

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0144

Order No. 21-UI-160948 Reversed ~ No Disqualification

*Order No. 21-UI-160947 ~ Affirmed in Part, Reversed in Part, and Reversed and Remanded in Part
(Ineligible Weeks 12-20 through 25-20 and 38-20; Eligible Weeks 36-20 through 37-20 and 39-20
through 5-21)*

PROCEDURAL HISTORY: On January 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective September 8, 2020 (decision # 75715). Also on January 8, 2021, the Department served notice of an administrative decision concluding that claimant was not able to work and was therefore ineligible to receive unemployment insurance benefits during each of the weeks from March 21, 2020 through January 2, 2021 and until the reason for the denial had ended (decision # 74050). Claimant filed timely requests for hearing on decisions # 75715 and # 74050. On February 9, 2021, ALJ Monroe conducted a consolidated hearing on both administrative decisions. On February 11, 2021, ALJ Monroe issued Order No. 21-UI-160948, affirming decision # 75715, and Order No. 21-UI-160947, modifying decision # 74050 to conclude that claimant was unable to work and ineligible to receive benefits during each of the weeks including March 15, 2020 through August 29, 2020, but was able to work and eligible to receive benefits during each of the weeks including August 30, 2020 through February 6, 2021. On February 26, 2021, claimant filed applications for review of Orders No. 21-UI-160948 and 21-UI-160947 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-160948 and 21-UI-160947. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0143 and 2021-EAB-0144).

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

However, the parties may offer new information into evidence at the remand hearing on the issue of claimant's eligibility to receive benefits for the weeks including June 21, 2020 through August 29, 2020 (week 26-20 through 35-20). At that time, it will be determined if the new information will be admitted

into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

Based on *de novo* review of the entire consolidated record in these cases, and pursuant to ORS 657.275(2), the portions of Order No. 21-UI-160947 concluding that claimant was not eligible for benefits for the weeks including March 15, 2020 through June 20, 2020 (weeks 12-20 through 25-20), and that claimant was eligible for benefits for the weeks including August 30, 2020 through September 12, 2020 (weeks 36-20 through 37-20), as well as September 20, 2020 through February 6, 2021 (weeks 39-20 through 5-21), are **adopted**. The remainder of this decision addresses: (1) Order No. 21-UI-160498, and whether claimant was disqualified from receiving benefits based on her work separation from the employer, and (2) the remaining portions of Order No. 21-UI-160947, which includes claimant's eligibility for benefits for the weeks including June 21, 2020 through August 29, 2020 (weeks 26-20 through 35-20), and the week of September 13, 2020 through September 19, 2020 (week 38-20).

FINDINGS OF FACT: (1) Claimant worked as a repair specialist for the employer from December 16, 2019, until September 8, 2020. Claimant's work involved installing drywall and making general repairs to homes.

(2) The employer was based in Bend, Oregon. At all times relevant to this decision, Bend and the surrounding geographic area was claimant's normal labor market area.

(3) On March 4, 2020, claimant sustained multiple musculoskeletal injuries when a piece of drywall fell on her head at work. The employer approved a medical leave of absence for claimant beginning March 4, 2020 and continuing until such time as claimant's doctor released claimant to return to work. The employer expected claimant to maintain communication with the employer during the leave of absence and to advise the employer when claimant's doctor approved claimant to return to work for light duty. Claimant was aware of and understood the employer's expectations regarding maintaining communication during claimant's leave of absence.

(4) From March 4, 2020 through June 21, 2020, claimant's doctor restricted her from performing any work due to her injuries. Following appointments with her doctor in late March and early April 2020, claimant texted the employer with status updates and she and the employer had lengthy text exchanges. On April 14, 2020, claimant had another doctor consult, learned her status was unchanged, and on April 15, 2020, sent the employer a text advising that she remained restricted from working.

(5) On June 22, 2020, claimant's doctor approved claimant to perform light duty work on a part time basis not to exceed 20 hours per week. The next day, claimant attempted to contact the employer to advise the employer of her status change. Claimant tried calling the employer's business telephone line but it was disconnected. She attempted to contact the employer's office manager and loss coordinator but her calls were not answered and her texts were returned as undeliverable. Claimant drove by the employer's two office locations during business hours and did not see anyone. Claimant succeeded in contacting the employer's mitigation manager, who was one of claimant's supervisors, by telephone. The mitigation manager explained to claimant that the

employer was closed and that claimant's job had been eliminated. Based on this conversation, claimant believed the employer had closed.

(6) In July 2020, the employer learned from their insurance provider that claimant's doctor had approved claimant for part time light duty work. On July 17, 2020, the employer sent a certified letter to claimant with an enclosed light duty modified job description. Claimant did not receive the certified letter.

(7) On September 1, 2020, claimant's doctor approved claimant for work with no restrictions.

(8) On September 8, 2020, after having not received a response to the July 17, 2020 letter, the employer sent claimant a text that stated, in part, "Since you declined our return to work offer that was sent to you on July 17, 2020, we will be needing your work phone, charger and shirts back. You have 7 days from today to return the above items to us before we report them as stolen to the Bend Police Department." Exhibit 2 at 35. Claimant sent a response text on September 16, 2020 stating that she "did not decline a return to work offer" and was not in Bend but would return the employer's items as soon as she returned to Bend. Exhibit 2 at 36.

(9) From September 13, 2020 through September 17, 2020, claimant was away from her home in Bend visiting her mother who was hospitalized in Eugene, Oregon.

(10) Claimant filed a claim for unemployment insurance benefits and claimed benefits for each of the weeks including March 15, 2020 through February 6, 2021 (weeks 12-20 through 5-21), the weeks at issue. The Department paid claimant benefits for the weeks of March 15, 2020, through January 2, 2021 (weeks 12-20 through 53-20). The Department did not pay claimant for the weeks of January 3, 2021 through February 6, 2021 (weeks 1-21 through 5-21).

CONCLUSIONS AND REASONS: Order No. 21-UI-160948 is reversed, the employer discharged claimant, but not for misconduct. Order No. 21-UI-160947 is reversed and remanded for further inquiry as to whether claimant was eligible to receive benefits for the weeks of June 21, 2020 through August 29, 2020 (weeks 26-20 through 35-20). Order No. 21-UI-160947 is reversed to the extent it concluded that claimant was eligible to receive benefits for the week of September 13, 2020 through September 19, 2020 (week 38-20); claimant was not eligible for benefits for week 38-20.

Nature of 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).

The record indicates that the employer discharged claimant on September 8, 2020. On that date, the employer sent claimant a text message requesting that claimant return the employer's equipment and advised that if she did not do so within seven days, the employer would report the items as stolen to the police. Given the employer's desire to have the employer's work equipment returned, and the employer's willingness to potentially involve the police to achieve that end, the preponderance of evidence supports that as of the date of the employer's September 8, 2020 text message, the employer

would not have allowed claimant to work for an additional period of time. Thus, claimant's work separation was a discharge that occurred on September 8, 2020.

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) (September 22, 2020). "[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).

Order No. 21-UI-160948 concluded that claimant's failure to communicate with the employer amounted to a willful or wantonly negligent violation of the employer's reasonable expectations and therefore constituted misconduct. Order No. 21-UI-160948 at 4. Order No. 21-UI-160948 is reversed, however, because the record does not establish that claimant violated the employer's expectations willfully or with wanton negligence.

The record shows that claimant maintained regular contact with the employer about her ability to work during March and April 2020. Thereafter, in late June 2020, the record shows that claimant attempted to inform the employer of her part time light duty status, but succeeded only in contacting the employer's mitigation manager, who advised claimant that the employer was closed and claimant's job had been eliminated. Claimant plausibly explained at hearing that she believed the employer was closed based on the representations made by the mitigation manager as well as the facts that the employer's business telephone line was disconnected, her calls and texts to the employer's office manager and loss coordinator were unsuccessful, and the employer's office locations appeared closed when she drove by them. Transcript at 67-72. The employer disputed claimant's testimony on these points. In the employer's telling, the employer never closed, the employer's business telephone line was connected, the office manager and loss coordinator would have responded to claimant's calls and texts if claimant made them, and, when the mitigation manager spoke with claimant, he was no longer working for the employer. Transcript at 74-75. Viewed objectively, the evidence on these points was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy their evidentiary burden. Consequently, on these disputed matters, this decision's findings are based on claimant's evidence.

Thus, the record indicates that claimant was communicative with the employer about her status in March and April 2020 and did not act willfully or with wanton negligence in failing to communicate with the employer thereafter because she believed the employer had closed. Although the employer mailed claimant a certified letter enclosing a light duty job description on July 17, 2020, claimant did not actually receive that letter. Therefore, there is no basis to conclude that, by virtue of the July 17, 2020 letter, claimant was aware that the employer remained open and continued to expect claimant to maintain communication. The employer did not establish that claimant violated the employer's expectation regarding maintaining communication willfully or with wanton negligence. Accordingly,

claimant's discharge was not for misconduct. Order No. 21-UI-160948 is therefore reversed and claimant is not disqualified from receiving benefits based on her work separation from the employer.

Able to Work and Available for Work. Order No. 21-UI-160947 analyzed claimant's eligibility to receive benefits for the weeks at issue. As noted above, this decision is adopting the portions of the order that concluded claimant was not eligible to receive benefits for weeks 12-20 through 25-20, and was eligible to receive benefits for weeks 36-20 through 37-20 and weeks 39-20 through 5-21. However, the order's analysis of claimant's eligibility for benefits for the weeks including June 21, 2020 through August 29, 2020 (weeks 26-20 through 35-20), which corresponds to the time claimant was approved to work part time light duty, is reversed and remanded for the reasons discussed below. Furthermore, the order's analysis of claimant's eligibility for benefits for the week of September 13, 2020 through September 19, 2020 (week 38-20), which corresponds to the week claimant visited her mother in Eugene, Oregon, is reversed for the reasons discussed below.

Week 38-20. For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

* * *

(d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week * * *.

* * *

OAR 471-030-0036(3). OAR 471-030-0036(6)(a) defines an individual's normal labor market area as the "geographic area surrounding the individual's permanent residence within which employees in similar circumstances are generally willing to commute to seek and accept the same type of work at a comparable wage."

Order No. 21-UI-160947 concluded that claimant was eligible to receive benefits for the week of September 13, 2020 through September 19, 2020 (week 38-20), without analyzing whether claimant was available for work for that week. Order No. 21-UI-160947 at 3.

Here, claimant's normal labor market area during the weeks at issue was Bend, Oregon. From September 13, 2020 through September 17, 2020, claimant was away from Bend in Eugene, Oregon visiting her mother. Therefore, claimant was not available because she was not present in her normal labor market area during the week of September 13, 2020 through September 19, 2020 (week 38-20) and is not eligible to receive benefits for that week. For this reason, the portion of Order No. 21-UI-160947 that concluded that claimant was eligible for benefits for the week of September 13, 2020 through September 19, 2020 (week 38-20) is reversed.

Weeks 26-20 through 35-20. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual is considered able to work for purposes of ORS 657.155(1)(c) only if physically and mentally capable of performing the work the individual is actually seeking during all of the week. OAR 471-030-0036(2) (August 2, 2020 through December 26, 2020). An individual prevented from working full time

or during particular shifts due to a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h) shall not be deemed unable to work solely on that basis so long as the individual remains available for some work. OAR 471-030-0036(2)(b). Under 29 CFR §1630.2(h), a condition affecting the musculoskeletal body system is a type of physical impairment. Where the Department has paid benefits, it has the burden to prove benefits should not have been paid. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

Order No. 21-UI-160947 concluded that because claimant was fully restricted from working from March 4, 2020 until June 21, 2020, and then was approved to work only on a part time light duty basis from June 22, 2020 until August 31, 2020, claimant was not physically capable of performing the type of work she was seeking during the entire period of March 15, 2020 through August 29, 2020 (weeks 12-20 through 35-20). Order No. 21-UI-160947 at 3. The order did not analyze whether claimant’s injuries constituted a long-term physical impairment under OAR 471-030-0036(2)(b), or assess claimant’s ability to work under the modified standard set forth by that administrative rule.

The record indicates that claimant’s injuries constituted a long-term physical impairment. Claimant sustained injuries affecting her musculoskeletal body system of such severity that her ability to work was fully restricted for approximately three months, and then limited to part time light duty for an additional period of almost three months thereafter. Given that claimant’s musculoskeletal injuries persisted for a lengthy period of time, the record supports that claimant’s injuries were a long-term physical impairment. Accordingly, OAR 471-030-0036(2)(b) required claimant’s ability to work during the period of her long-term physical impairment to be evaluated under the relaxed standard set forth by that administrative rule.

Remand is necessary because Order No. 21-UI-160947 failed to identify claimant’s injury as a long-term physical impairment and thus failed to analyze claimant’s ability to work during the period of March 15, 2020 through August 29, 2020 under the modified standard of OAR 471-030-0036(2)(b). However, because claimant was entirely restricted from working for the period of March 15, 2020 through June 21, 2020 (weeks 12-20 through 25-20) claimant’s ability to work for that period does not need to be re-evaluated on remand. Rather, the modified able to work standard set forth by OAR 471-030-0036(2)(b) should be applied to the period of time claimant was restricted to part time light duty work, *i.e.*, the period of June 22, 2020 through August 31, 2020 (weeks 26-20 through 35-20). Keeping in mind that OAR 471-030-0036(2)(b) requires that claimant not be deemed unable to work solely because her impairment prevented her from working full time, so long as she was available for some work, the ALJ should develop the record on remand as to what work claimant sought, and whether claimant was physically capable of performing that work, during the period of June 22, 2020 through August 31, 2020. The ALJ should also inquire into what jobs claimant applied for on a week-by-week basis during that time period.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was eligible to receive benefits during the period of June 21, 2020 through August 29, 2020 (week 26-20 through 35-20), Order No. 21-UI-160947 is reversed in part, and this matter is remanded.

DECISION: Order No. 21-UI-160948 is set aside, as outlined above. Order No. 21-UI-160947 is reversed and remanded in part, as outlined above, and also reversed in part, as outlined above.

S. Alba and D. P. Hettle.

DATE of Service: April 5, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-160947 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymoz.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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.