

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0980**

*Late Application for Review Allowed*  
*Reversed – No Disqualification*

**PROCEDURAL HISTORY:** On November 30, 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 benefits effective October 31, 2021 (decision # 123340). Claimant filed a timely request for hearing. On August 30, 2022, ALJ Vaughn conducted a hearing, and on August 31, 2022 issued Order No. 22-UI-201818, affirming decision # 123340. On September 20, 2022, Order No. 22-UI-201818 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On September 22, 2022, claimant filed a late application for review with the EAB.

**WRITTEN ARGUMENT:** Claimant filed a written submission with her application for review, a portion of which was a written statement describing the circumstances that prevented her from timely filing her application for review, and a portion of which was a written argument. As discussed below, EAB considered claimant's written statement describing the circumstances that prevented her from timely filing her application for review. EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is the written statement claimant provided with her application for review, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

**FINDINGS OF FACT:** (1) Janus Youth Programs, Inc. employed claimant as an overnight youth care specialist from November 6, 2016 until November 1, 2021. The employer provided services to

individuals who were re-entering the community after being held in custody at juvenile corrections facilities.

(2) The employer expected claimant to follow state mandatory reporting guidelines in cases of abuse or neglect. In pertinent part, this required claimant to report to the Department of Human Services (DHS) any instance in which there was reasonable cause to believe that a child (defined as a person 20 years old or younger) is subjected to verbal, physical, or sexual abuse. Additionally, the employer expected claimant to file an incident report for some circumstances that would not require mandatory reporting under state guidelines, such as if a client is observed masturbating in a common area of their residence. Claimant understood these expectations.

(3) On or about October 12, 2021, claimant was working her overnight shift going from client residence to residence, checking on clients. Claimant opened the door to the apartment of a client, and as she did so, observed him masturbating in the living room area of his apartment. The client was 21 years old and was alone in the apartment at the time, although he had a roommate who was away at work.

(4) Because the client's activities occurred in the living room area, which was a common area of the apartment, claimant was required to report what she observed to the employer by filing an incident report. However, upon walking in on the client, the client expressed to claimant his embarrassment and asked her not to report what she saw. To spare the client of embarrassment, claimant agreed not to report the incident and told the client, "if I don't say anything then you can't either because otherwise, we're both gonna . . . be in trouble[.]" Transcript at 21. Claimant then departed the apartment and continued her rounds.

(5) The next day, the client told his roommate about the incident, and the roommate then told his therapist about it. The therapist, in turn, informed the employer of the incident. On or about October 14, 2021, after she learned that the employer had become aware of the incident, claimant filed an incident report regarding what she observed.

(6) On October 21, 2021, the employer suspended claimant pending an investigation regarding her failure to initially report the incident. Two human resources workers looked into the matter, and communicated claimant's failure to report the incident to DHS. DHS took no action. On November 1, 2021, the employer discharged claimant for initially failing to report that she had observed the client masturbating.

(7) Prior to discharging claimant, claimant had never received a written or verbal warning for violation of an employer policy or expectation. On one occasion during her tenure with the employer, claimant had made "a med error" but the employer had "absolved" her of that, and did not discipline her for it. Transcript at 25.

**CONCLUSIONS AND REASONS:** Claimant's late application for review of Order No. 22-UI-201818 is allowed. The employer discharged claimant, but not for misconduct.

**Late Application for Review.** An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a

“reasonable time” upon a showing of “good cause.” ORS 657.875; OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 22-UI-201818 was due by September 20, 2022. Because claimant did not file her application for review until September 22, 2022, the application for review was late.

Claimant provided a written statement with the application for review. In it, claimant explained that when she received Order No. 22-UI-201818, she misread it and believed that the time period to timely file an application for review was twenty days from when she received the order, not twenty days from when it was mailed. EAB Exhibit 1 at 1. Claimant did not re-read the instructions and realize that September 20, 2022 was the deadline until September 22, 2022, the day she filed her application for review. EAB Exhibit 1 at 1. However, claimant stated that she experienced numerous life events and difficulties during the time period she was operating under the misunderstanding that the deadline to file was September 22, 2022. Specifically, during that time period, claimant’s terminally ill son was visiting from Pennsylvania and had a medical emergency and was hospitalized, claimant was caring for her 96-year-old mother, claimant was studying for the board examination to become a certified nursing assistant, claimant was working, and claimant lacked a working computer or printer at home. EAB Exhibit 1 at 1. On September 22, 2022, claimant was able to go to her local WorkSource office and use the resources there to file her application for review and it was at that time that she re-read Order No. 22-UI-201818 and discovered that September 20, 2022 was the deadline to timely file an application for review. EAB Exhibit 1 at 1.

Claimant’s evidence shows that she failed to file an application for review by September 20, 2022 because she mis-read Order No. 22-UI-201818, and that circumstances beyond her reasonable control relating to the various life events and difficulties recited above prevented her from re-reading the hearing order and realizing her error until September 22, 2022. On September 22, 2022, the circumstances that prevented a timely filing abated and claimant was able to go to a WorkSource office and file her application for review. Claimant therefore has shown that circumstances beyond her reasonable control prevented her from filing a timely application for review, and that she filed her late application for review within a reasonable time after the circumstances that prevented a timely filing ceased to exist. Claimant therefore has established good cause to extend the filing deadline to September 22, 2022, and the late application for review is allowed.

**Discharge.** 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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The order under review concluded that claimant was discharged for misconduct because she willfully violated the employer’s expectations regarding making an incident report and her conduct was not an isolated instance of poor judgment. Order No. 22-UI-201818 at 3-4. While claimant’s policy violation was willful, the record does not support that her conduct was not an isolated instance of poor judgment.

At hearing, the employer characterized claimant’s failure to report her observation of the client masturbating as both a breach of the incident report requirement and a violation of claimant’s duty to make a mandatory report of abuse or neglect of a child. Transcript at 7. As an initial matter, the record shows that the mandatory reporting requirement was not implicated. The client was 21 years old and thus not a child as that concept is defined by the mandatory reporting guidelines. Further, the client’s act of masturbating was not a form of abuse. The employer also asserted that claimant’s act of failing to make an internal incident report was a form of neglect that triggered claimant’s mandatory reporting duties, apparently contending that claimant herself neglected the client by not making an incident report and then failed to report that neglect to DHS. Transcript at 33. However, claimant’s failure to make an incident report did not amount to neglect of the client, and, in any event, claimant’s duty to mandatorily report suspected instances of abuse or neglect did not apply to the client because he was not a child within the meaning of the guidelines. That claimant’s conduct did not implicate the mandatory reporting requirement is bolstered by the fact that when the employer communicated claimant’s failure to report the incident to DHS, DHS took no action. For these reasons, the record does not show that claimant violated the employer’s expectations regarding her duty to mandatorily report child abuse or neglect.

However, the record does show that claimant willfully violated the employer’s expectation that she file an incident report regarding observing the client masturbating in a common area of his residence. Claimant understood that the employer expected her to file an incident report in that situation. Nevertheless, to spare the client of embarrassment, and because he asked her to do so, claimant intentionally failed to file an incident report regarding what she saw. This was a willful violation of a standard of behavior the employer had a right to expect of claimant.

However, claimant’s willful violation was not misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Applying these standards, claimant's willful violation was an isolated instance of poor judgment. First, the record shows that claimant's violation was isolated. Prior to discharging claimant, claimant had never received a written or verbal warning for violation of an employer policy or expectation. On one occasion during her tenure with the employer, claimant had made "a med error" but the employer had "absolved" her of that, and did not discipline her for it. Transcript at 25. Accordingly, claimant's failure to file an incident report was a single occurrence rather than a repeated act or pattern and therefore was an isolated act within the meaning of OAR 471-030-0038(1)(d)(A).

Moreover, claimant's willful failure to file an incident report did not exceed mere poor judgment. Claimant's conduct did not violate the law nor was it tantamount to unlawful conduct. Although claimant was required by law to mandatorily report child abuse or neglect, as discussed above, that duty did not apply to the final incident that resulted in claimant's discharge. Claimant's failure to file an incident report with the employer, while a violation of an internal employer policy, was not an illegal act nor was it equivalent in value or effect to unlawful conduct. Furthermore, claimant's conduct did not cause an irreparable breach of trust or make a continued employment relationship impossible. Claimant withheld from the employer that she had seen the client, who was an adult, engaging in a private act in his own apartment, at night, with no one else around, but which the client happened to be doing in a common area. While claimant's withholding of information showed a lack of candor, the employer did not meet their burden to show that claimant's failure to be forthcoming with what she saw was a breach of trust that could not be repaired.

For these reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Claimant's late application for review of Order No. 22-UI-201818 is allowed. Order No. 22-UI-201818 is set aside, as outlined above.

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

**DATE of Service: December 19, 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.

**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 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**  
 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)

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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.