

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1052**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer with good cause and was not disqualified from receiving benefits based on the work separation (decision # 115950). The employer filed a timely request for hearing. On September 23, 2022, ALJ D. Lee conducted a hearing, and on September 30, 2022 issued Order No. 22-UI-204021, reversing decision # 115950 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective June 20, 2021. On October 15, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered claimant's argument when reaching this decision.

In his written argument, claimant expressed confusion regarding why the employer in this case was NW Employment Solutions LLC, rather than the employer he testified at hearing to having worked for most recently (an entity called Metro Security Services). Claimant's Written Argument at 2; Transcript at 4-38. A review of Department records shows that claimant filed his initial claim on September 8, 2021, claimed benefits each week for several weeks thereafter, and then stopped claiming in fall of 2021. Claimant then restarted his claim on July 11, 2022, and at that time identified the employer in this case as an employer for whom he worked after he stopped claiming. However, Department records suggest that claimant did not report that he had worked for Metro Security Services at the time he restarted his claim.<sup>1</sup>

Because the Department was aware that claimant worked for the employer, the Department adjudicated that work separation, which gave rise to decision # 115950, and eventually led to this appeal. Therefore, the employer in this case is the correct employer. Because the Department was not aware that claimant

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<sup>1</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

worked for Metro Security Services, the Department did not adjudicate claimant's work separation from that entity. Claimant may contact the Department and report the dates he worked for Metro Security Services, and the earnings he received from them. Doing so may affect whether the Department views claimant's apparent failure to disclose Metro Security Services as a willful misrepresentation to obtain benefits. The Department also may treat wages claimant earned from Metro Security Services as wages earned from subject employment, which may affect the determination of a new claim claimant may file in the future.

**FINDINGS OF FACT:** (1) NW Employment Solutions, LLC employed claimant from June 14, 2021 until June 22, 2021. The employer was a staffing agency. On June 14, 2021, they assigned claimant to a work assignment for one of their clients, Pacific Fence Company.

(2) The employer expected claimant to contact them a reasonable time in advance of claimant's scheduled shift if claimant was going to be absent or tardy for the shift. Claimant understood this expectation.

(3) On June 22, 2021, claimant did not report for his scheduled shift at Pacific Fence Company or contact the employer to advise he would be absent from his work assignment that day. As a result, also on June 22, 2021, the employer ended claimant's work assignment for Pacific Fence Company because he failed to notify the employer of his absence.

(4) Claimant was absent from work on June 22, 2021 and did not notify the employer of his absence on that day because he had "a lot going on at the time in [his] life" due to being homeless and sleeping outdoors in an encampment on the side of the freeway. Transcript at 60. Claimant also did not "really care that much at the time" about the work assignment or give his "full focus" to it because it was a temporary staffing agency assignment. Transcript at 58-59, 60.

(5) Prior to June 22, 2021, claimant received a verbal warning from Pacific Fence Company for being absent or tardy. Claimant's attendance had not been "up to par" on that occasion because he was experiencing homelessness and sleeping outdoors in an encampment on the side of the freeway. Transcript at 56.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

**Nature of the Work Separation.** If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). In the case of individuals working for temporary agencies, employee leasing companies, or governmental programs where a state agency serves as the employer of record for individuals performing home care services, the employment relationship "shall be deemed severed at the time that a work assignment ends." OAR 471-030-0038(1)(a).

The work separation was a discharge that occurred on June 22, 2021. The employer was a staffing company and had assigned claimant to a work assignment for one of their clients. When claimant failed

to notify the employer of his absence on June 22, 2021, the employer ended claimant's work assignment. Per OAR 471-030-0038(1)(a), by ending claimant's work assignment on June 22, 2021, the employer severed their employment relationship with claimant. Because the employer severed the employment relationship, claimant could not have continued to work for the employer for an additional period of time. Therefore, when the employer severed their employment relationship with claimant, they discharged him. Thus, the work separation was a discharge that occurred on June 22, 2021.

**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). "[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). 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).

The employer failed to meet their burden to show that they discharged claimant for misconduct. The employer discharged claimant for failing to notify the employer of his absence on June 22, 2021.

Claimant understood the employer's expectation that he was required to notify them a reasonable time in advance of his scheduled shift if he was going to be absent. Claimant failed to do that on June 22, 2021. However, for claimant's violation to amount to misconduct under ORS 657.176(2)(a), the violation must have been willful or wantonly negligent. Claimant did not notify the employer of his absence on June 22, 2021 because he had "a lot going on at the time in [his] life" due to being homeless and sleeping outdoors in an encampment on the side of the freeway. Transcript at 60. This evidence suggests that claimant's violation on June 22, 2021 was not willful because it was not the result of an intent to breach the employer's expectation. However, the record shows that claimant also violated the employer's expectation on June 22, 2021 because he did not "really care that much at the time" about the work assignment or give his "full focus" to it because it was a temporary staffing agency assignment. Transcript at 58-59, 60. This raises the possibility that claimant's failure to comply with the employer's policy, although resulting from his homelessness, may have been the result of an indifference to the consequences of his actions, which would amount to a wantonly negligent violation of the policy.

Nevertheless, even if the failure to notify the employer of his absence on June 22, 2021 was willful or wantonly negligent, the employer failed to show that it was not an isolated instance of poor judgment. Although claimant testified that he received one verbal warning for attendance from the employer's client prior to June 22, 2021, claimant explained that his attendance was not "up to par" on that occasion because he was experiencing homelessness and sleeping outdoors in an encampment on the side of the freeway. Transcript at 56. The employer's witness testified at hearing that she believed that claimant's attendance had been "spotty" but conceded that the employer had no documentation of claimant ever receiving any discipline for poor attendance, and did not otherwise offer any evidence that claimant had previously breached the employer's attendance expectations willfully or with wanton negligence. Transcript at 44, 49-50. In light of this evidence, the record fails to show that any breach of the employer's attendance policy prior to June 22, 2021 was a willful or wantonly negligent violation. Therefore, the employer did not establish that claimant's failure to notify the employer of his absence on June 22, 2021 was a repeated act or pattern of other willful or wantonly negligent behavior. Accordingly, claimant's violation on June 22, 2021 was isolated.

The record also shows that claimant's failure to notify the employer of his absence on June 22, 2021 did not exceed mere poor judgment. Claimant's conduct did not violate the law, nor was it tantamount to unlawful conduct. The conduct did not involve dishonesty, theft, or the like and therefore did not result in an irreparable breach of trust. Nor does the record show that claimant's conduct otherwise made a continued relationship impossible.

Claimant's failure to notify the employer of his absence on June 22, 2021 therefore was, at worst, an isolated instance of poor judgment, which is not misconduct. Claimant therefore 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-204021 is set aside, as outlined above.

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

**DATE of Service:** December 27, 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.

**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.