concerning what was said, or what was not said, are hearsay. No one testified on behalf of the department. Uncorroborated hearsay alone does not constitute substantial evidence.¹¹

Moreover, the department's *Disputed Claims Manual* provides that there is no concealment issue and no fraud investigation required when the claimant fails to report income on the weekly claim certification and notifies the department of such failure within 14 days following the date the certification was filed. When an investigation establishes that a claimant gave a false answer, two examples of acts that are not considered concealment are "[p]aid training not reported because claimant did not consider this to be work and wages" and "[c]laimant believes their work or labor is donated and is paid unexpectedly." It is not clear from the record in this case how the employee's actions with respect to weeks 4 and 5 of 2013 differ from these examples.

⁷ *Scott G. Lynch*, UI Dec. Hearing No. 10404406AP (LIRC Mar. 11, 2011); *Holloway v. Mahler Enter., Inc.*, UI Dec. Hearing No. 11606291MW (LIRC Nov. 4, 2011).

⁸ *Kamuchey v. Trzesniewski*, 8 Wis. 2d 94, 98, 98 N.W.2d 403 (1959); *Schroeder v. Drees*, 1 Wis. 2d 106, 112, 83 N.W.2d 707 (1957).

⁹ *Joseph W. Hein, Jr.*, UI Dec. Hearing No. 00605374MW (LIRC Dec. 13, 2001); *Scott G. Lynch*, *supra*.

¹⁰ *Karandjeff v. Cmty. Living Alliance Inc.*, UI Dec. Hearing No. 11611430MW (LIRC June 20, 2012); *Nestor Gutierrez*, UI Dec. Hearing No. 00005766MD (LIRC July 19, 2002).

¹¹ *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶ 8, 278, Wis. 2d 111, 118, 692 N.W.2d 572.

It was the department's burden to establish by clear, satisfactory, and convincing evidence that the employee, when filing her claims for weeks 4 and 5 of 2013, intentionally misled or defrauded the department by withholding or hiding information or making a false statement or misrepresentation in order to receive benefits to which the employee knew she was not entitled. Such evidence is absent in this case. Instead, the evidence in the record shows that the employee did not report work performed and wages earned in weeks 4 and 5 of 2013 because she did not believe that she would be paid for time spent in training based on past experience and based on the fact that her new employer never told her that she would be paid for training.

The commission therefore finds that, in weeks 4 and 5 of 2013, the employee worked and earned wages from M T Tax Group, LLC, but she did not conceal from the department the work performed and the wages earned in those weeks, within the meaning of Wis. Stat. § 108.04(11).

The commission further finds that the employee earned wages from M T Tax Group, LLC in the amount of \$73.15 in week 4 of 2013 and \$130.55 in week 5 of 2013, and is thus entitled to partial benefits for those weeks, pursuant to Wis. Stat. § 108.05(3).¹²

The commission further finds that the employee's failure to report work and wages from the employer on her weekly claim certifications for weeks 4 and 5 of 2013, while not fraudulent, prevents waiver of recovery of the overpayment, under Wis. Stat. § 108.22(8)(c). The matter will be remanded to the department for a recalculation of the employee's overpayment in light of her eligibility for partial benefits for the weeks at issue.

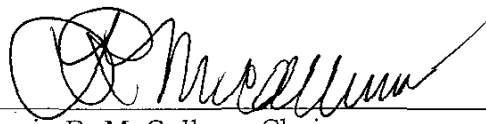
DECISION AND ORDER

The appeal tribunal decisions are reversed. Accordingly, the employee is entitled to partial unemployment insurance benefits for weeks 4 and 5 of 2013. As a result of this decision, the employee's unemployment insurance benefit amount shall not be reduced, and there is no overpayment penalty.

This matter is remanded to the department for a calculation of the employee's entitlement to partial unemployment benefits for the weeks at issue and any corresponding overpayment.

¹² The issue of how the \$80 the employee received in week 4 of 2013 from the subject employer affects her eligibility for benefits is not before the commission and, therefore, is not addressed.

BY THE COMMISSION:


Laurie R. McCallum, Chairperson


C. William Jordahl, Commissioner


David B. Falstad, Commissioner

NOTE: The commission did not consult with the ALJ before reversing the appeal tribunal decisions. The commission must only consult with an ALJ with respect to his or her impressions and conclusions regarding the credibility of witnesses in situations where the ALJ heard conflicting testimony and the commission reverses the ALJ and makes contrary findings. *See Braun v. Indus. Comm'n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967). In this case, the ALJ did not hear any conflicting testimony. The employee agreed that she performed work and earned wages in the weeks at issue. The employee and her new employer both testified that the employee was not told that she would be paid for training. The employee testified that she reported her unexpected pay for training to the department a few days after it was received. There was no testimony to the contrary. No one testified on behalf of the department.

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