

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0718**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 21, 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 was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 133333). The employer filed a timely request for hearing. On June 3, 2022, ALJ Janzen conducted a hearing, and on June 7, 2022 issued Order No. 22-UI-195454, affirming decision # 133333. On June 23, 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 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 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) Extreme Grocery Discounters, LLC employed claimant, most recently as a general manager, from November 4, 2015 until July 17, 2020. Claimant reported directly to the CEO of the company.

(2) The employer maintained a zero-tolerance drug and alcohol use policy. The employer's policies required managers to report potential employee drug and alcohol violations to their supervisors. Claimant was not aware of what his reporting duties were if he suspected that an employee had violated this policy.

(3) In May 2020, one of the employer's other managers discovered a wallet that contained a syringe that the manager believed might contain drugs. An employee later claimed the wallet. Claimant was not working at the time the wallet containing the syringe was discovered.

(4) When claimant returned to work, the store manager informed claimant about the wallet containing the syringe that had been found, and later claimed, by an employee. Claimant told the store manager that they should conduct a urinalysis on the employee who claimed it, if they believed the syringe contained drugs.

(5) Claimant did not immediately inform the CEO of this incident because the CEO was out of town and had requested not to be disturbed. Claimant subsequently forgot about the incident and did not report it to the CEO upon his return.

(6) In June 2020, a store manager informed the CEO about the incident and also reported being scared to discuss the incident with claimant. The CEO scheduled a meeting to discuss the incident with claimant. At the conclusion of this meeting, the CEO discharged claimant.

**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).

The record shows the employer discharged claimant for failing to report an incident in which an employee was suspected of bringing drugs. At hearing, the employer testified they had a zero tolerance policy toward drug and alcohol use. Transcript at 6-7. The employer also testified they maintained a policy which “[ ] says the manager’s go[t] to report to, uh, somebody above the person who it was reported to. So the chain of command would have been the right way for him to report it to the CEO.” The employer believed that claimant’s failure to report the found wallet, with a syringe that could have contained drugs, violated the reporting and zero tolerance policy and that, as the general manager, claimant should have reported this incident to the CEO when he found out about it from the store manager. Transcript at 32. The employer did not offer any other evidence of a specific policy that claimant violated. Even assuming that claimant did violate the employer’s reporting policy by failing to report the incident to the CEO, the employer did not meet their burden to show that this violation was a willful or wantonly negligent disregard of the employer’s standards of behavior.

The record shows that claimant was unaware of the reporting duties the employer expected and the employer offered no evidence to show that claimant knew those expectations or that claimant understood that failing to report to the CEO the incident of a found syringe belonging to an employee that *may* have contained drugs, was a violation of the employer’s policy. Even assuming that claimant was aware of and understood the employer’s policy, the record shows that, at worst, claimant’s failure to inform the CEO of the incident was the result of a mistake. At hearing, claimant testified that he simply

forgot about the incident and that, had he remembered, he would have informed the CEO about it. Transcript at 17. Though the employer's witness characterized claimant's actions as "covering up for an employee," they offered no supporting evidence to show that claimant's failure to inform them was the result of anything other than faulty memory. Transcript at 7. Therefore, the record shows that more likely than not, claimant did not intentionally disregard the employer's expectations or act with indifference toward the employer's expectations.

To the extent the employer discharged claimant because the store manager was afraid to discuss the incident with claimant, the employer's witness offered no additional details and did not show how the store manager's fear was the result of a willful or wantonly negligent breach of the employer's expectations by claimant. Transcript at 9. At hearing, the employer's witness read from meeting minutes but presented no first hand testimony regarding any actions taken by claimant which would have caused the store manager's fear, as reported in the meeting minutes read, and offered no other incidents of any prior violations of any other employer policies. Transcript 8-10. The store manager did not testify. Therefore, the record shows that claimant was discharged, but not for a willful or wantonly negligent violation of the employer's reasonable expectations.

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

**DECISION:** Order No. 22-UI-195454 is affirmed.

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

**DATE of Service:** September 23, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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