

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0027

Order No. 20-UI-158147 Affirmed ~ Disqualification
Order No. 20-UI-158200 Affirmed ~ Overpayment Assessed

PROCEDURAL HISTORY: On June 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective December 22, 2019 (decision # 131808). On July 7, 2020, decision # 131808 became final without claimant having filed a timely request for hearing. On November 18, 2020, the Department served notice of another administrative decision, based in part on decision # 131808, concluding that claimant received benefits to which he was not entitled, and assessing an overpayment of \$3,322 in regular unemployment insurance benefits and \$6,600 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department (decision # 141441). On November 25, 2020, claimant filed a late request for hearing on decision # 131808 and a timely request for hearing on decision # 141441.

On December 21, 2020, ALJ Micheletti conducted hearings on both administrative decisions. On December 22, 2020, ALJ Micheletti issued Order No. 20-UI-158200, affirming decision # 141441. On December 23, 2020, ALJ Micheletti issued Order No. 20-UI-158147,¹ concluding that claimant had timely filed a request for hearing on decision # 131808, and affirming the merits of that decision. On January 8, 2021, claimant filed applications for review of Orders No. 20-UI-158200 and 20-UI-158147 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-158200 and 20-UI-158147. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0027 and 2021-EAB-0026).

EVIDENTIARY MATTER: At the hearing for decision # 131808, The ALJ admitted Exhibits 1–4 into evidence, but failed to mark Exhibits 1 and 2. As a clerical matter, EAB identified the exhibits based on

¹ This order amended Order No. 20-UI-158033, issued on December 22, 2020, which erroneously concluded that claimant was subject to disqualification as of December 22, 2020, rather than December 22, 2019, but otherwise reached the same conclusions regarding claimant's late request for hearing and the merits of decision # 131808.

the ALJ's description of them, and marked them as Exhibits 1 and 2. Order No. 2020-UI-158147, Transcript at 26–27. At the hearing for decision # 141441, the ALJ admitted Exhibit 1 into evidence, but failed to mark it as an exhibit. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 1. Order No. 2020-UI-158200, Transcript at 9.

EAB reviewed the entire hearing record. Based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), Order No. 2020-UI-158200 is **adopted**. Additionally, the portion of Order No. 2020-UI-158147 concluding that claimant filed a timely request for hearing on decision #131808 is **adopted**. The remainder of these decisions address the merits of Order No. 2020-UI-158147, pertaining to whether claimant was discharged for misconduct.

FINDINGS OF FACT: (1) Estremado Logging Inc. employed claimant as a log truck driver from July 13, 2019 until December 27, 2019.

(2) State and Federal law required claimant to maintain a commercial driver license (CDL) to work as a log truck driver. Claimant understood that if he did not maintain his CDL privileges, he would not be able to work for the employer as a log truck driver.

(3) On November 27, 2019, claimant consumed alcohol and then operated a motor vehicle on a public highway in Oregon. While driving, claimant was stopped by a law enforcement officer, who cited claimant for Driving Under the Influence of Intoxicants (DUII). Claimant submitted to a breath test at the time, which showed that claimant had a blood alcohol content (BAC) level of 0.13, which exceeds the legal limit. The traffic stop was not the result of a motor vehicle accident. Claimant understood that if he consumed alcohol and then drove on a public highway, he could be cited for DUII and could possibly lose his CDL privileges.

(4) In late November 2019, claimant contacted the employer to inform them that he had been cited for DUII and that his CDL privileges would be suspended at the end of the year. Claimant appealed the license suspension, but he did not prevail on appeal and his CDL was suspended.

(5) Claimant last worked for the employer as a log truck driver on December 27, 2019. Claimant was not able to continue working for the employer as a log truck driver because he no longer had CDL privileges. The employer did not explicitly tell claimant that he had been discharged, and claimant never told the employer that he quit the job. As of December 27, 2019, continuing work as a log truck driver was available with the employer, but the employer did not have any work available that did not require a CDL.

(6) After claimant stopped working for the employer as a log truck driver, he believed that the employer might be able to transfer him to another position which did not require a CDL. The employer ultimately offered claimant work in a fire watch position, which he accepted and worked from August 18, 2020 until October 9, 2020.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

Nature of the Work Separation. 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)

(September 22, 2020). 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).

At hearing, both parties offered testimony that suggested that claimant may not have been discharged. The employer's witness testified that claimant was never told that he was discharged and did not tell the employer that he quit. Transcript at 40–41. Similarly, claimant testified that at the time he stopped working as a log truck driver, he had believed that the employer would be moving him to another position. Transcript at 43–45. However, neither party offered evidence to show that the employer made a firm offer to transfer claimant to another position at the end of December 2019, or that the employer took any other steps to maintain an employment relationship with claimant (such as keeping claimant on the employer's payroll in some fashion, or continuing to pay for claimant's health insurance or other benefits) between December 2019 and August 2020. The record therefore shows that, more likely than not, the employment relationship between claimant and the employer severed on December 27, 2019, and that claimant's work for the employer from August through October 2020 was a separate period of employment. The record also shows that claimant was willing to continue working for the employer after December 27, 2019, but that the employer was not willing to allow claimant to do so, because he was no longer qualified to drive a log truck and no other work was available. The employer therefore discharged claimant on December 27, 2019.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c).

The employer discharged claimant because, as a result of the DUII and license suspension, claimant could no longer drive a log truck for the employer. The record does not explicitly show that claimant consumed alcohol prior to driving on November 27, 2019. However, claimant was stopped by law enforcement without being involved in an accident, his breath test showed a BAC level over the legal limit, and claimant offered no evidence to suggest that he had not been drinking or that the breath test gave a false positive result. From this evidence, it is reasonable to infer that, more likely than not, claimant consumed alcohol prior to driving on November 27, 2019. Claimant admitted that he was aware that driving after consuming alcohol could lead to a loss of his CDL, and that losing his CDL would mean he could no longer drive for the employer. As a result, claimant's failure to maintain his CDL was the result of his own wanton negligence, and was reasonably attributable to his own actions.

The record also fails to show whether claimant was on-duty when he was cited for the DUII. A disqualification under ORS 657.176(2)(a) must be for misconduct connected with work. When an individual's off-duty conduct results in their discharge, the relevant inquiry is whether claimant willfully or with wanton negligence created the situation that made it impossible to comply with the employer's workplace requirements. *See accord Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991). However, even if claimant was not on-duty at the time, the record established, as discussed above, that claimant, with wanton negligence, created the situation that made it impossible to comply with the employer's requirement that he maintain his CDL. Therefore, regardless of whether claimant was on-duty when he was cited for the DUII, his actions that led to the discharge were connected with work.

For these reasons, claimant was discharged for misconduct connected with work and is disqualified from receiving unemployment insurance benefits effective December 22, 2019.

DECISION: Orders No. 20-UI-158200 and 20-UI-158147 are affirmed.

S. Alba and D. P. Hettle.

DATE of Service: February 11, 2021

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: This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the "Contact Us" form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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 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 فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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