

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0314**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 5, 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 October 10, 2021 (decision # 102054). Claimant filed a timely request for hearing. On February 14, 2022, ALJ Demarest conducted a hearing and issued Order No. 22-UI-186373, affirming decision # 102054. On March 7, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Willie's Tavern Inc. employed claimant as a bartender from March 18, 2021 until October 16, 2021.

(2) The employer had a "three-strike" rule by which the employer documented the write-ups they gave employees, and upon giving a third write-up to an employee, the employee was subject to discharge. Transcript at 7. Claimant was aware of and understood the three-strike rule. The employer used a gas line to power their grill and deep fryer, and expected claimant to turn the gas line off when she was responsible for the kitchen and closing the bar. Claimant also expected claimant to refrain from serving alcoholic beverages after 9:00 p.m. Claimant knew and understood these expectations.

(3) On May 4, 2021, claimant served an alcoholic beverage to a patron at 9:03 p.m. Claimant took the patron's order at 8:45 p.m., and the patron paid for the drink at that time. However, claimant was not able to make the patron's drink and serve it to them until 9:03 p.m. because she had multiple other patrons and had to serve drinks to them first. The employer gave claimant a write-up for this incident.

(4) On August 10, 2021, claimant was working with a cook who was responsible for the employer's kitchen, which included the gas line that powered the grill and deep fryer. Claimant instructed the cook thirty minutes before closing time to turn off the gas line. However, the cook forgot to do so. The employer gave claimant a write-up for this incident.

(5) On October 4, 2021, claimant was responsible for the kitchen, and closed the bar without turning off the gas line. Claimant turned off the grill and the deep fryer and intended to turn off the gas line but forgot to do so. The employer gave claimant a write-up for this incident.

(6) On October 16, 2021, the employer discharged claimant for receiving a third write-up under their three-strike rule.

**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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that the employer discharged claimant for misconduct connected with work because claimant acted with wanton negligence in failing to turn off the gas line on October 4, 2021, and that her conduct was not an isolated instance of poor judgment or a good faith error. Order No. 22-UI-186373 at 2-3. However, the record does not support a conclusion that claimant was discharged for misconduct.

The proximate cause of claimant’s discharge was the October 4, 2021 incident in which claimant forgot to turn off the gas line at closing time. This is because—given that the incident represented claimant’s third write-up under the employer’s three-strike rule—it was 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).

It is undisputed that claimant failed to turn off the gas line on October 4, 2021. However, the employer did not meet their burden to show that claimant did so willfully or with wanton negligence. On that date, claimant turned off the grill and the deep fryer and intended to turn off the gas line but simply forgot to do so. The record evidence shows that claimant did not intentionally fail to turn off the gas line. Nor did claimant’s mistake in failing to turn off the gas line show indifference to the consequences of her conduct because she intended to turn it off, and successfully turned off the deep fryer and grill, but simply forgot to do so for the gas line. Therefore, although claimant may have been careless, and

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).

To any extent claimant's discharge was partially attributable to her serving an alcoholic beverage after 9:00 p.m. on May 4, 2021 or the gas line remaining on after closing time on August 10, 2021, the employer did not establish that claimant's behavior on those occasions constituted misconduct. The record shows that on May 4, 2021, claimant served an alcoholic beverage to a patron at 9:03 p.m. because she was not able to make the patron's drink and serve it to them before 9:00 p.m. due to having multiple other patrons whom she had to serve first. The record demonstrates that claimant did not intend to serve the patron after 9:00 p.m. but merely was unable to serve the drink until 9:03 p.m. because of the press of business. The record also shows that claimant likely acted in good faith and did not know that her conduct in serving the drink probably the employer's expectations. This is because it was reasonable for claimant to expect the employer would approve of claimant serving the patron when she did given that the patron had already paid for their drink and claimant served it within a few minutes of 9:00 p.m.

Likewise, the employer did not meet their burden to show that claimant violated the employer's expectations willfully or with wanton negligence when the gas line remained on after closing time on August 10, 2021. On that date, a cook was responsible for the employer's kitchen and claimant instructed the cook thirty minutes before closing time to turn off the gas line. As such, the record does not show that claimant intended for the gas line to remain on after closing time or failed to take measures to have it turned off before closing. The record also does not show that claimant knew or should have known that her conduct probably would result in the gas line remaining on given that the kitchen, which included the gas line that powered the grill and deep fryer, was the cook's responsibility and claimant told the cook to turn off the gas line.

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

**DECISION:** Order No. 22-UI-186373 is set aside, as outlined above.

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

**DATE of Service:** May 11, 2022

**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 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 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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