

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0096**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 21, 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 June 27, 2021 (decision # 145116). Claimant filed a timely request for hearing. On December 16, 2021, ALJ Micheletti conducted a hearing, and on December 22, 2021 issued Order No. 21-UI-182483, reversing decision # 145116 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 10, 2022, 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 the information is relevant to EAB's determination of whether claimant is disqualified from receiving benefits based on his work separation from the employer, and 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 FACT:** (1) CVK Construction LLC employed claimant as a flooring installer for about four years until June 26, 2021.

(2) The owner of the business regarded claimant as being "like a son" to him, and was involved in claimant's life in ways that exceeded the scope of a typical employment relationship, such as helping claimant purchase a vehicle. Transcript at 9.

(3) For about the last year of his employment, claimant was tardy to work on multiple occasions, in violation of the employer's expectation that he arrive to work on time.

(4) On or around June 19, 2021, claimant was driving his personal vehicle home from work and fell asleep behind the wheel. Claimant subsequently crashed his vehicle and sustained injuries that impacted his ability to perform his regular duties. As a result, the owner of the company temporarily required claimant to perform light-duty supervisory work until he was cleared to return to regular duties by a doctor.

(5) During his shift on June 26, 2021, claimant requested permission to leave work early due to pain from his injuries. The owner granted claimant's request, and claimant left for the day. Later that evening, claimant and the owner had a phone conversation during which claimant requested the following day off from work in order to further recuperate from his injuries. In response, the owner called claimant a "pussy," told claimant that "the reason [claimant] really didn't want to come work the next day was because [claimant] wanted to spend time with [his] girlfriend, and that she's taking up too much of [his] time," and told claimant that he would be discharged if claimant did not break up with his girlfriend. Transcript at 28. Claimant asked the owner if he was being serious, and the owner confirmed that he was. Claimant hung up on the owner. After claimant hung up on him, the owner sent claimant a text message indicating that claimant's final check would be ready for him in the morning.

(6) The owner believed that claimant's recent difficulties at work, such as his tardiness and the motor vehicle accident that impaired his ability to work, related to claimant's girlfriend, with whom claimant frequently argued.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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).

At hearing, claimant testified that the owner told him that he would be discharged if he did not break up with his girlfriend. By contrast, the owner testified that he discharged claimant due to "tardiness and insubordination," citing claimant's frequent lateness to work and having fallen asleep behind the wheel of the employer's work vehicle.<sup>1</sup> Transcript at 4, 7, 8. The owner also disputed claimant's assertion that he had told claimant that he would discharge claimant if claimant did not break up with his girlfriend, testifying instead that he told claimant only that claimant "need[ed] to do something about that, 'cause it's affecting your work." Transcript at 35.

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<sup>1</sup> The owner testified that claimant had fallen asleep at the wheels of both claimant's own personal vehicle *and* the employer's work vehicle. Transcript at 5. Claimant disputed this assertion, testifying that he had only fallen asleep behind the wheel of his own vehicle. Transcript at 24. Because the outcome of this matter does not depend upon whether claimant fell asleep behind the wheel of the employer's work vehicle, it is not necessary to resolve this conflict in the record.

Because neither party offered corroborating evidence beyond their own testimony, it is necessary to examine the consistency of the testimony to determine which account is entitled to more weight. On that front, claimant’s testimony was generally internally consistent, whereas the owner’s testimony was internally inconsistent. For instance, the owner initially testified that claimant had crashed his personal vehicle on the same day that the owner discharged him, but later testified that he was uncertain about the date and that it might have been a week earlier. Transcript at 9, 16. The owner also initially testified that he had made the decision to discharge claimant prior to the phone conversation between the two on June 26, 2021, but later testified, “. . . I gotta be honest, it was during the course of that conversation [that he decided to discharge claimant]”. Transcript at 12–13, 20. Because claimant’s testimony was more consistent, it is afforded more weight. Additionally, claimant testified that the owner was “pretty intoxicated” during the conversation on June 26, 2021—an allegation that the owner did not refute—thereby calling into question the accuracy of the owner’s recollection of that conversation. Transcript at 28. When viewed as a whole, the preponderance of the evidence supports a finding that the owner discharged claimant because claimant did not agree to break up with his girlfriend.

While it is clear from the record that the owner believed that claimant’s relationship with his girlfriend had been negatively impacting his work performance, and while claimant’s work performance may in fact have been poor, the final incident that led the owner to discharge claimant was claimant not agreeing to break up with his girlfriend, rather than the underlying issues that compelled the owner to make such a demand. *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). The question of whether the employer discharged claimant for misconduct must therefore focus on claimant not agreeing to break up with his girlfriend.

In short, while an employer has the right to expect that an employee adhere to an attendance policy or maintain specific standards of work performance, an employer does not have the right to expect an employee to make specific changes to their personal life—such as breaking up with a significant other—in order to achieve those goals. For that reason, claimant not agreeing to break up with his girlfriend was not a willful or wantonly negligent violation of the standards of behavior that an employer has the right to expect of an employee, and was therefore not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is therefore not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 21-UI-182483 is affirmed.

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

**DATE of Service:** February 18, 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 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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