

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1192

Reversed
Disqualification Weeks 37-22 through 39-22; 41-22

PROCEDURAL HISTORY: On October 4, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was disqualified from receiving unemployment insurance benefits for the week of September 11, 2022, through September 17, 2022¹ (week 37-22) and until the reason for the disqualification had ended because claimant was unemployed due to a labor dispute that was in active progress (decision # 155749). Claimant filed a timely request for hearing. On September 22, 2023, ALJ Mott conducted a hearing. On October 4, 2023, ALJ Mott issued Order No. 23-UI-237676, reversing decision # 155749 by concluding that claimant was not disqualified from receiving benefits for the weeks of September 11, 2022 through October 1, 2022, and October 9, 2022 through October 15, 2022 (weeks 37-22 through 39-22 and week 41-22) because claimant was unemployed due to a lockout that rendered the disqualifying provision of ORS 657.200(1) inapplicable. On October 24, 2023, the Department filed an application for review with EAB.

WRITTEN ARGUMENT: EAB considered the Department's argument in reaching this decision.

FINDINGS OF FACT: (1) Weyerhaeuser Company employed claimant as a saw filer since at least November 2019. Claimant was represented by a union, the International Association of Machinists and Aerospace Workers (IAMAW), Local 246.

¹ Decision # 155749 stated that claimant was disqualified for the week of "September 11, 2022 through September 14, 2022." However, since benefit weeks end on a Saturday, it was established at hearing that this was a typographical error and that decision # 155749 disqualified claimant for the week of September 11, 2022 through September 17, 2022. Transcript at 5.

(2) On May 31, 2022, the contract between claimant's union and the employer expired. Thereafter, the union and the employer attempted to negotiate a new contract regarding the wages and benefits of the employer's union-represented employees.

(3) On September 12, 2022, claimant's union informed the employer that the union had decided to strike. On September 13, 2022, the union began the strike against the employer.

(4) After the strike began, the employer locked their gates so that "outside people could not enter." Transcript at 12. A picket line formed outside claimant's worksite. Represented employees "were not disallowed" entry to the worksite by the employer, but employees did not enter due to the strike.

(5) Claimant was on vacation when the strike began and found out about it online. Claimant had been scheduled to return to work following his vacation on September 16, 2022. Claimant did not go to the worksite or attempt to work for the employer during the strike. Claimant believed he could not contact the employer during the strike to determine whether he was able to report for work because the employer's electronic communications system was inaccessible to claimant and other represented employees. Claimant did not work for the employer for the duration of the strike.

(6) On September 16, 2022, claimant filed an initial claim for unemployment insurance benefits. Claimant claimed benefits for the weeks including September 11, 2022 through October 1, 2022, and October 9, 2022 through October 15, 2022 (weeks 37-22 through 39-22; 41-22). These are the weeks at issue. The Department did not pay claimant benefits for the weeks at issue.

(7) Shortly after claimant filed his initial claim for benefits, the Department sent him a labor dispute questionnaire. Claimant answered the questions contained in the questionnaire and returned the document to the Department. Among other questions, the questionnaire asked, "Did you refuse to cross the picket line?" to which claimant answered "Yes." Transcript at 8. Claimant answered "Yes" to this question because, at the time he filled out the questionnaire, he refused to cross the picket line "out of respect for both parties at that point." Transcript at 21.

(8) On October 28, 2022, IAMAW concluded its strike against the employer and the lockout by the employer was ended. Thereafter, claimant resumed working for the employer.

CONCLUSIONS AND REASONS: Claimant was unemployed due to a labor dispute in progress and was disqualified from receiving benefits pursuant to ORS 657.200(1) for the weeks of September 11, 2022 through October 1, 2022, and October 9, 2022 through October 15, 2022 (weeks 37-22 through 39-22; 41-22).

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. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

ORS 657.200(1) provides that "[a]n individual is disqualified for benefits for any weeks with respect to which [the Department] finds that the unemployment of the individual is due to a labor dispute that is in active progress at the factory, establishment or other premises at which the individual is or was last

employed or at which the individual claims employment rights by union agreement or otherwise.” Under OAR 471-030-0097 (January 11, 2018), “The term ‘labor dispute’ as used in the Employment Department law means any concerted or deliberate action by two or more individuals or by an employing unit resulting in either a strike or lockout in which wages, hours, working conditions or terms or employment of the individuals are involved.”

Although ORS 657.200(1) has the effect of disqualifying an individual from receiving benefits for weeks of unemployment for which the elements of ORS 657.200(1) are met, ORS 657.200(3)(a) provides as follows:

(3) This section does not apply if it is shown to the satisfaction of the director that the individual:

(a) Is unemployed due to a lockout, as defined in ORS 662.205, at the factory, establishment or other premises at which the individual was last employed[.]

ORS 662.205(4) defines “Lockout” to mean “any refusal by an employer to permit employees to work as a result of a dispute with such employees affecting wages, hours or other terms or conditions of their employment.”

Thus, if claimant’s unemployment during the weeks at issue was due to a strike, it was due to a labor dispute in active progress and, under ORS 657.200(1), claimant would be disqualified from receiving benefits for the weeks at issue. If, instead, claimant’s unemployment during the weeks as issue was due to a lockout, it too would meet the OAR 471-030-0097 definition of a labor dispute, but would satisfy the elements of ORS 657.200(3)(a), which renders the disqualifying effect of ORS 657.200(1) inapplicable and therefore would result in claimant not being disqualified from receiving benefits for the weeks at issue.

The Oregon Court of Appeals has held that, for purposes of ORS 657.200(1), the words “due to a labor dispute” means “caused by a labor dispute.” *Barrier v. Employment Division*, 29 Or. App. 387, 391, 563 P.2d 1230, 1232 (1976) (citing *Skookum Co. v. Employment Division*, 24 Or. App. 271, 545 P.2d 914 (1976)). Under these precedents, it is not sufficient to meet the disqualifying provision of ORS 657.200(1) “if the unemployment merely occurred during the course of a strike.” *Barrier*, 29 Or. App. at 391.

The order under review concluded that “claimant’s unemployment during the weeks at issue was caused, at least in part, by an employer lockout,” making the disqualification provision of ORS 657.200(1) inapplicable because of the exception set forth in ORS 657.200(3). Order No. 23-UI-237676 at 4. While the record supports the conclusion that a lockout existed, it does not support that claimant’s unemployment was due to the lockout rather than the strike.

The record shows that a labor dispute involving the employer was in progress during the weeks at issue. A picket line formed in front of claimant’s worksite as a result. The employer’s payroll coordinator testified that while gates were locked restricting “nonemployee” access to the worksite, represented employees “were not disallowed” beyond the picket line and gates, “but chose not to cross over.” Transcript at 13. The payroll coordinator also testified that she “[did not] know what would happen” if a

represented employee had come to the employer during the strike period and asked to return to work. Transcript at 13. Claimant denied going to the worksite during the strike. Transcript at 18-19. Further, claimant testified that he “couldn’t contact” the employer during the strike after they blocked access to the communications systems. Transcript at 20.

While the employer may have intended only to keep out nonemployees by locking the gates based on the testimony in this hearing record, it can reasonably be inferred that the effect was to also preclude entry by represented employees. That the employer did not reach out to represented employees to offer them the option of crossing the picket line to return to work if they desired, but instead curtailed access to electronic communication between employer and employees, further suggests that the employer was not allowing represented employees to return to work. The employer’s conduct therefore amounted to a refusal to permit employees to work as a result of a dispute affecting terms or conditions of employment, and accordingly amounted to a lockout as defined by ORS 662.205(4).

The record fails to show that claimant’s unemployment was caused by the lockout. Evidence of whether claimant was willing to cross the picket line to work if the lockout had not occurred was in conflict. Claimant did not assert that he *attempted to* contact the employer in an effort to report for work, though the employer inhibited his ability to contact them electronically. Claimant also indicated in a questionnaire response that he would not have crossed the picket line, and testified this was “out of respect for both parties at that point.” Transcript at 21-22. This evidence tends to show that claimant was withholding work in accordance with the strike, and that therefore it was the strike that caused claimant to be unemployed during the weeks at issue. However, he testified he subsequently changed his mind and would have crossed the picket line if he “physically could have,” though he could not recall when he changed his mind in this regard. Transcript at 22. He also did not participate in activities related to the strike, such as picketing, and testified he would have worked for the employer during the strike, if allowed. Transcript at 20. As the Department did not pay claimant benefits for the weeks at issue, claimant bears the burden of proving by a preponderance of evidence that his unemployment was due to a lockout rather than due to the strike. As the record evidence regarding whether claimant was willing to cross the picket line and work had the employer allowed is conflicting and no more than equally balanced, claimant has not met that burden. Therefore, more likely than not, claimant’s unemployment was due to the strike, which was the labor dispute in active progress, and not due to a lockout. Accordingly, the lockout exception to disqualification provided by ORS 657.200(3)(a) is inapplicable, and ORS 657.200(1) disqualification applies.

For these reasons, claimant was unemployed due to a labor dispute in progress and was disqualified from receiving unemployment insurance benefits pursuant to ORS 657.200(1) for the weeks of September 11, 2022 through October 1, 2022, and October 9, 2022 through October 15, 2022 (weeks 37-22 through 39-22; 41-22).

DECISION: Order No. 23-UI-237676 is set aside, as outlined above.

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

DATE of Service: December 7, 2023

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 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 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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