

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0311**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and claimant was disqualified from receiving unemployment insurance benefits effective July 12, 2020 (decision # 102230). Claimant filed a timely request for hearing. On January 26, 2021, ALJ Snyder conducted a hearing, and on January 28, 2021 issued Order No. 21-UI-160006, reversing decision # 102230 and concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits. On February 1, 2021, the employer filed an application for review with the Employment Appeals Board (EAB)

On March 10, 2021, EAB issued Appeals Board Decision 2021-EAB-0073, setting aside Order No. 21-UI-160006 and remanding this case for further development of the record to determine whether the employer discharged claimant for misconduct. On April 7, 2021, ALJ Snyder conducted a hearing on remand, and on April 9, 2021, issued Order No. 21-UI-164540, concluding the employer discharged claimant, but not for misconduct and claimant was not disqualified from receiving benefits. On April 20, 2021, the employer filed an application for review of Order No. 21-UI-164540 with EAB.

**FINDINGS OF FACT:** (1) PNW Metal Recycling Inc. employed claimant from July 13, 2011 to July 16, 2020.

(2) The employer expected claimant to report for work as scheduled or notify his supervisor or their human resources department that he would be absent at least one hour in advance of his shift. Claimant was aware of the employer's expectations regarding attendance and notification of impending absence from work.

(3) On July 30, 2018, claimant did not report for work as scheduled or notify the employer he would be absent in advance of his shift. On August 8, 2018, the employer gave claimant a final warning for violating the employer's attendance expectations on July 30, 2018. On July 7, 2019, the employer gave claimant a warning for failing to notify the employer at least one full hour in advance of his shift that he

would be absent from work. On June 17, 2020, the employer gave claimant a warning that to request vacation time, he was required to complete a leave request rather than text his request to a supervisor.

(4) On July 13, 2020, as claimant prepared to go to work as scheduled, he received a call that his son, who lived in Florida, had contracted COVID-19 and was ill. While on his way to work, claimant became worried about his son, decided to not report for work, and notified his supervisor that he would be absent for that reason 26 minutes prior to his shift. Claimant's supervisor notified claimant that he had not followed the employer's notification procedure requiring at least one-hour notice of absence prior to his shift.

(5) After notifying the employer he would be absent on July 13, 2020, claimant had an argument with his wife. Claimant's wife called 911 and accused him of domestic violence. Later on July 13, 2020, police stopped claimant while he was driving his motor vehicle and subsequently arrested and incarcerated him. While being booked in the local jail, an officer assisted claimant in sending a text message from his phone to his supervisor that he would not be at work on July 14, 2020.

(6) On July 15, 2020, claimant remained incarcerated, did not report for work as scheduled and was unable to notify the employer in advance that he would be absent because he did not have access to his phone while in jail. After claimant was released from jail later that day, he sent his supervisor a text message but received no response.

(7) On July 16, 2020, the employer discharged claimant for being absent from work on July 15, 2020 and violating its absence notification procedure.

(8) As of April 7, 2021, claimant was contesting the charges against him and awaiting trial.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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). 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 employer discharged claimant for failing to report for work as scheduled or notify the employer he would be absent on July 15, 2020, following prior attendance policy violations in 2018, 2019 and 2020. However, the employer did not decide to discharge claimant until after the July 15, 2020 violation occurred. 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). Therefore, claimant's attendance policy violation on July 15, 2020 is the proper focus of the misconduct analysis.

Where, as here, the employer discharged claimant because his incarceration left him unable to report to work for a scheduled shift or notify the employer in advance that he would be absent, the relevant inquiry is whether claimant willfully or consciously engaged in conduct he knew or should have known would probably result in his incarceration and resultant inability to report to work or notify the employer of his absence. *See, Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991) (where off-duty conduct makes it impossible for an individual to comply with the employer's attendance requirements, the relevant question is whether claimant willfully created the situation that made it impossible for him to attend work or to comply with the policy).

Claimant did not report for work or comply with the employer's notification procedure on July 15, 2020 because he was incarcerated and did not have access to his phone while in jail. Claimant's incarceration was caused by an arrest for criminal charges. At hearing, claimant denied engaging in the conduct for which he was arrested, and asserted he was contesting the charges against him with the assistance of an attorney and awaiting trial. Transcript at 22. The employer did not dispute claimant's assertions or offer any opposing evidence. Accordingly, the record fails to show that claimant consciously engaged in conduct that he knew or should have known would probably result in his arrest and incarceration. Absent such a showing, the employer failed to meet its burden to show that claimant willfully, or with wanton negligence, created the situation that made it impossible for him to attend work or notify the employer he would be absent in accordance with its procedure.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 21-UI-164540 is affirmed.

S. Alba and D. Hettle;  
A. Steger-Bentz, not participating.

**DATE of Service:** May 27, 2021

**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](https://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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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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