

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0008**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 165022). Claimant filed a timely request for hearing. On December 13, 2018, ALJ Meerdink conducted a hearing, and on December 14, 2018, issued Order No. 18-UI-121280, affirming the Department's decision. On December 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a written argument. However, he failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant's argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's argument or any information not received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Superior Janitorial and Maintenance employed claimant as a custodian from August 10, 2016 to September 24, 2018.

(2) The employer expected its employees to keep the employer's work vehicles they used for their custodial assignments clean and neat. Claimant failed to do so on at least two unspecified occasions since the beginning of his employment and had been given verbal warnings about keeping the employer's vehicles clean on each of those occasions. Claimant was aware of and understood the employer's expectation.

(3) The employer also expected any employee who was absent from work for three or more consecutive days to bring in a doctor's excuse for the absenteeism. On September 18, 19 and 20, 2018, claimant was absent from work due to a combination of a hip injury and insomnia. On September 21, 2018, prior to the beginning of his evening shift that day, claimant presented the employer with a medical note that stated the following: "You saw [named individual] PA on Friday September 21, 2018 for hip pain. The

following issue was [also] addressed: difficulty falling or staying asleep. What's next? Counseling follow-up with [named individual] PSYD on Tuesday, October 21, 2018." Audio Record at 9:45 to 11:15. The employer was dissatisfied with the note because it did not specify that claimant was absent from work on September 18, 19, and 20 for those reasons, and requested a more detailed note and told him to bring such a note with him to a meeting with the owner on Monday, September 24, 2018. The meeting had been scheduled by the owner to discuss claimant's recent excessive absenteeism and deteriorating work quality. Claimant then completed his September 21 work shift, although he "wasn't feeling well that night," and at the end of his shift he drove the employer's vehicle back to the employer's yard and "forgot" to clean out the employer's van that he and a coworker had used. Audio Record at 48:30 to 49:40.

(4) On Monday, September 24, 2018, prior to his meeting with claimant, the employer's owner inspected the van that claimant had used to complete his custodial assignment on Friday, September 21, 2018, and found food wrappers, an empty 7-11 cup, and cigarette butts in a vehicle cup holder. The owner became upset because it violated the employer's expectation regarding vehicle care and maintenance, he thought claimant had been disrespectful in leaving the vehicle in a messy condition, and claimant had been warned about that issue before. When claimant reported for his scheduled meeting with the owner later that day, the owner discharged claimant for failing to leave the work vehicle in a clean condition.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, claimant's first-hand testimony that he "wasn't feeling well" during his shift on September 21, 2018 and "forgot" to clean out the employer's van at the end of his shift differed from the owner's speculation that claimant had been consciously disrespectful in failing to clean out the employer's van after returning it to the employer's yard that day. In the absence of evidence demonstrating that claimant was not a credible witness, we conclude that his first-hand testimony was at least as persuasive as the employer's speculation concerning claimant's mental state when he returned the van to the employer. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. Consequently, on this matter in dispute, we based our findings on claimant's evidence and found that on September 21, 2018, claimant forgot to clean out the employer's van when he returned it to the employer's yard at the end of his shift.

At hearing, the employer's owner asserted that the "final straw" that caused him to decide to discharge claimant on September 24, 2018, was his failure to clean out his work vehicle after returning it to the employer at the end of his shift on September 21, 2018. Audio Record at 26:00 to 28:00. Therefore, that incident was the proximate cause<sup>1</sup> of claimant's discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to keep the work vehicles he used for his custodial assignments clean and neat. Claimant had failed to do so at least twice prior to September 21, 2018, and had been given verbal warnings about keeping the employer's vehicles clean on each of those occasions. Claimant violated that expectation again on September 21, 2018 by returning the vehicle without cleaning out the food wrappers, 7-11 cup and cigarette butts the employer found on September 24, 2018. In Order No. 18-UI-121280, the ALJ concluded that claimant's failure to clean the vehicle as expected constituted misconduct, reasoning:

Despite repeated warnings, claimant left cigarette ashes and butts, and food containers in the van. This was at least a wantonly negligent disregard for the employer's policy.

Order No. 18-UI-121280 at 3. However, it is not enough that claimant understood that the employer expected him to keep the work vehicles he used for his custodial assignments clean and neat. Where, as here, a claimant is discharged because of a failure to act, a finding that he did so with wanton negligence requires evidence that the failure was conscious. *See* OAR 471-030-0038(1)(c). An unconscious failure to act is, at most, evidence of negligence, or the failure to exercise due care. Negligence, even repeated negligence, in the performance of work-related duties, may be a valid basis for a discharge, but it is not sufficient to establish misconduct under ORS 657.176(2)(a).

Here, on September 21, 2018, claimant completed his work shift although he "wasn't feeling well that night" and probably for that reason, after he returned the employer's vehicle to the yard, "forgot" to clean it out. Forgetting to clean out the van did not constitute a conscious disregard of the employer's expectation. On this record, the employer failed to establish that the conduct for which claimant was discharged was the result of conscious conduct, i.e., either willful or wantonly negligent. Accordingly, for the reasons discussed above, the discharge was not for misconduct as defined by OAR 471-030-0038(3)(a).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a), and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 18-UI-121280 is set aside, as outlined above.<sup>2</sup>

D. P. Hettle and S. Alba;

---

<sup>1</sup> *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).

<sup>2</sup> This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

J. S. Cromwell, not participating.

**DATE of Service: February 7, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have 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 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**

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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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.