

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0720

Order No. 21-UI-173731 Modified – Disqualification Effective August 9, 2020 (Week 33-20)
Order No. 21-UI-173608 Affirmed – Ineligible Weeks 33-20 through 04-21

PROCEDURAL HISTORY: On May 24, 2021, 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 August 2, 2020 (decision # 165141). On June 2, 2021, the Department served notice of an administrative decision concluding that claimant was not available for work for the weeks including August 9, 2020 through January 30, 2021 (weeks 33-20 through 04-21) and was therefore not eligible to receive benefits for those weeks (decision # 133159). Claimant filed timely requests for hearing on decisions # 165141 and 133159. On August 26, 2021, ALJ Murdock conducted a consolidated hearing at which the employer failed to appear. On August 27, 2021, ALJ Murdock issued Order No. 21-UI-173608, affirming decision # 133159, and on August 31, 2021 issued Order No. 21-UI-173731, affirming decision # 165141. On September 3, 2021, claimant filed applications for review of Orders No. 21-UI-173731 and 21-UI-173608 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 21-UI-173731 and 21-UI-173608. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2021-EAB-0720 and 2021-EAB-0721).

FINDINGS OF FACTS: (1) Millar's Hiway Tire, Inc. employed claimant as a tire technician from May 8, 2020 until August 10, 2020.

(2) The employer expected claimant to report to work for his scheduled shifts. Claimant understood this expectation. At the time of claimant's employment with the employer, claimant was on probation. The terms of claimant's probation required him to not drink alcohol or get involved in any fights. Claimant knew that if he violated his probation, he could be incarcerated. Claimant also knew that if he were incarcerated, he would be unable to report for his scheduled shifts.

(3) On the evening of August 8, 2020, claimant went to a party at a friend's house. Claimant intentionally drank alcohol at the party. Eventually, two of claimant's friends started fighting. Claimant attempted to break up the fight, but while he was trying to do so, someone punched him. Claimant then

intentionally punched that person back and became involved in the fight. Thereafter, the police arrived at the party and arrested claimant for violating his probation.

(4) In the early morning hours of August 9, 2020, police placed claimant in custody at the Linn County, Oregon jail. Claimant worked a Monday through Friday schedule for the employer and was scheduled to work the next day, Monday August 10, 2020. Claimant told his girlfriend to call the employer on his behalf and inform them that he had been arrested, did not know how long he would be in jail, and would like to keep his job. On August 10, 2020, claimant's girlfriend conveyed claimant's message to the employer. Claimant remained in custody in the Linn County jail on August 10 and 11, 2020, failed to report for his scheduled shifts on those days, and never worked for the employer again.

(5) On August 11, 2020, claimant was transferred to the Clackamas County, Oregon jail. Claimant remained in custody there until September 4, 2020. On September 4, 2020, claimant was transferred to the Washington County Community Corrections Center in Washington County, Oregon. Beginning on September 16, 2020, corrections officials in Washington County placed claimant in a work release program. Due to the COVID-19 pandemic, however, the officials barred claimant from doing any work under the work release program. On January 26, 2021, Washington County corrections officials released claimant from custody.

(6) On May 3, 2021, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks including August 9, 2020 through January 30, 2021 (weeks 33-20 through 04-21). These are the weeks at issue. The Department did not pay claimant benefits for any of the weeks at issue.

(7) The Department determined that claimant's labor market was Molalla, Oregon and surrounding areas in Clackamas County. Claimant's customary work was general labor, which is performed all days and hours in claimant's labor market.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct. Claimant was not available for work during the weeks including August 9, 2020 through January 30, 2021 (weeks 33-20 through 04-21).

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) (December 23, 2018). 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 preponderance of the evidence shows that the employer discharged claimant on August 10, 2020. The record shows that continuing work was available for claimant that day because the employer scheduled claimant to work. The record also indicates that claimant was willing to continue to work for an additional period of time, as he told his girlfriend to convey to the employer that he wanted to keep his job. However, the record does not show that the employer responded to the message or made any effort to hold claimant's position open. Given the employer's apparent silence, coupled with the fact that claimant's message conveyed that the length of his confinement was unknown—meaning that claimant would be absent indefinitely—the weight of the evidence supports that, upon receiving claimant's

message, the employer was not willing to allow claimant to continue to work. Because the record shows that, more likely than not, claimant was willing to continue to work but was not allowed to do so by the employer when they received his message via his girlfriend on August 10, 2020, the work separation was a discharge that occurred on August 10, 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). “[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 are not misconduct. OAR 471-030-0038(3)(b). “Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment” and may not be excused as an isolated instance of poor judgment. OAR 471-030-0038(3)(b)(D)

The employer discharged claimant because his off-duty conduct resulted in his incarceration, which made it impossible for him to comply with the employer’s expectation that he report to work for his scheduled shifts. The record shows that claimant willfully created the situation that made it impossible for him to comply with the employer’s attendance expectation because claimant knew he was on probation and that violation of his probation could result in his incarceration. Claimant willfully violated his probation by intentionally drinking alcohol and getting into a fight on August 8, 2021, which resulted in his going to jail and therefore failing to report for his scheduled shifts. Accordingly, claimant’s conduct was a willful violation of the employer’s standards of behavior. *See 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).

Claimant’s conduct was not an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b)(D), acts that violate the law or are tantamount to unlawful conduct exceed mere poor judgment and may not be excused as an isolated instance of poor judgment. Here, claimant’s conduct of violating his probation by drinking alcohol and getting into a fight violated the law and resulted in claimant being incarcerated. Thus, claimant’s conduct exceeded mere poor judgment and was not an isolated instance of poor judgment. Because claimant’s conduct was not an isolated instance of poor judgement, claimant was discharged for misconduct.

Available for Work. To be eligible to receive unemployment insurance 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:

* * *

(b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities[.]

* * *

OAR 471-030-0036(3) (August 2, 2020 through December 26, 2020). Furthermore, “[f]or purposes of ORS 657.155(1)(c), an individual is not available for work in any week claimed if: . . . [d]uring the week, the individual is incarcerated during any days or hours customary for the type of work the individual is seeking[.]” OAR 471-030-0036(3)(f)(B). The meaning of “[i]ncarcerated” includes being “in custody at a . . . county . . . law enforcement or correctional facility[.]” OAR 471-030-0036(3)(f)(B)(i). However, “[w]hen an individual is in an alternative sentencing facility operated pursuant to a community corrections plan that individual will not be considered unavailable for work solely because of their non-traditional custody.” OAR 471-030-0036(3)(f)(B)(ii). Because the Department did not pay benefits to claimant for the weeks at issue, claimant has the burden to prove that he should have been paid benefits. *See Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (where the Department has paid benefits it has the burden to prove benefits should not have been paid; by logical extension of that principle, where benefits have not been paid claimant has the burden to prove that the Department should have paid benefits).

The record shows that claimant was incarcerated from August 9, 2020, when he was taken into custody at the Linn County jail, until January 26, 2021, when he was released from the Washington County Community Corrections Center. This period of incarceration corresponds to each week of the weeks at issue, the weeks of August 9, 2020 through January 30, 2021 (weeks 33-20 through 04-21). Claimant’s customary work was general laborer work, which is performed all days and hours in claimant’s labor market. Because claimant was incarcerated during the weeks at issue during the days and hours in which his type of work was customarily performed, he was not available for work during those weeks pursuant to OAR 471-030-0036(3)(f)(B).

OAR 471-030-0036(3)(f)(B)(ii) provides that where an individual is in custody in an alternative sentencing facility operated pursuant to a community corrections plan, they may be incarcerated but still be considered available for work. The record does not show that OAR 471-030-0036(3)(f)(B)(ii) applies to claimant. Here, the record shows claimant was placed in a work release program during the bulk of his confinement at the Washington County Community Corrections Center, from September 16, 2020 until January 26, 2021, but that he was not permitted to do any work release work during that period because of the COVID-19 pandemic. Because claimant did not produce evidence establishing that the Washington County Community Corrections Center was an alternative sentencing facility operated pursuant to a community corrections plan, he failed to establish that OAR 471-030-0036(3)(f)(B)(ii) was applicable to the work release program in which he was placed.

Finally, claimant was not available for work during the weeks at issue for the additional reason that, pursuant to OAR 471-030-0036(3)(b), he was not capable of accepting and reporting for suitable work opportunities within his labor market during the weeks at issue because he was incarcerated.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective August 9, 2020. Additionally, claimant was not available for work during the weeks including August 9, 2020 through January 30, 2021 (weeks 33-20 through 04-21) and therefore was ineligible for benefits for those weeks.

DECISION: Order No. 21-UI-173731 is modified as indicated above. Order No. 21-UI-173608 is affirmed.

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

DATE of Service: October 8, 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.

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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 desisyong ito.

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
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