

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1015**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective August 8, 2021 (decision # 145705). Claimant filed a timely request for hearing. On November 2, 2021, ALJ Murdock conducted a hearing, and on November 8, 2021 issued Order No. 21-UI-179276, reversing decision # 145705 by concluding that claimant was discharged, but not for misconduct and was not disqualified from receiving benefits based on the work separation. On November 29, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Northwest Disability Benefits LLC employed claimant as a legal assistant from December 26, 2017 until August 12, 2021.

(2) The employer expected their employees to report for work as scheduled or notify the employer if they would be absent or late. Claimant was aware of the employer's expectations.

(3) Prior to August 12, 2021, claimant had suffered from poor health and trauma due to violence perpetrated against her on separate occasions by a member of her household and someone outside the home. Those circumstances led to troubled sleep, fatigue, panic attacks and required medical and therapy appointments, causing her to miss days of work or arrive to work late. She often failed to timely notify the employer of her absences or late arrivals to work as required due to oversleeping, stress, fatigue, and poor health. The employer issued written warnings to claimant on March 2, 2020 and April 9, 2020 for not timely calling the designated person to report late arrivals to work, on March 24, 2021 and April 7, 2021 for calling in after her shift started to report absences, and on June 11, 2021 for a "no-call-no-show." Exhibit 1.

(4) On May 13, 2021, claimant spent her morning break time in her car on the street but as she prepared to return to work, her car window would not roll up, leaving it unsecured on the street where it was parked. She attempted to notify the partners, the human resources manager, and her supervisor of the issue and to request permission to park her car that day in the employer's secure parking area. The human resources manager replied that she could not authorize claimant to park her vehicle in the secure parking area. Claimant did not want to leave her vehicle parked on the street with the open window and concluded that combining her break period with her lunch period would give her sufficient time to fix the window herself. She was mistaken in that conclusion, but the employer later allowed her to move her car to the secure parking area. After that incident, the employer did not issue a written warning but notified claimant, and claimant understood, that she needed to obtain permission from the human resources manager or a partner to extend her breaks or be away from the office without permission.

(5) On August 12, 2021, claimant experienced problems with the brakes in her vehicle while driving to work. She arrived at work before 8:00 a.m., called a nearby mechanic to see if the car could be serviced and was told that if she brought the car in soon, it could happen. She decided to use her morning break to drop the vehicle off and then walk back to the office. At 8:34 a.m., she told her supervisor what she intended to do and was told to notify the human resources manager before she left. Claimant did not because she thought she would be back within her break period and wanted to avoid speaking with the human resources manager, who caused her stress. Due to unforeseen circumstances related to the servicing of her vehicle, claimant did not return to the office until around 9:40 a.m. When claimant returned, claimant sent an explanatory email to the human resources manager. Later that day, claimant met with the employer's partners and human resources manager; claimant's employment was terminated for being away from the office without permission.

**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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for being away from the office without permission on August 12, 2021. Claimant admitted that she knew and understood that expectation following the incident on May 13, 2021. Transcript at 31. Claimant violated that employer expectation on August 12, 2021 when she left the office without first speaking with the human resources manager as directed by her supervisor. Exhibit 1 at 4. Claimant admitted at hearing that not communicating with the human resources manager was a "lapse of judgment," but that speaking to her added to claimant's stress level. Transcript at 23. That evidence is sufficient to establish that claimant consciously left the office without first speaking to

the human resources manager, which claimant knew or should have known would probably result in a violation of the employer's expectations. Under those circumstances, claimant's decision to leave the office demonstrated indifference to the consequences of her actions and constituted a wantonly negligent violation of the standards of behavior the employer had a right to expect from her.

Nevertheless, the record fails to show that claimant's August 12, 2021 conduct constituted misconduct, rather than an isolated instance of poor judgment. The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Applying these standards, the record shows that claimant's August 12, 2021 conduct in being away from the office without permission was an isolated instance of poor judgment. The record shows that claimant had been given written warnings for violating the employer's attendance policy in March, April and June of 2021. Exhibit 1. However, it fails to show that the violations that led to those warnings were based on decisions to willfully violate the employer's attendance expectations or consciously take actions that claimant knew or should have known would probably result in violations of those expectations. Claimant testified, and the employer did not dispute, that claimant had "severe" health issues that prevented her from both arriving at work and/or calling in to the employer as required if she would be late. Transcript at 18 to 21. She also testified that she kept the employer informed about "what was going on with [her] medically" during that period. Transcript at 21. She further testified that because of her inability to wake or stay awake in time to comply with the employer's call in expectations, she acquired a second alarm clock and new phone to aid her in that regard, which demonstrated that she was not indifferent to the consequences of her actions. Transcript at 16. The record also shows that claimant's May 13, 2021 conduct was not a willful or wantonly negligent violation of an employer expectation because on that date claimant spoke with the human resources

supervisor about her problem and concern with her vehicle window and her desire to park her car in the employer's secure parking area for that reason. Transcript at 31. By initially notifying the human resources supervisor of her problem and concerns, the record shows that claimant was not indifferent to the consequences of her actions. For these reasons, the evidence as to whether claimant's prior violations of the employer's attendance expectations constituted conduct that were either willful or wantonly negligent is at best equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. Therefore, the record does not show that the incidents that occurred prior to August 12, 2021 was willful or wantonly negligent behavior, which means that claimant's conduct on August 12, 2021 was an isolated act.

Although claimant's August 12, 2021 conduct was an isolated instance of poor judgment, it did not exceed mere poor judgment because it did not violate the law and was not tantamount to unlawful conduct. Nor, viewed objectively, did claimant's conduct constitute an irreparable breach of trust or otherwise make a continued employment relationship impossible because claimant emailed the human resources manager immediately upon her return to the office and was honest about her reasons for leaving work when she did. Viewing the record as a whole, the record does not establish that claimant's conduct exceeded mere poor judgment.

Accordingly, the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. For that reason, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Order No. 21-UI-179276 is affirmed.

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

**DATE of Service:** January 6, 2022

**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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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