

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0831**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 23, 2006, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92542). On September 12, 2006, decision # 92542 became final without claimant having filed a timely request for hearing. On April 26, 2019, claimant filed a late request for hearing. On May 6, 2019, ALJ Kangas issued Order No. 19-UI-129365, dismissing claimant's late request for hearing subject to his right to renew the request by responding to an appellant questionnaire by May 20, 2019. On May 13, 2019, claimant responded to the questionnaire. On June 5, 2019, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 19-UI-129365 was canceled. On June 7, 2019, OAH mailed notice of a hearing scheduled for June 19, 2019. On June 19, 2019, ALJ Logan conducted a hearing at which the employer did not appear, and on June 21, 2019 issued Order No. 19-UI-132049, re-dismissing claimant's late request for hearing. On June 28, 2019, claimant filed a timely application for review of Order No. 19-UI-132049 with the Employment Appeals Board (EAB).

On August 1, 2019, EAB issued Appeals Board Decision 2019-EAB-0606, allowing claimant's late request for hearing and remanding the matter to the Office of Administrative Hearings for a hearing on the merits of decision # 92542. On August 13, 2019, ALJ Logan conducted a hearing at which the employer did not appear, and on August 16, 2019, issued Order No. 19-UI-135136, concluding that claimant voluntarily left work without good cause. On August 26, 2019, claimant filed an application for review with EAB.

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

**FINDINGS OF FACT:** (1) Kelley Bros Inc. employed claimant from February 2004 until February 17, 2006 to operate machinery for its logging company.

(2) The employer expected claimant to report to work when it scheduled claimant to work. Claimant understood the employer's expectation as a matter of common sense.

(3) During 2006, claimant was experiencing "family problems" and going through a divorce from his wife. During the week of February 12, 2006, claimant became "infatuated" with trying to "catch" his wife who he believed was "lying" and "seeing somebody else" at the time. Audio Record at 11:14 to 11:19. Claimant "just lost track of time" while he was watching his wife and failed to report for work for four consecutive days during the week of February 12. Audio Record at 11:20 to 11:26. When claimant "finally snapped out of it," he realized that he had missed work.

(4) The next day, on February 17, 2006, claimant returned to work and was willing to work. The employer told him it had hired a replacement in his absence and was "going to let [him] go." Audio Record at 9:49 to 10:08.

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

**Work Separation.** The first issue presented by this case is whether claimant quit work or was discharged. 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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Order No. 19-UI-135136 determined that claimant voluntarily left work without good cause. The order reasoned that claimant could have continued to work for the employer if he had reported to work, and that by failing to report to work for four days, claimant showed his unwillingness to continue working for the employer, making the work separation a quit.<sup>1</sup> The record does not support the conclusion that claimant voluntarily left work.

It is undisputed in the record that claimant reported to work and was willing to work after missing work for four days. The record shows that claimant's failure to report to work was due to his "family problems" and not to an unwillingness to continue the employment relationship. Because claimant was willing to continue working, but the employer did not allow him to do so, the work separation was a discharge.

**Discharge.** Because Order No. 19-UI-135136 concluded that claimant quit work, it applied the standard used in a quit case to determine if a claimant shall be disqualified from the receipt of unemployment insurance benefits, and determined that claimant's need to miss work to "confirm his suspicions of [his wife's] dishonesty" did not establish good cause to leave work.<sup>2</sup> However, because the employer discharged claimant, it is necessary to apply the standard applicable in a discharge case.

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<sup>1</sup> Order No. 19-UI-135136 at 2-3.

<sup>2</sup> Order No. 19-UI-135136 at 3-4.

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). The record does not show that claimant’s failure to report to work for four days was accompanied by the consciously aware mental state required to show by a preponderance of evidence that his behavior was willful or wantonly negligent. Claimant’s failure to report to work resulted from his being in an “infatuated” state of mind, which presumably affected his judgment. Claimant’s state of mind and the distraction of his “family problems” caused him to “[lose] track of time” and to miss work. The record does not show that claimant’s conduct resulted from a conscious decision to miss work or indifference to the consequences of missing work. On this record, that claimant “lost track of time” does not establish that his failure to report to work for four days was the result of misconduct. Without more, the record fails to show that claimant’s failure to report to work for four days during the week of February 12, 2006 resulted from misconduct.

The employer failed to meet its burden to establish that claimant’s discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-135136 is set aside, as outlined above.

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

**DATE of Service: October 2, 2019**

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

**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 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**  
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