

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0459**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 1, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 82616). The employer filed a timely request for hearing. On March 21, 2022, ALJ Lucas conducted a hearing, and on March 23, 2022 issued Order No. 22-UI-189532, affirming decision # 82616. On April 11, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) Avamere Court at Keizer employed claimant as a caregiver from October 31, 2018 until January 17, 2022.

(2) The employer expected claimant to report for her scheduled shifts and clock in on time. Claimant understood that expectation.

(3) Claimant had Attention Deficit Hyperactivity Disorder (ADHD). Claimant's condition frequently caused her to begin her work tasks for a brief period when she arrived for a scheduled shift without first clocking in.

(4) From January 14, 2021 through January 15, 2022, claimant reported for her scheduled shifts late on multiple occasions.

(5) On January 15, 2022, claimant arrived for her scheduled shift on time but, upon arrival, the employer required claimant to undergo a COVID-19 screening. Claimant was not allowed to clock in until after the screening was complete. After completing the screening, claimant forgot to clock in and started performing her work tasks. After a brief period, claimant remembered she had not clocked in, and proceeded to do so 13 minutes after the beginning of her scheduled shift.

(6) On January 17, 2022, the employer discharged claimant. The “deciding factor” in the employer’s decision to discharge claimant was the fact that she clocked in 13 minutes late on January 15, 2022. Transcript at 7.

**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).

The employer discharged claimant because she clocked in 13 minutes late on January 15, 2022. Although the record shows that claimant was tardy for shifts on numerous occasions before that date, the “deciding factor” in the employer’s decision to discharge claimant on January 17, 2022 was the incident on January 15, 2022. Therefore, claimant’s conduct on January 15, 2022 was the proximate cause of 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); *see also* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge).

The employer did not meet their burden to show that claimant’s conduct on January 15, 2022 was misconduct because the preponderance of the evidence does not support that claimant’s late clock-in time on January 15, 2022 was a willful or wantonly negligent violation of the employer’s expectations. At hearing, the employer’s witness, a human resources representative who testified exclusively based on notes and recorded clock-in times, testified that claimant was 13 minutes late for her shift on January 15, 2022. Transcript at 7. However, claimant testified that she had arrived on time that day, but clocked in 13 minutes late because of both the delay caused by a required COVID-19 screening and her tendency to begin work tasks without clocking in due to her ADHD. Transcript at 20, 25.

Claimant’s firsthand account is entitled to more weight, and the record therefore shows that claimant was on time for work on January 15, 2022 and did not intend to clock-in 13 minutes late. Further, claimant’s conduct in clocking in 13 minutes late was not wantonly negligent. This is because the late clock in time was caused in part by claimant undergoing the screening procedure required by the employer, which shows that claimant was not indifferent to the consequences of her actions but was complying with an employer requirement. Further, more likely than not, claimant was not conscious that

her conduct on January 15, 2022 would probably result in a violation of the employer's expectations given that the delay was caused in part by forgetfulness induced by ADHD.

For these reasons, the record shows that the employer discharged claimant, but not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 22-UI-189532 is affirmed.

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

**DATE of Service:** June 27, 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 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**

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**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.

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