

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1140**

*Affirmed ~ No Disqualification*  
*Confirmada ~ No Descalificación*

**PROCEDURAL HISTORY:** On October 12, 2022, 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 # 83411). The employer filed a timely request for hearing. On November 9, 2022, ALJ Lucas conducted a hearing that was interpreted in Spanish, and on November 15, 2022, issued Order No. 22-UI-207369 affirming decision # 83411. On November 17, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**HISTORIA PROCESAL:** *El 12 de octubre de 2022, el Departamento de Empleo de Oregon (el Departamento) envió notificación de una decisión administrativa concluyendo que el empleador despidió al reclamante, pero no por mala conducta y que el reclamante no fue descalificado de recibir beneficios de desempleo basado en la separación del trabajo (decisión # 83411). El empleador sometió una aplicación oportuna para una audiencia. El 9 de noviembre de 2022, el juez administrativo Lucas llevó a cabo una audiencia que fue interpretada al español. El 15 de noviembre de 2022, el juez administrativo emitió la Orden No. 22-UI-207369, confirmando la decisión # 83411 del Departamento. El 17 de noviembre de 2022, el empleador presentó una aplicación para revisión de la Orden No. 22-UI-207369 a La Junta de Apelaciones de Empleo (EAB).*

**WRITTEN ARGUMENT:** The employer's argument included a letter dated November 21, 2022 and notes from claimant's supervisor. Each of these documents contained information that was not part of the hearing record. With regards to the supervisor's notes, the employer has shown that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. EAB considered these notes in reaching this decision. With regards to the letter dated November 21, 2022, the employer did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the additional information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence in the record when reaching this decision. EAB considered this argument to the extent it was based on the record.

**ARGUMENTO POR ESCRITO:** *El argumento por escrito del empleador contiene información que no es parte del expediente de la audiencia en este caso. El empleador demostró que razones o circunstancias afuera de su control le impidieron ofrecer los apuntes del supervisor durante la audiencia y el EAB tuvo en cuenta esa información en llegar a esta decisión. El empleador no demostró que razones o circunstancias afuera de su control le impidieron ofrecer la carta del 21 de noviembre de 2022 durante la audiencia y el EAB no tuvo en cuenta esa información en llegar a esta decisión. De acuerdo con ORS 657.275(2) y OAR 471-041-0090 (13 de mayo de 2019), EAB solamente puede considerar información que haya sido recibida como evidencia en la audiencia judicial.*

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of the portion of the employer's argument listed above, 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.

**ASUNTO DE PRUEBAS:** *EAB ha considerado evidencia adicional para tomar esta decisión de acuerdo con OAR 471-041-0090(1) (13 de mayo de 2019). La evidencia adicional consiste de la parte del argumento del empleador descrita anteriormente, ha sido marcada como EAB Exhibit 1, y se le ha dado una copia a las partes con esta decisión. Cualquier parte que se oponga a la admisión de EAB Exhibit 1 tiene que someter su objeción a esta oficina por escrito, y tiene que incluir la base de su objeción, entre diez días de cuando esta decisión fue enviada. OAR 471-041-0090(2). A menos que su objeción sea recibida y afirmada, el hecho reconocido permanecerá en el expediente.*

**FINDINGS OF FACT:** (1) Fred Eichler Construction employed claimant as a framer from May 14, 2018 until August 4, 2022.

(2) The employer maintained a safety policy that required claimant to wear safety glasses throughout his shift. The employer also maintained an attendance policy that required employees to report to work and remain at work during the times assigned by their supervisor. Claimant was aware of both of these policies.

(3) Throughout claimant's employment, he had multiple attendance policy violations. The two most recent violations occurred when claimant arrived to work late on July 15, 2022, and when claimant was absent on June 9, 2022. EAB Exhibit 1 at 11, 12.

(4) On August 2, 2022, claimant forgot to put on his safety glasses when returning from a break.

(5) On August 3, 2022, claimant forgot to put on his safety glasses when returning from a break.

(6) On August 4, 2022, the employer discharged claimant in the middle of his shift.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The discharge analysis must focus on the proximate cause for discharge, which is the final incident that led to the discharge when it occurred. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

Though the employer cited attendance issues and failing to wear safety glasses as the reasons for claimant’s discharge, the timing of the discharge and the record otherwise show that the proximate cause of the discharge was claimant’s failure to wear safety glasses on August 2 and 3, 2022. The most recent attendance violations listed on the exhibit submitted by the employer occurred because of illness from July 19, 2022 to July 22, 2022 and July 25, 2022. EAB Exhibit 1 at 12. The employer has not alleged that these absences were for anything other than illness and the supervisor’s note from July 26, 2022 states that claimant stated he was “still under the weather.” EAB Exhibit 1 at 12. Absences due to illness are not misconduct and therefore if these absences were the proximate cause of the discharge, then claimant was discharged not for misconduct. OAR 471-030-0038(3)(b). The most recent attendance violation, not from illness, according to the evidence submitted by the employer, occurred when claimant reported to work late on July 15, 2022.<sup>1</sup> EAB Exhibit 1 at 12. The most recent other absence, according to the evidence submitted by the employer, occurred on June 9, 2022. The exhibit submitted by the employer provided no further explanation as to why claimant was late on July 15, 2022 or absent on June 9, 2022. The employer also did not testify about either incident at hearing. As such, it is not clear what the employer’s response to either of these incidents was, how these events influenced the employer’s decision to discharge claimant, or why, if these incidents were the proximate cause of the discharge, the employer waited until August 4, 2022 to respond to claimant’s attendance issues. Claimant’s failure to properly wear safety glasses, on the other hand, most recently occurred on August 2, 2022, and August 3, 2022. Given that the discharge occurred on August 4, 2022, it is more likely than not that the proximate cause of the discharge was claimant’s failure to wear safety glasses.

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<sup>1</sup> The supervisor’s notes allege that claimant stated he would be leaving early on August 2, 2022, but do not allege that he actually did leave work early after the supervisor informed him that he could not do so. EAB Exhibit 1 at 12.

The record shows that on August 2, 2022 and August 3, 2022, claimant failed to properly wear safety glasses as required by the employer. This was a reasonable policy for the employer to adopt given the need to abide by safety regulations, the employer's potential liability, and their concern for employee safety. However, the employer has not shown that claimant failed to wear the glasses willfully or with wanton negligence. Claimant testified that on both occasions, he took the safety glasses off on a break and merely forgot to put them back on. Transcript at 29-30. The employer has offered no testimony to contradict this, and the supervisor's notes submitted by the employer corroborate claimant's account of August 2, 2022. EAB Exhibit 1 at 12. As such, claimant's failure to act was not willful. Further, the employer has not alleged that claimant resisted or did not wear the safety glasses after he was reminded to do so. This shows that claimant was not indifferent to the consequences of failing to wear safety glasses. The record does not show that claimant's failure to put the glasses back on after his breaks was a conscious decision and did not necessarily demonstrate indifference to the consequences of failing to wear safety glasses. As such, the record does not show that claimant's failure to act was wanton negligence. Thus, the employer has not shown that they discharged claimant for misconduct.

The employer discharged claimant, but not for misconduct, and he is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 22-UI-207369 is affirmed. *La Orden de la Audiencia 22-UI-207369 queda confirmada.*

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

**DATE of Service: January 24, 2023**

**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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**NOTA:** *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Vea ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](https://courts.oregon.gov). En este sitio web, hay información disponible en español.*

**Por favor, ayúdenos mejorar nuestros servicios completando un formulario de encuesta sobre nuestro servicio de atención al cliente.** Para llenar este formulario, puede visitar <https://www.surveymzmo.com/s3/5552642/EAB-Customer-Service-Survey>. Puede acceder a la encuesta usando una computadora, tableta, o teléfono inteligente. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.



# 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**  
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