

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0492**

*Reversed*  
*No Disqualification*  
*Eligible Weeks 49-22 to 02-23*

**PROCEDURAL HISTORY:** On January 4, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not available for work for the weeks including December 11, 2022 through December 31, 2022 (weeks 50-22 through 52-22) and was denied benefits for those weeks and until the reason for the denial had ended (decision # 94116). On January 9, 2023, the Department served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective December 4, 2022 (decision # 160248). Claimant filed timely requests for hearing on decisions # 94116 and 160248. On March 29, 2023, ALJ Chiller conducted a consolidated hearing, and on April 6, 2023 issued Order No. 23-UI-221359, modifying decision # 94116 by concluding that claimant was not available for work for the weeks including December 4, 2022 through January 14, 2023 (weeks 49-22 through 02-23) and was denied benefits for those weeks.<sup>1</sup> Also on April 6, 2023, ALJ Chiller issued Order No. 23-UI-221361, affirming decision # 160248. On April 26, 2023, claimant filed applications for review of Orders No. 23-UI-221359 and 23-UI-221361 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 23-UI-221359 and 23-UI-221361. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2023-EAB-0493 and 2023-EAB-0492).

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

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<sup>1</sup> Although Order No. 23-UI-221359 stated that it affirmed decision # 94116, it modified that decision by changing the effective dates of ineligibility from weeks 49-22 through 52-22 to weeks 49-22 through 02-23. Order No. 23-UI-221359 at 3.

**FINDINGS OF FACT:** (1) Colvin Oil I LLC employed claimant 24 hours per week as an associate at their gas station from March 14, 2022 until December 6, 2022.

(2) The employer expected that their employees would not act in rude, disrespectful, or harassing ways toward others. Claimant was told of this expectation when hired.

(3) For “most of [his] life,” claimant suffered from schizophrenia, schizoaffective disorder, bipolar disorder and depression. Transcript at 58. Claimant underwent anger management therapy for approximately seven years preceding his hire by the employer. A representative of the therapy program assisted claimant in getting the gas station job and the employer was aware of claimant’s mental health conditions. The conditions rendered claimant unable to successfully perform most full-time work.

(4) During and after his employment with the employer, claimant received Supplemental Security Income (SSI) benefits because he was unable to work full-time due to his disabilities. Claimant limited the hours he worked for the employer to 24 per week, in part so as not to exceed income limits that would disqualify him from receiving SSI benefits and related medical coverage.

(5) In October and November 2022, claimant’s coworkers complained to store management that claimant was spreading rumors about them and attempting to boss them around. Claimant received two verbal warnings about this conduct on separate occasions during this time. Claimant responded angrily and defensively when receiving these warnings.

(6) On December 6, 2022, in response to several coworker complaints, the employer issued claimant a final written warning regarding spreading rumors about other employees. Specifically, the employer alleged that claimant had spread a rumor that a particular employee was frequenting a “drug house.” Transcript at 17. The store manager summoned claimant to her office to receive and sign the warning. While discussing the warning, claimant became “really frustrated” and “upset” and raised his voice at the manager. Transcript at 30. The manager told claimant to “clock out” and go home due to his “attitude.” Transcript at 30. Claimant then slammed the office door in anger, the force of which caused noticeable damage to the wall. Claimant clocked out and walked home.

(7) Immediately after claimant left the gas station, the manager attempted to call claimant on his phone. When claimant spoke with the manager after he arrived home, the manager discharged him due to his conduct in her office.

(8) On December 14, 2022, claimant filed an initial claim for unemployment benefits. He thereafter claimed benefits for the weeks including December 4, 2022 through January 14, 2023 (weeks 49-22 through 02-23). These are the weeks at issue.

(9) Claimant submitted his initial claim for benefits at a WorkSource office with the assistance of a WorkSource representative, who suggested that he state on the claim that he was willing to accept full-time work, though he preferred part-time work so as not to jeopardize his SSI benefits. Claimant nevertheless wrote in his initial claim that he could “only work 24 hours [per week, in order to] get SSI.” Transcript at 46. Claimant had similar conversations with Department representatives over the course of his claim regarding his desire to seek full-time work but preferring part-time work due to the potential impact on his SSI benefits.

(10) In early 2023, claimant completed an eight-week job training program at Goodwill that involved claimant working there for 30 hours per week.

**CONCLUSIONS AND REASONS:** Claimant was discharged, but not for misconduct. Claimant was 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).

Order No. 23-221361 concluded that claimant acted with wanton negligence in yelling at his manager and slamming the door, and he was therefore discharged for misconduct. Order No. 23-UI-221361 at 3-4. The record does not support this conclusion.

Though the employer disciplined claimant through verbal warnings for previous incidents involving discord with his coworkers, the most recent incident of discord led to a final written warning on December 6, 2022. Because the employer decided to impose a lesser discipline than discharge for these incidents of discord, they are not the focus of the discharge analysis. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). The employer would not have discharged claimant but for his actions in the manager’s office in response to receiving the written warning, and these actions were therefore the proximate cause of his discharge.

The employer discharged claimant for acting in a rude and disrespectful way by yelling at his supervisor and slamming the door to her office, causing damage. The employer reasonably expected that their employees would not act in rude, disrespectful, or harassing ways toward others. The record shows that claimant suffered from serious mental health conditions and was undergoing a course of treatment for anger management that began many years prior to this employment. A representative from claimant’s treatment program worked with the employer to get claimant the job, and it is reasonable to infer that the employer was therefore aware of claimant’s limitations related to his mental health conditions. Claimant responded poorly when receiving earlier verbal warnings during his employment. However, claimant’s manager, in presenting the December 6, 2022 written warning, prolonged the encounter beyond obtaining claimant’s signature by continuing to discuss the matter as claimant became increasingly agitated and unable to control his anger. As a result, claimant yelled at the manager and slammed the door to her office hard enough to cause damage to the wall it contacted. It is reasonable to infer from both his lengthy history of mental health treatment and his difficulties in interacting with his supervisor

on other occasions during this employment that it is unlikely claimant was unable to control his actions, and was incapable under the circumstances of deliberating on the potential consequences of his actions prior to engaging in them. Accordingly, his actions were neither willful nor wantonly negligent, and the employer has not shown that claimant was discharged for misconduct.

Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

**Availability for work.** 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
- (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; and
- (c) Not imposing conditions which substantially reduce the individual’s opportunities to return to work at the earliest possible time; and
- (d) Physically present in the normal labor market area as defined by section (6) of this rule, every day of the week \* \* \*.
- (e) However, an individual with a permanent or long-term physical or mental impairment (as defined at 29 CFR 1630.2(h)) which prevents the individual from working full time or during particular shifts shall not be deemed unavailable for work solely on that basis so long as the individual remains available for some work.

\* \* \*

OAR 471-030-0036(3) (December 8, 2019).

29 C.F.R. §1630.2(h) defines “physical or mental impairment” as:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Order No. 23-UI-221359 concluded that claimant was not available for work for purposes of ORS 657.155(1)(c) for the weeks at issue because he restricted his availability to part-time work. Order No. 23-UI-221359 at 3. The record does not support this conclusion.

The record shows that claimant was not available for full-time work due to a permanent mental impairment, but that he was available for some work. Claimant wrote in his initial claim for benefits that he was not seeking employment in excess of 24 hours per week because he was receiving SSI benefits. The record shows that he made similar statements to Department representatives evaluating his claim at various stages. At hearing, claimant expressed a desire for full-time work, tempered with concern at the possibility of losing his eligibility for SSI benefits and corresponding medical coverage if he exceeded SSI income limits. Transcript at 41. The record therefore shows that claimant was, more likely than not, restricting his availability to perform full-time work.

However, this restriction was a result of being unable to perform full-time work due to an impairment. Claimant's schizophrenia, schizoaffective disorder, bipolar disorder and depression were permanent mental impairments as defined at 29 CFR 1630.2(h). By granting claimant SSI benefits, the Social Security Administration concluded that claimant was, on a permanent or long-term basis, incapable of maintaining substantial gainful employment because of his impairments.<sup>2</sup> Claimant's difficulties in his most recent part-time employment, particularly in interacting appropriately with others, accepting correction from supervisors, and controlling his anger, all of which ultimately led to his discharge from that employment, demonstrated that claimant was unlikely to be able to maintain permanent, full-time employment due to his impairments. The record therefore shows that claimant was prevented from working full-time by his impairments. Nonetheless, his success in the Goodwill training program, which was of limited working hours and duration, supported claimant's contention that he could be successful despite his impairments in some types of work other than full-time employment. Claimant's statements have been consistent since his initial application that he was able, available for, and actively seeking such other work. Accordingly, under OAR 471-030-0036(3)(e), claimant is not deemed unavailable for work because he was prevented from working full-time by his impairments but was available for other work.

Therefore, claimant was available for work during the weeks including December 4, 2022 through January 14, 2023 (weeks 49-22 through 02-23), and is eligible to receive benefits for those weeks.

**DECISION:** Orders No. 23-UI-221359 and 23-UI-221361 are set aside, as outlined above.

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

**DATE of Service:** May 31, 2023

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

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<sup>2</sup> 42 U.S.C. § 1382c(3)(a) provides, in relevant part, “[A]n individual shall be considered to be disabled for purposes of [SSI program requirements] if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.”

**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](https://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.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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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 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 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  
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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.