

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1168**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134349). Claimant filed a timely request for hearing. On December 12, 2018, ALJ Wyatt conducted a hearing, and on December 14, 2018 issued Order No. 18-UI-121286, reversing the Department's decision. On December 18, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Kamran Haghghat, DDS MS PC employed claimant as a dental assistant from approximately September 18, 2018 until October 24, 2018.

(2) The employer expected claimant to perform her duties with reasonable competence. The employer also expected claimant to report on time for her shifts. Claimant understood the employer's expectations as a matter of common sense.

(3) When claimant was hired, the dentist was aware that she did not have a great deal of experience in periodontal dentistry, which was one of the employer's specialties. Upon hire, claimant was subject to a 90 day probationary period to allow the employer to assess the adequacy of her performance.

(4) A few times during her employment, claimant felt overwhelmed and told the dentist she did not know if she could perform the work that was expected of her. Claimant lacked confidence because she lacked experience in periodontics and the dentist's regular dental assistant was away.

(5) Claimant had stomach ulcers. On October 17, 18 and 19, 2018, claimant reported for work, although she was ill with stomach problems. On October 17 or 18, during the workday, claimant cried in the employer's backroom for an hour because she was experiencing abdominal pain. The dentist saw her and claimant expressed to him that she was not confident in her work performance. The dentist told claimant that she needed to become more confident in order to reassure patients.

(6) As of October 23, 2018, claimant was still ill, but intended to report for work at 7:30 a.m. on October 24. Claimant set the alarm on her phone to awaken her in sufficient time to arrive at work by 7:30 a.m. The alarm that claimant had set did not awaken her on October 24, either because she slept through it as a result of illness or because the alarm did not work. When claimant awakened, she notified the dental office she was going to be late for work. Claimant reported for work on October 24 two hours late, around 9:30 a.m.

(7) Upon her arrival at work on October 24, the dentist told claimant that she was discharged. The dentist discharged claimant because she had not reported for work on time that day and she had in the past expressed that she felt she might not be able to adequately perform the work for which she had been hired.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the dentist testified that claimant reported late for work on several occasions throughout her employment, the final incident of tardiness that led him to discharge claimant was her belated arrival at work on October 24. Audio at ~7:18, ~10:16. EAB customarily assesses only the final incident of a claimant's alleged violation of an employer's expectations to determine whether claimant engaged in misconduct. This is so because, as here, if the employer was aware of prior incidents around the time they occurred and did not discharge claimant, it presumably did not consider them sufficient to merit discharge. Claimant's late arrival to work on October 24 is the proper focus of the misconduct analysis.

That claimant was ill on October 24 and set an alarm that should have awakened her in sufficient time to arrive for work at 7:30 a.m. was not challenged at hearing. There is no basis in the record to doubt claimant's testimony of those issues. The record does not disclose any ground for claimant to have foreseen that, when she set the alarm that was intended to timely wake her up on October 24, she needed to take precautions in addition to setting that alarm to ensure that she awakened on time that morning. Under the circumstances, claimant's oversleeping was not an intentional or volitional action on her part, and likely was not behavior of which she was consciously aware when it occurred. As such, while claimant may have violated the employer's expectations by not arriving on time for work, that violation was not the result of willful or wantonly negligent behavior and was not misconduct.

With respect to claimant's lack of confidence in her ability to perform the work for which she was hired and her expressions of perceived inadequacy to the dentist, there is insufficient evidence in the record on

which to conclude that such feelings or statements constituted willful or wantonly negligent violations of a reasonable the employer's standards. Further, the employer also did not contend that, aside from feelings and expressions, claimant's actual job performance was inadequate. Even if it was, claimant's performance would not be considered misconduct because under OAR 471-030-0038(3)(b) a claimant's inefficiencies due to lack of job skills or experience are not misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 18-UI-121286 is affirmed.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service: January 16, 2019**

**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](http://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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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**

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**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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