

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

RYAN J SALLEE  
Claimant-Appellant

Precedent Benefit  
Decision No. P-B-499

DEL TACO LLC  
c/o UC Express  
Employer/Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

BONNIE GARCIA

ALBERTO TORRICO

ROBERT DRESSER

KATHLEEN HOWARD

ROY ASHBURN

Pursuant to section 409 of the California Unemployment Insurance Code, AO-262854 is hereby designated as Precedent Decision No. P-B-499.

Adopted as Precedent: June 12, 2012

**Case Nos.: AO-262854 through AO-262862**  
**Claimant: RYAN J SALLEE**

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**OP**

The claimant appealed from the decisions of the administrative law judge that held the claimant:

1. disqualified for benefits under section 1256 of the Unemployment Insurance Code;
2. disqualified for benefits for five weeks under code section 1257(a); and,
3. liable for repayment of a \$15,379 overpayment under code section 1375, and for a 30 percent penalty assessment in the amount of \$4,613.70 under code section 1375.1.

The employer's reserve account was relieved of charges.

Pursuant to California Code of Regulations, title 22, section 5100(b), these appeals are consolidated for consideration and decision.

We delete the word "employer" where it appears listed as a party present at the hearing.

**ISSUE STATEMENT**

The issues are:

1. What effect, if any, does the employer's failure to respond to the first notice of claim filed have on its right to later receive a ruling;
2. Whether the claimant was discharged for misconduct connected with the most recent work;
3. If the claimant is disqualified for benefits under code section 1256, what is the effective date of the disqualification;

4. Whether the claimant willfully made a false statement, or representation, or willfully withheld a material fact when claiming benefits.
5. Whether the claimant was overpaid benefits, and, if so, whether the claimant is liable for the repayment of those benefits; and
6. Whether the claimant was overpaid benefits due to a willful false statement or representation, or willful withholding of a material fact when claiming benefits.

### FINDINGS OF FACT

The claimant was last employed as a crew leader at a Del Taco restaurant for six months earning \$8.50 per hour. He last worked on June 10, 2009 and separated from his employment under the following circumstances.

The claimant was called in to meet with the manager when he arrived at work on June 10, 2009. The manager told the claimant that co-workers had complained about him. The most recent incident involved the claimant swearing at a shift leader during the claimant's last shift. The manager also stated the claimant's work performance was not acceptable. The claimant complained to the manager about changes in his schedule reducing his hours from 30 to 15 hours. The meeting became heated and the claimant was told to "leave." The manager did not yell at the claimant nor did she tell the claimant he was discharged or fired. The claimant knew he was scheduled for additional shifts but did not return to work those hours. The claimant was unhappy about the reduction in his hours.

Later on June 10, the claimant filed his unemployment claim on-line listing June 10 as his final day of work. He correctly identified Del Taco as his last employer and reported to the Employment Development Department (EDD) that he was "placed on-call." The claimant later explained that he believed the employer was laying him off when he was told to leave, or, effectively placing him on on-call status.

A notice of claim filed was sent to the employer by the EDD on June 17, 2009, informing it that the claimant had filed a claim for benefits. The EDD claim notes do not show that EDD received a response to the notice of claim filed.

The EDD did not issue a written determination regarding the claimant's eligibility for benefits but began paying the claimant unemployment insurance benefits on July 2, 2009 for the week ending June 20, 2009. When the claimant's regular benefits were exhausted, the EDD found the claimant eligible for extended

benefits under the Emergency Unemployment Compensation (hereafter referred to as "EUC") program and paid the claimant extended benefits beginning December 16, 2009. The claimant received EUC extended benefits through December 18, 2010.

On December 22, 2010, the EDD sent Del Taco a new notice of claim filed because the claimant was being transferred from the EUC extended benefits program to the Federal-State Extended Compensation Act of 1970 (hereafter Fed-Ed or federal-state) benefits program. Del Taco was still the claimant's most recent employer at the time he became eligible for Fed-Ed benefits. According to the EDD claim notes, on March 24, 2011, the employer responded in writing to the second notice of claim filed stating the claimant voluntarily quit due to dissatisfaction with the job. The claim notes describe the employer's response as timely. The employer's response was not included in the information forwarded by the EDD for consideration at the hearing.

On April 1, 2011, an EDD representative spoke with both the claimant and an employer representative regarding the claimant's June 10, 2009 separation. In April 2011, the EDD issued a written determination and ruling which found the claimant disqualified for benefits under code sections 1256 and 1257(a) and relieved the employer's reserve account of charges under code section 1030. The 1256 disqualification listed a beginning date of June 7, 2009.

The EDD also issued a series of notices of overpayment and penalty assessments covering the period of June 13, 2009 through March 12, 2011. The notices include Fed-Ed benefits the claimant received beginning December 19, 2010 through March 12, 2011. Those benefits totaled \$2,025.

The claimant filed timely appeals and the matters were set jointly for hearing. The claimant was the only party who appeared at the hearing.

### REASONS FOR DECISION

In order to simplify the decision, we are separating the employer's entitlement to a ruling from the claimant's eligibility for benefits and potential liability for any overpayment of benefits and penalties. We deal first with the issue of the ruling.

### THE RULING

Section 1327 of the Unemployment Insurance Code requires the EDD to give notice of the filing of a new or additional claim to the employer by whom the claimant was last employed immediately preceding the filing of the claim.

If a claimant's most recent employer wants a ruling, it must respond to the notice of claim filed within ten days after it is mailed. The response must include any facts known to the employer that might affect the claimant's eligibility for benefits, including the circumstances of the claimant's separation from employment. The ten day period may be extended for good cause. (Unemployment Insurance Code section 1030(a) and 1327.)

Sections 4654 and 4655 of the Unemployment Insurance Code contain identical procedures for new or additional claims for federal state extended benefits. The EDD is required to send a notice of claim filed and the employer must respond as in code section 1030(a) and 1327. The EDD is required to consider facts submitted by an employer, and, if federal-state extended benefits are requested, make a determination as to a claimant's eligibility for federal-state extended benefits.

At the time the claimant became eligible for Fed-Ed benefits the employer was sent a second notice of claim filed as required by Unemployment Insurance Code sections 4654 and 4655.

As a result of the employer's response to the second notice of claim filed, EDD issued a determination and ruling which found the claimant disqualified for benefits and the employer's reserve account relieved of charges. The claimant filed a timely appeal.

In Precedent Ruling Decision P-R-363, the Board considered the employer's entitlement to a ruling under similar facts. In that case the employer also failed to respond to the first notice of claim filed, but responded to the second.

The Board's decision includes a lengthy review of the obligations of both the employer and the EDD, as set out in statutes and regulations, in regards to rulings in both regular and federal-state claims. The Board stressed the employer's obligation to promptly provide the EDD with information which would bear upon the claimant's entitlement to benefits. "The purpose of the unemployment compensation program is to provide benefits to those claimants who are involuntarily unemployed within the meaning of the California law. As ameliorative legislation it is essential that a determination of entitlement be rendered as expeditiously as possible to provide continuing funds to claimants who are qualified to receive benefits. It is for such reasons that time limitations have been imposed not only on the employer but on the Department as well." (Precedent Ruling Decision P-R-363, pg 9.)

Having reviewed both the statutory scheme and public policy considerations, the Board held in Precedent Ruling Decision P-R-363 that where the employer,

without good cause, fails to respond to the first notice of claim filed, the employer is not entitled to a determination or a ruling.

There is no evidence in the record that the employer filed a timely response to the first notice of claim filed or that the employer had good cause for any such failure to respond. In the absence of such evidence, the ruling in this case was issued in contravention of Precedent Ruling Decision P-R-363. Based on that precedent and the record in this case, we set aside those portions of the administrative law judge's decision and the underlying EDD ruling which concern the employer's reserve account.

### THE SEPARATION

We move now to the claimant's entitlement to benefits under code section 1256.

An individual is disqualified for benefits if the individual left the most recent work voluntarily without good cause or the individual was discharged for misconduct connected with the most recent work. (Unemployment Insurance Code, section 1256.)

In Precedent Benefit Decision P-B-37, the appeals board held that in determining whether there has been a voluntary leaving or a discharge under section 1256 of the code it must first be determined who was the moving party in the separation. If the claimant left employment while continuing work was available, the claimant was the moving party. If the employer refused to permit the claimant to continue working, although the claimant was ready, willing and able to do so, the employer was the moving party.

After a discussion with the employer about both the employers' dissatisfaction with the claimant's work and the claimant's dissatisfaction with the reduction in his hours, the claimant was told to "leave". He was not told he was being terminated. He knew that he was scheduled for additional shifts, but he did not return. The term "leave" is ambiguous and the claimant could have, but did not, ask the employer to clarify whether he was being asked to leave the room, leave for the day or leave the job altogether.

The claimant's interpretation without clarification about what the employer wanted was not reasonable and, in light of his other expressed unhappiness about the working conditions, the most reasonable conclusion given the circumstances is that he quit.

In Precedent Benefit Decision P-B-229, the Appeals Board held that a claimant who left work primarily in protest to a reprimand which was apparently merited, and which was given in a reasonable manner, left without good cause.

Although the claimant stated the final discussion was heated, he conceded the employer did not yell at him. We do not find the reprimand provided good cause to quit.

In Precedent Benefit Decision P-B-301, the claimant quit when her hours of work per week were reduced from 40 to 16. She presented no evidence that working part-time would cause any undue hardship or prevent her from seeking full-time employment elsewhere. The appeals board held the claimant left without good cause.

The claimant in this case, like the claimant in Precedent Benefit Decision P-B-301, was unhappy at having his hours reduced. He presented no evidence that the reduction would cause unusual hardship or that he could not use the time to seek full time work elsewhere. Consequently, his reduction in hours does not provide good cause to quit for purposes of determining eligibility for unemployment insurance benefits.

We understand the claimant's argument that he did not return to work the scheduled shift as he had been told to leave. The claimant argues that the employer laid him off or placed him on-call when he was sent home. While we understand the claimant's interpretation of the events, we find that interpretation unreasonable in light of the surrounding circumstance and find the claimant voluntarily quit without good cause.

Having found the claimant did not have good cause to quit, we affirm that portion of the administrative law judge's decision which found the claimant disqualified from receiving benefits under code section 1256. We now must determine the effective date of the disqualification.

The EDD's April, 2011 determination established June 7, 2009, as the effective date of the 1256 disqualification, reaching back to disqualify the claimant effective the date of his separation from employment 22 months earlier.

Because the EDD issued the April 2011 determination only after the employer responded to the Fed-Ed notice of claim filed, it follows that the determination was issued pursuant to Unemployment Insurance Code sections 4654 and 4655. As discussed earlier, these sections provide that the EDD must notify the employer of a Fed-Ed claim, permit the employer to respond to the claim and then "make a determination as to the claimant's eligibility for Federal-State

extended benefits.” (Unemployment Insurance Code section 4655.) As the statute only permits the EDD to determine the claimant’s eligibility for Federal-State extended benefits, determinations issued after the employer responds to the Fed-Ed notice of claim filed must be limited to the claimant’s eligibility for Fed-Ed benefits unless some other authority exists allowing a retroactive disqualification for benefits received prior to the Fed-Ed claim for benefits. While the determination itself does not reference the EDD’s authority for applying the disqualification retroactively, we look to precedent decisions, cases and statutes which might authorize retroactive application.

One possible authority for retroactive application is section 1260(a). That section provides that an individual disqualified under section 1256 is ineligible to receive unemployment benefits *beginning in the week the act that causes disqualification occurs* and continuing until the claimant has registered for work and performed services in bona fide employment for which remuneration is received equal to or in excess of five times the claimant’s weekly benefit amount. (Emphasis added.)

If considered alone, section 1260(a) would require every section 1256 disqualification to begin with the week of the act that causes the disqualification, in this case the week beginning June 7, 2009. Such a result conflicts with section 4655, which limits the EDD’s authority regarding eligibility determinations in Fed-Ed claims to Fed-Ed benefits. When conflicts occur between Unemployment Insurance Code provisions contained in Part 1 “Unemployment Compensation” (which includes section 1260(a)) and those in Part 4 “Federal-State Extended Compensation” (which includes section 4655), the provisions of Part 4 prevail with respect to federal-state extended benefits. (Code section 4002(a).) Consequently those portions of section 1260(a) which appear to require a 1256 disqualification issued in a case such as this to relate back to the week of the disqualifying act are superseded and do not authorize a disqualification date earlier than the date the claimant became eligible for Fed-Ed benefits, December 19, 2010 in this case.

In addition to determining the claimant’s entitlement to Fed-Ed benefits, the April 2011 determination can be viewed as a reversal or redetermination of the original unwritten determination that found the claimant not disqualified under code section 1256. We consider next whether the EDD is authorized to redetermine the claimant’s entitlement to benefits under the circumstances of this case.

Determinations of eligibility under code section 1256 are made by the EDD after notice to the claimant’s most recent employer and an opportunity for that employer to respond. (Unemployment Insurance Code sections 1327 and 1328.) Additionally, the EDD is required to interview the claimant in detail as to the reasons for his unemployment (Title 22, California Code of Regulations, section

1326-1(a)(1)(A).) The EDD is required to “promptly notify” the claimant and any employer who responded to the claim notice about the determination. (Unemployment Insurance Code sections 1328 and 1332(a).) Service of any notice of determination of eligibility shall be made personally or by mail. Failure to serve this notice shall not affect the determination of eligibility. (Unemployment Insurance Code section 1332(a).)

The mechanisms for reconsideration or reversal of a determination are defined by statute. A party can appeal a determination which may result in a decision reversing the determination. (Unemployment Insurance Code sections 1328 and 1332.) The EDD may “for good cause” reconsider a determination within 15 days after an appeal or within 20 days if no appeal is filed. If the claimant does not appeal from an adverse decision issued by an administrative law judge, or such an appeal is withdrawn or dismissed, the EDD may, for good cause, reconsider the underlying determination throughout the benefit year and any extensions of the benefits. If, after reconsideration, a new reconsidered determination is issued, the parties again have appeal rights. (Unemployment Insurance Code section 1332(b).) With the exception of cases involving fraud, misrepresentation or willful nondisclosure full (Unemployment Insurance Code section 1332.5), these are the only statutory guidelines regarding reconsidered determinations.

The purposes of the time limitation in section 1332 are to insure prompt payment or denial of benefits and to give the EDD the authority to have supervisors review decisions made by its employees and correct patent errors. (*Miranda v. UIAB* (1973) 36 Cal App 3d 213, 219.)

The federal courts have considered the authority of the EDD to reconsider initial determinations of eligibility beyond the section 1332 statutory limits and recognized one exception to the time limits. In *Holt v. Donovan* (9<sup>th</sup> Cir. 1986) 790 F2d 1417, the court held that section 1332(a) did not bar prospective redetermination of benefits when the redetermination was issued because agency policy regarding eligibility had changed. In reaching its decision the court recognized the importance of section 1332 in expediting the prompt payment or denial of benefits, but concluded the section “was not intended, however, to paralyze agency efforts to correct its own erroneous interpretations of the law.” *Holt* at 1418. See also *Turner v. Brock* (9<sup>th</sup> Cir. 1987) 813 F 2d 1494. We note that both *Holt* and *Turner* envisioned only prospective changes in a claimant’s eligibility for benefits.

The determination in this case was not issued as a result of a change in interpretation of law, but rather as a result of new information obtained from the last employer that it could have, presumably, provided earlier. Consequently, the exception carved out in *Holt* and its progeny does not apply.

In Precedent Benefit Decisions P-B-128 and P-B-439, the Board permitted redeterminations beyond the 1332 statutory period. In each case the EDD issued a first written determination which effectively overruled an earlier unwritten determination long after the time period provided in code section 1332. In Precedent Benefit Decision P-B-128, the Board distinguished determinations concerning on-going eligibility for benefits from the initial determination of eligibility when the claimant opens a claim. While the EDD is required to determine the eligibility of a claimant for benefits each week prior to issuing the benefit check, customarily the EDD does not issue a written determination. The payment itself is, in effect, the determination of eligibility. The Precedent identifies the payment as a “silent,” or “unwritten” determination.

In both Precedent Benefit Decisions P-B-128 and P-B-439, a late redetermination of the claimant’s on-going eligibility for benefits, as opposed to initial entitlement to benefits, was permitted. The late redetermination was allowed as the on-going weekly requirement to determine eligibility for benefits is not statutorily required to be in writing. In contrast, the initial determination considering the separation issued under code section 1328 is required to be written and served on all parties. Therefore, we conclude that the exception to compliance with the code section 1332 time limitations is limited to “silent” or “unwritten” determinations concerning on-going issues of eligibility, and does not apply to the initial determination of eligibility for benefits under code section 1256.

As this case involves the claimant’s entitlement to benefits under code section 1256, we find the EDD is bound by the timelines contained in code sections 1328 and 1332 even though the first determination regarding the claimant’s eligibility for benefits under code section 1256 was not a written determination. To find otherwise would defeat the purpose and spirit of code section 1332 that the claimant receive prompt payment of benefits he or she can rely on and that the EDD cannot reconsider except in limited circumstances. Otherwise a claimant, such as this claimant, would be at risk to repay almost two years of benefits after EDD determined the claimant eligible, where a new determination is issued only when the claimant becomes eligible for Fed-Ed benefits. While there may be exceptions permitting retrospective changes in a claimant’s eligibility under code section 1256 when the first written determination exceeds the timelines provided in code sections 1328 and 1332, no such exception exists in this case. In this case the EDD simply changed its position after obtaining new information from a former employer. Unless another reason exists to permit the disqualification to apply to benefits received prior to the application for Fed-Ed benefits, the disqualification is effective only as to the claimant’s Fed-Ed claim.

There is one other possible basis for the EDD to issue a late redetermination.

As noted above, the statutory limits in code sections 1328 and 1332 do not apply “in any case of fraud, misrepresentation or willful nondisclosure.” (Unemployment Insurance Code section 1332.5.)

In order for the EDD to disqualify the claimant for benefits received prior to the application for Fed-Ed benefits, the EDD must find the claimant committed fraud, willfully failed to disclose information or misrepresented facts surrounding his separation with actual knowledge that the representations were false. *Jackson v. Donovan* (9<sup>th</sup> Cir. 1985) 758 F2d 1313,1314. This standard mirrors the language in code section 1257(a), so if the claimant is found to be disqualified under section 1257(a), the EDD would have authority under section 1332.5 to make the disqualification under section 1256 effective going back to the date of separation, i.e. back to June 7, 2009.

For the reasons stated below in the section titled “FALSE STATEMENT”, we find that the claimant did not make a willful false statement and is not disqualified for benefits under section 1257(a). Having found not even a willful false statement, neither can we find fraud, misrepresentation or failure to disclose under code section 1332.5, and section 1332.5 does not apply. Because the time limits for the EDD to reconsider its original determination of the claimant’s eligibility have passed and no exceptions to those time limits are present in this case, the EDD’s authority to issue a new determination is limited to the claimant’s eligibility for Fed-Ed benefits under code section 4654. Therefore the effective date of the 1256 disqualification is December 19, 2010, when the claimant was first eligible for Fed-Ed benefits.

#### FALSE STATEMENT

An individual is disqualified for benefits if, for the purpose of obtaining benefits, he or she either willfully made a false statement or representation, with actual knowledge of the falsity of the statement or representation, or willfully failed to report a material fact. (Unemployment Insurance Code, section 1257(a).)

The burden of proving a willful false statement or withholding of material information is on the EDD. (Evidence Code, section 520; Precedent Benefit Decision P-B-224.)

The claimant reported to the EDD both that he was laid off of work and that he was placed on-call. The claimant was told to leave work. While we find the claimant’s failure to return for scheduled hours amounted to a voluntarily quit, we accept as true the claimant’s testimony he believed he was laid off or placed on-call. Consequently, we find the claimant did not make a willful false statement and reverse the administrative law judge’s decision as to this issue.

## OVERPAYMENT

Any person who is overpaid unemployment insurance benefits is liable for repayment unless the overpayment was not due to fraud, misrepresentation or willful nondisclosure, was received without fault, and its recovery would be against equity and good conscience. (Unemployment Insurance Code, section 1375(a).)

The overpayment determinations issued on this case cover the period July 4, 2009 through March 12, 2011. Having found the claimant's disqualification for benefits is effective only as to the Fed-Ed benefits, we reverse the administrative law judge's decisions as to all benefits received before December 19, 2010.

Having found the claimant disqualified from receiving Fed-Ed benefits, we affirm the overpayment beginning December 19, 2010.

We next look to whether the claimant is entitled to a waiver of the repayment of the overpayment.

In Precedent Decision P-B-361, the appeals board held that under section 1375 of the code, waiver of the recovery of an overpayment depends upon three tests. "First, were the benefits overpaid by the department because of fraud, misrepresentation or willful nondisclosure [P-B-69]. Second, was the overpayment received without fault on the part of the claimant. Third, provided there was no fraud or fault on the part of the claimant, would compelling recovery of the overpayment violate the principles of equity and good conscience [citation omitted]."

Fault does not signify willful intent or evil design; rather fault results from negligence, an error in judgment, or inadvertence due to lack of care or carelessness. (Precedent Decision P-B-368.)

We focus our attention on the fault analysis, as we have already found the claimant did not participate in fraud, misrepresentation or willful nondisclosure. The claimant knew when he filed his benefits that, although his employer sent him home, he was still on the calendar for future shifts. Nor did he disclose the reprimand which caused him to feel "fed up" with his job. While the claimant did not disclose all of the facts surrounding his separation to the EDD, we do not believe he willfully failed to disclose a material fact. On the other hand, had he disclosed this information, the EDD might have investigated his case more thoroughly. We find the claimant was negligent or made an error in judgment in not disclosing more of the circumstances surrounding his separation.

Consequently, we find the claimant was at fault and not entitled to a waiver of the overpayment of the Fed-Ed benefits he received.

If an individual is overpaid benefits because the individual made a willful false statement with actual knowledge, or withheld a material fact, the director shall assess against the claimant an amount equal to 30 percent of the overpayment amount. (Unemployment Insurance Code, section 1375.1.)

Having found the claimant did not make a willful false statement, the claimant is not liable for any overpayment penalty.

## DECISION

The decisions of the administrative law judge are affirmed in part, reversed in part and modified in part.

We set aside those portions of the decisions and underlying determination and ruling which concern the employer's reserve account. The claimant is disqualified for benefits under code section 1256 effective December 19, 2010 and such disqualification applies only to Fed-Ed benefits.

The claimant is not disqualified for benefits under code section 1257(a).

For the period beginning June 13, 2009 through December 18, 2010, the claimant was not overpaid benefits under code section 1375 nor is he liable for penalties under code section 1375.1.

For the period beginning December 19, 2010 through March 12, 2011, the claimant was overpaid benefits and is liable for repayment of the overpayment under code section 1375, but not liable for the penalty under code section 1375.1.