

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0653**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and disqualifying him from receiving benefits effective March 15, 2020 (decision # 85256). Claimant filed a timely request for hearing.

On May 28, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 8, 2020. On June 8, 2020, ALJ Williams conducted a hearing, and on June 10, 2020 issued Order No. 20-UI-150815, affirming decision # 85256.

On June 25, 2020, claimant filed an application for review of Order No. 20-UI-150815 with the Employment Appeals Board (EAB). On July 30, 2020, EAB issued Appeals Board Decision 2020-EAB-0496, reversing Order No. 20-UI-150815 and remanding the matter for additional proceedings.

On July 30, 2020, OAH issued notice of a hearing scheduled for August 17, 2020. On August 17, 2020, ALJ Williams conducted a hearing, at which the employer failed to appear, and on August 20, 2020 issued Order No. 20-UI-153230, reversing decision # 85256 and allowing claimant benefits. On August 24, 2020, the employer filed a request to reopen the August 17<sup>th</sup> hearing. On August 24, 2020, OAH mailed notice of a hearing scheduled for September 9, 2020. On September 9, 2020, ALJ Williams conducted a hearing, at which claimant and the employer both appeared, and on September 17, 2020 issued Order No. 20-UI-154103, allowing the employer's request to reopen, and again reversing decision # 85256 and allowing claimant benefits.

On October 7, 2020, the employer filed a timely application for review of Order No. 20-UI-154103 with EAB. EAB considered the written argument the employer filed by email on October 24, 2020 when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 20-UI-154103 allowing the employer's request to reopen is **adopted**.

**FINDINGS OF FACT:** (1) Rich Holland Painting Inc. (employer) employed claimant as a painter from March 19, 2018 to March 16, 2020.

(2) Claimant worked Monday through Friday from 7:00 a.m. to 3:30 p.m. The employer required employees to notify the office assistant of absences at least an hour prior to the beginning of their shifts. The employer reviewed the attendance policy with claimant at least ten times, and notified him there could be repercussions for violating the policy, but did not discipline claimant for his violations of the policy.

(3) Claimant regularly had poor attendance, and regularly failed to report his absences or tardiness to the office assistant. In March 2020, claimant apologized for his attendance at least twice, promised that it would not happen again, and promised to “get back on track.” September 9, 2020 hearing, Transcript at 18; June 8, 2020 hearing, Transcript at 28.

(4) On March 3, 2020, claimant was unable to work because he was sick. He did not provide the office assistant with timely notice of his absence.

(5) Between March 3<sup>rd</sup> and March 11<sup>th</sup>, claimant was repeatedly absent to work. On at least four of those occasions, claimant was absent because he was sick, due to asthma, or due to depression. Claimant typically either did not notify the office assistant of his attendance, or notified the office assistant after his shift had begun.

(6) At all relevant times, claimant had COPD and asthma. Between March 6<sup>th</sup> and March 11<sup>th</sup>, claimant had been absent three times due to illness or depression. On one occasion in early March, claimant sent a text message that his “cough and asthma is real bad im [sic] concerned considering this whole coronavirus. So i [sic] have an appointment for today to see whats [sic] up.” Exhibit 1, claimant’s March text message.

(7) On March 9<sup>th</sup>, claimant sent a text message to the employer that stated, “I am sorry for being so unreliable lately after today this wont [sic] happen. Im [sic] just having some depression issues and still trying to find inaurance [sic] so i [sic] can see a doctor about it.” See Exhibit 1, claimant’s March 9, 2020 text message.

(8) On March 11<sup>th</sup>, claimant sent a text message to the employer stating that he needed to go to a dentist about “an emergency tooth pulling,” and stating that he was experiencing significant pain. Exhibit 1, claimant’s March 11, 2020 text message.

(9) On March 13, 2020, claimant reported to work one hour ten minutes late, and did not timely notify the office assistant of his tardiness. Claimant was late because he had been sleeping.

(10) That day, the employer’s executive administrator decided that she wanted to discharge claimant because of his attendance. However, she did not “typically just make the decision on my own”:

I would look at his file, determine if I felt it was reasonable to release him. Once I find reasonable cause I reached out to a second party and this is usually always my project manager . . . [h]e is in charge of the schedule for every field employee. And I do not file

anybody without his prior consent because he may need somebody onsite and I do not know those schedules.

See September 9, 2020 hearing, Transcript at 10. The executive administrator did not reach out to the project manager on March 13<sup>th</sup> because it was too late in the day, and planned to communicate with the project manager on March 16<sup>th</sup>, the next work day.

(11) On March 16, 2020, claimant was absent from work. His absence that day did not violate the employer's policies because he was absent due to a doctor's appointment and notified the employer more than an hour prior to his shift.

(12) After claimant called out sick, the executive administrator sent a text message to claimant asking for proof of his doctor's appointment. The executive administrator sent an additional text about the doctor's note and one text about a paid time off accrual.

(13) At approximately 4:00 p.m., the executive administrator spoke with the project manager about discharging claimant. The project manager agreed claimant should be discharged. Approximately two hours later, the employer notified claimant he was discharged.

**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. "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) (September 22, 2020). "[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).

There is no dispute in this case that claimant was frequently absent from or tardy to work and regularly failed to notify the employer of his absences and tardiness as required by the employer's attendance policy. The question is whether or not claimant's attendance and notice violations were misconduct under Employment Department law.

In order to determine whether the discharge was for misconduct, it is necessary to identify and analyze the event that was the "proximate cause" of the discharge. The proximate cause of a discharge is the incident without which the discharge would not have occurred; it is usually the final incident preceding the discharge. 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 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).

At the hearing and in written argument, the employer asserted that the final incident that caused the employer to discharge claimant occurred on March 13<sup>th</sup>, when claimant reported to work one hour ten minutes late without notifying the office administrator that he was going to be late. That assertion is difficult to reconcile in the context of other evidence from the hearings in this case. For example, the executive administrator both claimed to have decided to discharge claimant on March 13<sup>th</sup>, but also testified that while she thought claimant's attendance and notice issues warranted discharge she made discharge decisions in conjunction with the project manager, and she did not discuss claimant's situation with the project manager until March 16<sup>th</sup>. Additionally, it is not logical that if the employer had decided to discharge claimant because of his March 13<sup>th</sup> behavior that the employer would also text claimant twice on March 16<sup>th</sup> asking him to provide a doctor's note for the March 16<sup>th</sup> absence. It does not make sense that the employer would require a doctor's note for the March 16<sup>th</sup> absence if the employer had already decided to discharge claimant because of the March 13<sup>th</sup> behavior.

The final incident that preceded claimant's discharge appears most likely to have occurred on March 16<sup>th</sup>. The employer agreed at the hearing that claimant complied with the employer's attendance policy on March 16<sup>th</sup>. To the extent the employer discharged claimant for his March 16<sup>th</sup> absence, claimant's discharge was not for misconduct.

The employer's witness indicated that claimant's discharge was because of claimant's March 13<sup>th</sup> behavior, and that the employer did not immediately discharge claimant because the project manager might have needed claimant to keep working to fulfill the employer's business needs. To any extent it could be inferred that the final incident or proximate cause of claimant's discharge was his March 13<sup>th</sup> behavior, the record also shows that that incident was not misconduct.

With respect to claimant's failure to notify the employer of his March 13<sup>th</sup> tardiness at least one hour prior, claimant was asleep at that time. Because he was asleep, the record does not show that claimant acted willfully or consciously when he failed to notify the employer of his tardiness that day.

With respect to claimant's March 13<sup>th</sup> tardiness, claimant was, again, asleep at the time he violated the employer's attendance policy. Individuals who are asleep are typically unable to act willfully or with conscious indifference to the employer's expectations. For that reason, claimant's March 13<sup>th</sup> tardiness was not a willful or wantonly negligent violation of the employer's expectations.

On this record, it is also more likely than not that claimant's March 13<sup>th</sup> tardiness was the result of illness. Between March 6<sup>th</sup> and March 13<sup>th</sup> claimant was absent on four occasions because he was either too sick to work or because he was experiencing untreated depression. He had been absent only four days prior to March 13<sup>th</sup> because of depression, and his text message to the employer indicated that he had been unable to obtain treatment for his depression. Likewise, claimant had been experiencing illness and other health issues, not only prior to the March 13<sup>th</sup> tardiness but also through the date of his discharge, making it reasonable to infer that claimant was not in good health at the time of the March 13<sup>th</sup> tardiness, either due to being sick or to experiencing symptoms of untreated depression.

Because it is likely that claimant's March 13<sup>th</sup> tardiness, caused by sleeping in, was related to the sickness and/or depression he had been experiencing throughout the first part of March, it is reasonable to infer that claimant's March 13<sup>th</sup> tardiness was at least partially due to illness. Under OAR 471-030-0038(3)(b), absences due to illness are not misconduct.

For the foregoing reasons, regardless whether the employer discharged claimant for his behavior on March 13<sup>th</sup> or March 16<sup>th</sup>, claimant's discharge was not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 20-UI-154103 is affirmed.

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

**DATE of Service: November 13, 2020**

**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 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**  
 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)

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