

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0408**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On April 9, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving unemployment insurance benefits effective September 20, 2020 (decision # 95039). Claimant filed a timely request for hearing. On May 11, 2021, ALJ Janzen conducted a hearing and issued Order No. 21-UI-166547, affirming<sup>1</sup> decision # 95039 and concluding that claimant was discharged for misconduct, and disqualified from receiving benefits effective September 20, 2020. On May 19, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Dutch Girl Ice Cream employed claimant as a food production worker from September 21, 2020 until September 23, 2020. Claimant worked one shift for the employer, on September 21, 2020.

(2) The employer's policies required employees to report to work on time and to notify the employer if they were going to be absent. The employer considered employees who had two consecutive no-call, no-shows to have voluntarily quit their jobs. These policies were contained in the employer's handbook, a copy of which was provided to claimant when he was hired. Claimant generally understood these policies.

(3) On September 22, 2020, claimant slept through his alarm clock, and was subsequently absent from work, because he had a migraine. On September 23, 2020, claimant was absent from work because he had a migraine. Claimant did not notify the employer about either of these absences.

(4) On September 23, 2020, as a result of claimant's two consecutive no-call, no-shows, the employer considered claimant to have voluntarily quit and separated him from employment.

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<sup>1</sup> The order under review stated that decision # 95039 was *modified*. Order No. 21-UI-166547 at 4. However, as the date of disqualification remained the same, the order under review actually *affirmed* decision # 95039 on other grounds.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-166547 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) (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 order under review concluded that the employer discharged claimant and that claimant’s failure to notify the employer of his absence from work on September 23, 2020 was misconduct because he was “aware of the employer’s policies,” and therefore “at a minimum, claimant violated the employer’s attendance policies with wanton negligence.” Order No. 21-UI-166547 at 3. While the record supports the conclusion that claimant was discharged, and that he did not voluntarily quit, the record does not support the conclusion that he was discharged as a result of wantonly negligent conduct.

In order to conclude that claimant’s no-call, no-shows were wantonly negligent, the record must show that claimant acted with indifference to the consequences of his actions or failures to act. At hearing, claimant testified that sometime after his shift on September 21, 2020, he developed a migraine that lasted for about three days. Audio Record at 12:40. That claimant suffered from a migraine lasting for so long suggests that he may have been sufficiently incapacitated that he was unable to contact the employer to notify them of the absences. However, no inquiry was made as to whether claimant was actually capable of notifying the employer of the absences while he was suffering from the migraine; or, if he *was* capable of doing so, why he did not notify the employer. On remand, the record should be further developed to determine whether claimant’s no-call, no-shows on September 22, 2020 and September 23, 2020 were the results of claimant’s willful or wantonly negligent behavior.

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. 21-UI-166547 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-166547 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: June 25, 2021**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-166547 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 desisyong.

## 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**

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**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.

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