

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0647**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 6, 2021, 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 April 11, 2021 (decision # 115422). Claimant filed a timely request for hearing. On July 14, 2021, ALJ Frank conducted a hearing, and on July 22, 2021 issued Order No. 21-UI-170910, affirming decision # 115422. On August 11, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant submitted written arguments on August 11, 2021 and August 31, 2021. Claimant did not declare that she provided a copy of her August 11, 2021 argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Both written arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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). EAB considered claimant's August 31, 2021 argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Eugene Dental Partners LLC employed claimant as a financial coordinator from August 31, 2020 until April 15, 2021.

(2) The employer expected its employees to refrain from engaging in emotional outbursts while at work. The employer's expectation was not set forth in a written policy, but claimant was aware of that expectation as a matter of common sense.

(3) Around March 18, 2021, claimant was sitting at her desk performing her financial coordinator duties next to the wife of one of the employer's dentists, who was working on similar matters. Claimant became concerned because she speculated that she might lose her job to the dentist's wife. She left her

work area and went to speak with her supervisor. While outside of the presence of others, she tearfully expressed her concerns to the supervisor who denied that the employer was planning to replace claimant.

(4) On April 13, 2021, claimant was in a hallway at the workplace and spoke with her supervisor about her perception that the insurance team leader had taken away many of her job duties and given them to newly hired employees. As she explained her concerns to her supervisor, claimant used some “hand movements” and appeared to the supervisor to be “agitated and upset,” but was “not yelling.” Transcript at 7-8.

(5) On April 15, 2021, the employer discharged claimant for engaging in “emotional outbursts” while at work. Transcript at 5.

**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). 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).

Order No. 21-UI-170910 concluded that the employer discharged claimant for misconduct, reasoning that the employer’s account of claimant’s actions during multiple incidents demonstrated a pattern of willful violations of the employer’s expectation, in which “claimant would begin to complain very loudly, gesticulate and make accusations . . . [and] caused repeated workplace disturbances.” Order No. 21-UI-170910 at 3-4. However, the record fails to support the order’s conclusion.

In a discharge case, the proximate cause of the discharge is the initial 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 and is usually the last incident of alleged misconduct 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 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). At hearing, although the employer’s sole witness testified that the employer discharged claimant for “emotional outbursts,” she testified that the final incident that caused claimant’s discharge was what the witness described as an “outburst” in the employer’s hallway on April 13, 2021. Transcript at 5-7. Therefore, that incident was the proximate cause of claimant’s discharge and the incident without which claimant’s discharge would not have occurred when it did.

The record does not show that during the final incident on April 13, 2021, claimant knew or should have known that her conduct would probably result in a violation of the employer's expectation that claimant not engage in emotional outbursts at work. The record shows that claimant expressed her concern to her supervisor about losing certain job duties. However, claimant denied behaving inappropriately or engaging in an "outburst" of any kind and emphasized that she attempted to discuss her workplace concerns with the supervisor privately, outside the presence of any coworkers. Transcript at 20-21. When pressed for detail regarding claimant's conduct in the final incident, the employer's witness, who was the supervisor in question, described it as "not yelling, just very agitated and upset." Transcript at 7. When asked what she meant by that statement, she characterized claimant's conduct as an "emotional outburst" because of "the way she was talking and her mannerisms . . . irritated voice, lots of hand movements. I don't know how to tell you." Transcript at 8. The witness was unable to describe what "hand movements" claimant allegedly made; the record fails to show that claimant made any inappropriate or threatening hand gestures, or that claimant was insubordinate in any way. Absent evidence of a willful or wantonly negligent disregard of the employer's expectations, the employer failed to meet its burden to show that claimant engaged in misconduct on April 13, 2021.

For these reasons, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 21-UI-170910 is set aside, as outlined above.

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

**DATE of Service:** September 15, 2021

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

**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 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**  
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