EO: 700
BYE: 202213

State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2021-EAB-0548

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On April 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective March 28, 2021 (decision # 151955). Claimant filed a timely request for hearing. On June 16, 2021, ALJ Griffin conducted a hearing, and on June 18, 2021 issued Order No. 21-UI-169049, reversing decision # 151955 by concluding that claimant's discharge was not for misconduct, and therefore did not disqualify claimant from receiving benefits. On July 8, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer 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 the employer'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 FACTS:** (1) Dermatology Health Specialists PC employed claimant as a receptionist at their clinic from July 1, 2019 to April 2, 2021.

(2) The employer expected claimant to document telephone calls from patients by drafting notes summarizing each call in the employer's computer system and, via that system, route those notes to the healthcare provider who was treating the patient. The system also gave claimant the option to close a call note, which resulted in the note not being sent to the treating provider for review, although the note remained viewable in the system. The employer expected claimant to choose the close option only when the employer advised her to do so. Claimant was aware of and understood that expectation.

(3) On December 8, 2020, claimant took a call during which the patient advised claimant that their pharmacy had not received the treating provider's order authorizing the patient's prescriptions. Claimant contacted the pharmacy and called in the patient's prescriptions. The employer considered claimant to

have exercised medical judgment and given medical advice when she called in the prescriptions, which was beyond the scope of her job. On December 16, 2020, the employer placed claimant on a performance improvement plan due to claimant having called in the patient's prescriptions, as well as due to claimant's accumulation of unexcused absences and late arrivals. As part of the improvement plan, the employer informed claimant that she was expected not to give medical advice to patients during calls. Claimant was aware of and understood that expectation.

(4) On March 2, 2021, claimant took a call in which the patient complained of an eczema flare-up. The patient stated that the flare-up was causing swelling around their eyes and they were considering going to urgent care for medical attention. The patient requested their next appointment be moved forward a week and claimant complied with that request. Claimant did not offer to make an emergency appointment for the patient, although the employer could have accommodated that.

(5) On March 2, 2021, claimant documented what the patient told her in a call note. When she finished drafting the note, she accidentally closed it instead of routing it to the healthcare provider who was treating the patient.

(6) Thereafter, the patient's treating healthcare provider discovered the call note while reviewing the patient's chart and learned from the patient that they had received treatment for their eczema flare-up from urgent care. Because the patient's flare-up went unheeded by the provider due to claimant closing the call note, the employer was concerned that claimant's conduct may have "jeopardized the provider's license." Transcript at 14.

(7) On March 15, 2021, the employer prepared an incident report relating to claimant's conduct during the March 2, 2021 patient call. Claimant's manager reviewed the report with claimant and the matter was forwarded to the employer's executive board. Thereafter, the executive board decided to discharge claimant for "jeopardization of provider licensing on multiple occasions." Transcript at 8. The employer offered to allow claimant to resign in lieu of being discharged, but claimant wanted to continue working for the employer. On April 2, 2021, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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).

As an initial matter, it is necessary to identify the final incident that resulted in claimant's discharge. In a discharge case, the proximate cause of the discharge is the focus for purposes of determining whether

misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred. *See e.g.* Appeals Board Decision 12-AB-1087, May 7, 2012 (discharge analysis focuses on proximate cause of the discharge); 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). The record indicates that claimant was late for or absent from work on a number of occasions over the course of her employment, and that unexcused absences and late arrivals were part of the reason claimant was placed on a performance improvement plan on December 16, 2020. However, at hearing, the employer's witness testified that the employer decided to discharge claimant because of claimant's "jeopardization of provider licensing on multiple occasions." Transcript at 8. The employer's witness further testified that the final time claimant "jeopardized [a] provider's license" was in connection with claimant's conduct during the March 2, 2021 patient call. Transcript at 14. Thus, the record shows that the incident without which claimant's discharge would not have occurred was claimant's conduct during the March 2, 2021 patient call.

At hearing, the employer contended that two aspects of claimant's conduct regarding the March 2, 2021 patient call constituted misconduct. First, that claimant closed the call note and "did not send it to the provider to review[.]" Transcript at 15. Second, that claimant "provid[ed] patient care when she's not allowed to" by "provid[ing] medical information" to the patient during the call. Transcript at 14, 9.

It is undisputed that claimant closed the March 2, 2021 call note without being advised by the employer to do so. However, the employer did not meet their burden to show that claimant did so willfully or with wanton negligence. The record shows that claimant did not know why she closed the March 2, 2021 call note, but thought it may have been because she had "two [call notes] open" and "closed that one" while meaning to refer to both notes in the note that remained open. Transcript at 30. Claimant's testimony shows that she did not consciously close the note, or consciously engage in conduct that she knew or should have known would probably result in her doing so. Although claimant may have been careless, arguably negligent, her conduct was not willful, and did not rise to the level of *wanton* negligence as defined under OAR 471-030-0038(1)(c).

The other aspect of claimant's conduct during the March 2, 2021 call that the employer contended constituted misconduct was that claimant "provid[ed] patient care when she's not allowed to" by "provid[ing] medical information" to the patient during the call. Transcript at 14, 9. While evidence that claimant provided medical information to the patient during the call could potentially constitute a violation of the employer's expectation that claimant not give medical advice to patients, the record does not show that claimant gave the patient any medical information during the call. At hearing, the employer's witness conceded this point, but asserted that claimant's failure to offer to make an emergency appointment for the patient nevertheless constituted misconduct. Transcript at 25-27. However, the record fails to show claimant breached any known employer expectation by failing to making an emergency appointment for the patient during the March 2, 2021 call. The record shows that the patient requested that their appointment be moved forward a week, and claimant advanced the patient's next appointment one week to comply with that request. While claimant did not offer to make an appointment for an earlier point in time, it is not evident from the record that she knew or should have known that the employer expected her to do so.

For the foregoing reasons, the employer failed to establish that they discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based upon this work separation.

**DECISION:** Order No. 21-UI-169049 is affirmed.

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

**DATE of Service: August 10, 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. 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

**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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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