

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0429**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On March 25, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective February 23, 2020 (decision # 103836). Claimant filed a timely request for hearing. On May 5, 2020, ALJ Wymer conducted a hearing, and on May 12, 2020, issued Order No. 20-UI-149597, affirming the Department's decision. On May 27, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a written argument containing new information. Claimant did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Southern Oregon Elmer's LLC employed claimant as a bartender and lottery person from April 14, 2014 until it discharged her on February 26, 2020.

(2) Claimant's shifts began at 6:30 a.m. Claimant sometimes had difficulty waking up in the morning.

(3) On two occasions in December 2019, claimant reported to work late.

(4) On February 24, 2020, claimant reported to work late, at 7:20 a.m., because she did not wake up in time.

(5) On February 26, 2020, claimant was unable to report to work at the beginning of her scheduled shift because she "woke up late." Transcript at 26. Claimant contacted another employee to cover her shift for her.

(6) Later on February 26, 2020, claimant went to work, and the employer discharged her at that time.

**CONCLUSIONS AND REASONS:** Order No. 20-UI-149597 is reversed, and this matter remanded for further development of the record.

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) (December 23, 2018). “[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). Isolated instances of poor judgment, good faith errors, or absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

Order No. 20-UI-149597 concluded that the employer expected employees to report on time for the scheduled start of their shifts and to “notify the manager on duty at the restaurant as soon as possible if they were going to be late.”<sup>1</sup> The order further concluded that, by not contacting the employer as soon as possible when she knew she would be late for her shift on February 26, 2020, claimant willfully or wantonly violated the employer’s expectation that she contact the restaurant as soon as possible.<sup>2</sup> Similarly, although the order did not conclude that claimant’s failure to report to work on time on prior occasions was a willful or wantonly negligent violation of the employer’s expectations due to claimant’s tardiness, it did conclude that on December 21 and 28, 2019, claimant violated the employer’s expectations by failing to contact the manager immediately, even before contacting another employee to cover her shift.<sup>3</sup> Based on those prior incidents, the order concluded that the final incident on February 26 was not isolated, and therefore could not be excused as an isolated instance of poor judgment.<sup>4</sup>

It was uncontested that claimant understood the employer reasonably expected her to report to work on time for her scheduled shifts, which always began at 6:30 a.m., and that claimant did not report to work on time on at least three occasions, including February 26, 2020. The order under review does not address why it did not find claimant’s failure to report to work on time to be a wantonly negligent violation of the employer’s expectations. To do so, however, the record must be developed in part to show if claimant’s problem with waking up on time was due to an illness or other physical or mental disability. Moreover, although the record shows that claimant “set a couple different alarms,” it does not show what claimant did to ensure she would wake up on time on the date of the final incident, especially considering the general manager told claimant she could have discharged claimant when she was late on February 24. Transcript at 31. The general manager testified that claimant did not want to change her

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<sup>1</sup> Order No. 20-UI-149597 at 1.

<sup>2</sup> Order No. 20-UI-149597 at 4.

<sup>3</sup> Order No. 20-UI-149597 at 4.

<sup>4</sup> Order No. 20-UI-149597 at 4.

shift. Transcript at 17. However, the record does not show if claimant attempted to solve her attendance problem by making other changes to her schedule or routine.

It is undisputed that the final incident for which the employer discharged claimant occurred on February 26, 2020. However, the record does not show if the employer discharged claimant for tardiness, failure to notify the employer “as soon as possible” that she would be late, failure to find someone to cover her shift, or some combined failure to meet those expectations. Nor does the record show what the employer’s policy was regarding an employee giving the employer notice of being tardy or absent from work. Although the record shows the employer expected claimant to call in, there is also evidence in the record that the employer expected an employee to find a coworker to cover their missed shift. The record does not show what the employer’s expectation was under the circumstances on February 26, or claimant’s understanding of those expectations. The record does not show if claimant normally called the employer or a coworker to cover her shift first, and whether the employer advised claimant that she should call the employer first when claimant had called a coworker first in the past.

The employer provided evidence of text messages on February 26, but the record does not show what, if any, evidence claimant had regarding her telephone calls or text messages to the restaurant, managers, and coworker on February 26. This would include the substance and timing of the calls or text messages.

Claimant testified that, even had she woken up on time, she would not have been able to report to work on time because her boyfriend had mistakenly taken the keys for the vehicle claimant needed to drive to work. Transcript at 26. Claimant went to work later on February 26, but the record does not show what vehicle she used to get to work, and why she could not have taken that vehicle in the morning. The record does not show claimant’s normal means of transportation to work, and the steps she took to ensure that a lack of transportation did not cause her to be tardy or absent from work.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 20-UI-149597 is reversed, and this matter is remanded.

**DECISION:** Order No. 20-UI-149597 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** July 1, 2020

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-149597 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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