

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0790**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On March 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 114454). The employer filed a timely request for hearing. On June 21, 2022, ALJ Buckley conducted a hearing, and on June 23, 2022 issued Order No. 22-UI-196695, affirming decision # 114454. On July 13, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Strong Integrated Behavioral Health employed claimant as a licensed clinical social worker from January 21, 2019 to February 19, 2021.

(2) Claimant's work for the employer involved providing psychotherapy sessions to clients. Per federal regulations, the employer expected claimant to use the billing code 90837 when a psychotherapy session lasted 53 minutes to an hour, and list the actual start time and stop time of the therapy session in the chart note for the session. Claimant understood that she had to use code 90837 when a psychotherapy session lasted 53 minutes to an hour.

(3) During claimant's onboarding in January 2019, the employer told claimant that they expected her to use the billing code 90837 when a psychotherapy session lasted 53 minutes to an hour, and to list the actual start time and stop time of the therapy in the session's chart note. However, claimant did not understand from the onboarding that she was required to list the actual start time and stop time of the therapy in the session's chart note because the employer's training director was on vacation at the time.

(4) On December 9, 2020, the employer provided a training on billing to all their clinicians, including claimant, through a video conferencing platform. In the training, the employer conveyed to their clinicians that they expected them to use code 90837 when a psychotherapy session lasted 53 minutes to an hour, and list the actual start time and stop time in the session's chart note. Claimant was not aware that listing start times and stop times was discussed in the training.

(5) On February 8, 2021, claimant had a therapy session with a client that lasted for 39 minutes, but claimant used code 90837 to bill the session. Claimant also did not list the start time and stop time of the therapy in the session's chart note.

(6) On the morning of February 17, 2021, claimant had a therapy session with a client that lasted 33 minutes, but claimant used code 90837 to bill the session. Claimant also did not list the start time and stop time of the therapy in the session's chart note.

(7) Later on February 17, 2021, the employer had a therapy session scheduled with a client beginning at 3:00 p.m. The session lasted about 45 minutes, after which the client stated they had another matter to attend to and left the video conference. Although the session did not last at least 53 minutes, claimant used code 90837 to bill the session because she clicked the wrong button. The employer's receptionist had set the session for code 90837 by default and claimant was required to change the default setting. Claimant failed to do so because she needed to go to the bathroom and it "just didn't cross [her] mind." Transcript at 38. Claimant also did not list the start time and stop time of the therapy in the session's chart note.

(8) A client complained to the employer that claimant had billed the February 17, 2021 3:00 p.m. therapy session as lasting an hour when the session had not lasted that long because the client had attended a session with one of the employer's other clinicians on the same day beginning at 3:45 p.m. The employer conducted an audit and compared claimant's chart notes to the actual run times of her therapy sessions, which were recorded via the video conferencing platform. In so doing, the employer discovered the occasions on February 8, 2021 and on the morning of February 17, 2021—among other occasions—when claimant used code 90837 when a therapy session lasted less than 53 minutes, and failed to list the actual start time and stop time of the therapy sessions.

(9) On February 19, 2021, the employer held a meeting with claimant about the billing policy violations they discovered in their audit. Following the meeting, the employer discharged claimant effective that day. The reason for the discharge was violating the employer's expectations regarding all the occasions uncovered by the employer's audit, not only the violation that occurred regarding the February 17, 2021 therapy session that began at 3:00 p.m.

**CONCLUSIONS AND REASONS:** Order No. 22-UI-196695 is set aside, and this matter remanded for further proceedings consistent with this order.

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 order under review concluded that the employer discharged claimant, but not for misconduct because claimant was not conscious of her conduct and therefore did not violate the employer's expectations willfully or with wanton negligence. Order No. 22-UI-196695 at 4. The record as developed does not support that conclusion.

As it stands, the record shows that claimant knew and understood she had to use code 90837 when a psychotherapy session lasted 53 minutes to an hour but that, despite onboarding training and the December 9, 2020 group training, claimant did not understand that she was required to list the actual therapy start and stop times in her chart notes. As it stands, the record further shows that as to the February 17, 2021 therapy session that began at 3:00 p.m., claimant used code 90837 to bill the session because she clicked the wrong button because she had to go to the bathroom and it "just didn't cross [her] mind." Transcript at 38. Thus, it is possible to interpret claimant's use of code 90837 to bill the February 17, 2021 therapy session that began at 3:00 p.m. as a breach that was unconscious, when that act is viewed in isolation.

However, the record shows that the employer discharged claimant for violating their expectations regarding all the occasions uncovered by the employer's audit, including occasions that occurred on February 8, 2021 and the morning of February 17, 2021. *See* Exhibit 1 at 2. This means that claimant's use of code 90837 to bill for the February 17, 2021 therapy session that began at 3:00 p.m. must be considered in conjunction with the other occasions discovered by the employer in which claimant conducted therapy sessions that lasted less than 53 minutes, but for which claimant used code 90837 to bill the sessions.

On remand, the ALJ should ask questions to develop the record regarding the other occasions uncovered in the employer's audit in which claimant conducted therapy sessions that lasted less than 53 minutes, but for which claimant used code 90837 to bill the sessions. The ALJ should inquire when and how many such occasions there were. The ALJ should ask why claimant used code 90837 to bill those sessions. To the extent an assertion is made on remand that claimant's conduct was unconscious on those other occasions, the ALJ should inquire how claimant's use of code 90837 could be an unconscious act when done repeatedly and on numerous occasions.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether the employer discharged claimant for misconduct, Order No. 22-UI-196695 is reversed, and this matter is remanded.

**DECISION:** Order No. 22-UI-196695 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: October 14, 2022**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-196695 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.