EO: 200
BYE: 202223

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

063
AAA 005.00

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0701

Affirmed
Disqualification
Ineligible Weeks 25-21 through 31-21

PROCEDURAL HISTORY: On July 8, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective June 13, 2021 (decision # 112840). Also on July 8, 2021, the Department served notice of an administrative decision concluding that claimant was unavailable for work from June 20, 2021 through July 3, 2021 (weeks 25-21 through 26-21) and therefore ineligible for benefits for those weeks and until the reason for the denial had ended (decision # 113941). Claimant filed timely requests for hearing on decisions # 112840 and 113941. On August 10, 2021, ALJ Janzen conducted hearings on both decisions. On August 11, 2021, ALJ Janzen issued Order No. 21-UI-172317 affirming decision # 112840, and Order No. 21-UI-172314 modifying decision # 113941 by concluding that claimant was unavailable for work from June 20, 2021 through August 7, 2021 (weeks 25-21 through 31-21), and therefore ineligible for benefits for those weeks. On August 19, 2021, claimant filed applications for review of Orders No. 21-UI-172317 and 21-UI-172314 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-172317 and 21-UI-172314. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0700 and 2021-EAB-0701).

FINDINGS OF FACT: (1) The Oregon Department of Human Services employed claimant as a direct support crisis specialist from April 15, 1991 until June 16, 2021.

(2) The employer required claimant to maintain a valid driver's license for her position. Claimant was aware of the requirement.

(3) In March 2021, claimant drove her personal vehicle after consuming alcohol, and was subsequently arrested and charged with driving under the influence of intoxicants (DUII). Claimant was not performing services for the employer at the time. Claimant ultimately pleaded guilty to the DUII charge.

(4) On April 8, 2021, claimant's driver's license was suspended for a year as a result of the March 2021 DUII.

(5) On June 16, 2021, the employer discharged claimant because her driver's license had been suspended.

(6) On June 16, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks from June 20, 2021 through August 7, 2021 (weeks 25-21 through 31-21), the weeks at issue. The Department did not pay claimant benefits for those weeks.

(7) The Department determined that claimant's labor market was the Albany, Oregon area, including Lebanon, Brownsville, Sweet Home, and Corvallis, Oregon.

(8) During the weeks at issue, claimant primarily sought and applied for work as a certified nursing assistant, caregiver, or medication technician. These types of jobs required licenses or certifications which claimant did not possess at the time she applied for them.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct. Claimant was not available for work during the weeks at issue.

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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she lost her driver's license—a requirement of the job—as a result of her March 2021 DUII. At hearing, claimant testified that while the employer required her to maintain a driver's license, she believed that she could perform her job duties without a license, and the employer had previously made accommodations for other employees who had lost their licenses. Audio Record at 10:35, 12:52. For that reason, the record does not show that claimant was discharged for a willful or wantonly negligent failure to maintain a license necessary to the performance of the occupation.[1] Nevertheless, the record demonstrates that claimant's DUII constituted a willful or wantonly negligent violation of the employer's reasonable standards of behavior.

[1] *See* OAR 471-030-0038(3)(c).

Claimant was aware of the fact that the employer required her to maintain a driver's license as a condition of employment. Further, claimant either knew or should have known at the time she decided to drive after consuming alcohol, that doing so could result in her being charged with a DUII and subsequently losing her license. Therefore, claimant's decision to drive after consuming alcohol constituted indifference to her actions where she knew or should have known that doing so would probably result in a violation of the employer's expectation that she maintain a driver's license, and thereby make it impossible to comply with that expectation. *See*, e.g., *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991) (where off-duty conduct makes it impossible for an individual to comply with the employer's attendance requirements, the relevant question is whether claimant willfully created the situation that made it impossible for him to attend work or to comply with the policy); *see also Barnes v. Employment Dept.*, 171 Or App 342, 15 P3d 599 (2000) (claimant created a situation that made it impossible for him to comply with his employer's requirement that he maintain a valid driver's license); *Freeman v. Employment Dept.*, 195 Or App 417, 98 P3d 402 (2004) (claimant created a situation that made it impossible to comply with the employer's requirement that he maintain driving privileges); *Dawson v Employment Department*, 251 Or App 379, 283 P3d 434 (2012) (claimant's wantonly negligent decision to drink and drive resulted in his incarceration and made it impossible for claimant to comply with the employer's requirement that he remain available for work).

Claimant's decision to drive after consuming alcohol cannot be excused as an isolated instance of poor judgment. Acts that violate the law or are tantamount to unlawful conduct are not isolated instances of poor judgment. OAR 471-030-0038(1)(d)(D). The record shows that claimant was sufficiently under the influence to be charged with a crime to which she pleaded guilty. Because claimant's conduct violated the law, it was not an isolated instance of poor judgment. As such, claimant's willful or wantonly negligent violation of the employer's standards of behavior was misconduct. Claimant's discharge for that misconduct disqualifies her from receiving benefits.

Available for Work. 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). For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

> (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and
>
> * * *
>
> (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time[.]
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> * * *

OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020).

The record shows that claimant was primarily seeking types of work that required licenses or certifications, such as a certified nursing assistant (CNA) certificate. Claimant did not possess those

credentials at the time she sought or applied for those jobs, and therefore was not eligible to be hired for those jobs. Because claimant generally restricted her work search to work for which she would not actually be hired, claimant imposed a condition that substantially reduced her opportunities to return to work at the earliest possible time. Therefore, claimant was not available for work during the weeks at issue, and is not eligible for benefits for those weeks.

DECISION: Orders No. 21-UI-172317 and 21-UI-172314 are affirmed.

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

DATE of Service: September 21, 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 weeks ending September 4, 2021 and prior** as long as you were not eligible for other benefits during that time, and were unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA was an unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic. The program ended on September 4, 2021.

Visit https://unemployment.oregon.gov for more information, or to contact the Oregon Employment Department using the "Contact Us" form. You can also call 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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