

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0430**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective February 7, 2021 (decision # 131245). Claimant filed a timely request for hearing. On May 12, 2021, ALJ Murdock conducted a hearing, and on May 14, 2021, issued Order No. 21-UI-166899, concluding that the employer discharged claimant but not for misconduct and was not disqualified from receiving benefits. On May 29, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Mega Tiny Homes, LLC, employed claimant, last as an apprentice electrician, from August 2020 to February 10, 2021. The employer knew that claimant was maintaining recovery for alcoholism at the time he was hired. The employer's policy was to "try to help [employees] where they are," thus, the employer deemphasized claimant's past issues with alcohol at the time he was hired, and instead emphasized the need for claimant to be "committed" and "communicative." Transcript at 16.

(2) The employer expected claimant to notify the owner or the shop manager prior to when claimant's shift began in the morning. The owner approved claimant for time off whenever he asked, including all Fridays, so that claimant could care for his son. In those instances when claimant failed to report to work when scheduled, but later requested permission to be excused from work, the owner approved the requests with the directive that claimant "keep [her] posted." Transcript at 21. The employer did not issue any warnings to claimant about attendance.

(3) On January 17, 2021, claimant consumed alcohol after a long period of sobriety.

(4) On January 28, 2021, claimant provided the employer's shop manager a doctor's note stating that claimant needed to be out of work for ten days for medical reasons. Claimant nevertheless returned to work on February 2, 2021.

(5) On Friday, February 5, 2021, the shop manager texted claimant to ask whether he was coming to work that day. Claimant responded by reminding the shop manager that the owner had approved claimant to take Fridays off to take care of his son.

(6) On Sunday, February 7, 2021, claimant learned that a close friend had died. Claimant texted the safety manager and asked him to inform the shop manager that claimant would not be at work on Monday, February 8, 2021. Transcript at 34. The safety manager notified the shop manager that claimant would not be at work on February 8, 2021, due to the death of claimant's friend. Claimant "drank a lot" that evening and was "really hungover" on February 8, 2021. Transcript at 29, 34.

(7) On Tuesday, February 9, 2021, claimant arrived at work early to talk with the shop manager about his "relapse". Transcript at 5. The shop manager reprimanded claimant for failing to notify him directly that he would be absent on February 8, 2021. The shop manager explained to claimant that claimant had many "things to work on," and should seek help for his drinking, and asked claimant if he was "hung over." Transcript at 8-9. Claimant answered affirmatively. The shop manager told claimant to go home and that, "later on today I want you to tell me what you want." Transcript at 6. Claimant told the shop manager he would understand if the employer decided to fire him. The owner was present for some portion of this conversation.

(8) At 3:21 p.m. on February 9, 2021, claimant texted the shop manager that he "want[ed] to be sober, a great father, and a hard worker again," and that he "definitely [did not] want to be jobless" or "fired." Transcript at 31, 49. Claimant further stated, "Whatever you do I'll respect it." Transcript at 32. Claimant sent a second text at 4:47 p.m. asking the shop manager to call him when he could. Subsequently, claimant tried to call the shop manager, but received a text response from the shop manager, asking claimant to call back later. At 6:28 p.m., claimant attempted to call the shop manager again. In response, the shop manager texted claimant, asking him to call back later. Claimant attempted to call the shop manager later that evening and received a text response from the shop manager stating that the shop manager would call claimant the next day.

(9) On February 10, 2021, claimant did not report to work in the morning because the last communication claimant received from the shop manager was his text stating that he would call claimant on February 10, 2021. Claimant did not drink on February 10, 2021, was not "hung over" on February 10, 2021, and was capable of working on February 10, 2021. Transcript at 9. At 1:09 p.m., the shop manager texted claimant that "[y]our paycheck is here." Transcript at 32. Claimant responded, "Should I get my tools while I am there too?" Transcript at 32. The shop manager answered, "Yes," and claimant replied, "Okay." Transcript at 32. Claimant believed that the shop manager's directive to retrieve his tools meant that the employer had decided to discharge claimant. Claimant went to work, retrieved his paycheck and his tools, and thanked the shop manager for everything he had taught claimant. The shop manager wished claimant "best of luck." Transcript at 51.

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

**Nature of the work separation.** The first issue in this case is the nature of the work separation. 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) (September 22, 2020). 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).

The employer asserted that they did not discharge claimant, but rather, that claimant quit work when he failed to report to work on the morning of February 10, 2021. Transcript at 11, 17, 39-40, 53. However, the record shows that claimant was willing to continue to work for the employer, but was not allowed to do so by the employer. After the shop manager sent claimant home on February 9, 2021, claimant complied with the shop manager's instruction that he tell the shop manager "what he wanted" and sent the shop manager a text stating that he did not want to be "jobless" or "fired". Claimant then made multiple unsuccessful efforts to arrange a telephone conversation for that day with the shop manager to discuss claimant's employment status. Claimant's texts indicating that he did not want to be "jobless" or "fired," coupled with his attempts to establish contact with the shop manager to discuss his employment, support the conclusion that claimant was willing to continue working for the employer for an additional period of time.

Despite claimant's multiple February 9, 2021 attempts to clarify his employment status with the shop manager, and despite claimant's willingness to continue working for the employer as reflected in his texts to the shop manager, the shop manager was unavailable to further discuss the matter on February 9, 2021, and texted claimant that he would call claimant on February 10, 2021. The shop manager did not call claimant on February 10, 2021, and did not contact claimant until he texted him at 1:09 p.m. to tell claimant his paycheck was ready and he should retrieve his tools. In light of these circumstances, claimant's decision not to report to work on February 10, 2021 was reasonable because claimant had not yet received a call from the shop manager to discuss his employment status and claimant reasonably believed that this telephone call was a prerequisite to any return to work. As such, the shop manager's failure to call claimant on February 10, 2021 prevented claimant from returning to work, despite claimant's willingness to do so. The shop manager's subsequent text to claimant that his paycheck was ready and claimant should retrieve his tools further supports the conclusion that the employer was not willing to allow claimant to return to work. Under these circumstances, the preponderance of the evidence shows that the employer discharged claimant.

**Discharge.** 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 initial focus of the discharge analysis is on the final incident that prompted the employer to discharge claimant. 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). While the record shows that claimant failed to notify the correct manager of his absence on February 8, 2021, and was sent home on February 9, 2021, the preponderance of the evidence shows that those incidents were not the basis for the employer's decision to discharge claimant. Instead, the preponderance of the evidence shows that the employer severed the employment relationship because claimant failed to report to work the morning of February 10, 2021. Thus, whether claimant's failure to report to work the morning of February 10, 2021 was a willful or wantonly negligent violation of the employer's reasonable attendance expectations is the initial focus of the misconduct analysis.

Claimant's failure to report to work did not constitute misconduct because claimant's inaction, under the circumstances of this case, was not a willful or wantonly negligent disregard of the employer's attendance expectations. Rather, the record establishes that because the shop manager told claimant he would call claimant on February 10, 2021, and in light of the circumstances that had occurred between claimant and the shop manager on February 9, 2021, claimant reasonably believed that he should not report to work on February 10, 2021 until he first received a telephone call from the shop manager to discuss his employment situation. Furthermore, the record establishes that the effects of alcohol did not impact claimant on February 10, 2021, and claimant was otherwise capable of working that day. The preponderance of the evidence supports the conclusion that claimant reasonably refrained from going to work on February 10, 2021 because he had not yet received a call from the shop manager. The employer has failed to meet its burden to establish that they discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

**DECISION:** Order No. 21-UI-166899 is affirmed.

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

**DATE of Service:** July 6, 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 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 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 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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