

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1089**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On September 12, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 82009). The employer filed a timely request for hearing. On October 20, 2022, ALJ Griffin conducted a hearing and issued Order No. 22-UI-205551, affirming decision # 82009. On October 28, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Sweet Betty's Bistro employed claimant as a cook from mid- to late 2021 until May 15, 2022.

(2) Claimant was required to report to work each day by, at latest, 8:00 a.m. Claimant knew when he was required to report to work for each particular shift and that the employer expected him to arrive on time. However, claimant was late for his shifts on numerous occasions over the course of his employment. Exhibit 1 at 4-7. Claimant was late on those occasions because he was "just kind of going through it at the time." Audio Record at 22:41.

(3) On May 15, 2022, claimant did not report for his scheduled shift. On that day, claimant "missed [his] alarm clock," and woke up around 10:00 a.m. Audio Record at 20:24 to 20:37. Thereafter, at some point on that day, claimant called the kitchen manager and asked if he could report to work that day. The

kitchen manager told claimant to call the employer's owner. Claimant did so, left a voicemail, and never received a call back.

(4) The employer discharged claimant on May 15, 2022 because he did not report for work for his scheduled shift that day.

**CONCLUSIONS AND REASONS:** Order No. 22-UI-205551 is set aside and this matter is remanded for further development of the record.

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 claimant was discharged, but not for misconduct. Order No. 22-UI-205551 at 2-3. The record as developed does not support this conclusion.

It is not evident from the record whether claimant's failure to wake from his alarm clock, or his actions following his late awakening, were a willful or wantonly negligent disregard of the employer's reasonable expectation that he report to work by 8:00 a.m. on May 15, 2022. Claimant testified that he "missed his alarm clock." Audio Record at 20:24 to 20:37. The employer's witness testified that claimant reported that he "slept in," suggesting that he may have heard, but ignored, his alarm, or not set an alarm to awaken in time for an 8:00 a.m. shift. Audio Record at 10:34. On remand, the record should clarify this discrepancy between the parties' testimony. The record shows that claimant had reported to work late on repeated prior occasions, but not whether those prior occasions were due to missing his alarm. On remand, the ALJ should ask questions for more detail on what claimant meant by "missed his alarm clock" and what actions claimant had taken, if any, to prevent that from occurring on May 15, 2022.

Additionally, the record is not clear as to when claimant called in to work on May 15, 2022. The employer testified that claimant did not contact them until 2:00 p.m. Audio Record at 10:25. Claimant did not testify about when he notified the employer, only that he woke up around 10:00 a.m. and called the employer afterwards. Audio Record at 10:40. The record should be developed to determine when claimant called, and if there was a gap between when he awoke and when he called in, what accounted for this gap.

If the record on remand shows that the May 15, 2022 incident was a willful or wantonly negligent violation of the employer's expectations, the ALJ should inquire into each of claimant's previous

instances of tardiness to assess whether the prior instances were willful or wantonly negligent, as necessary to evaluate whether the May 15, 2022 incident was an isolated instance of poor judgment.

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-205551 is reversed, and this matter is remanded.

**DECISION:** Order No. 22-UI-205551 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service: January 3, 2023**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 22-UI-205551 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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**

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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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