

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1168**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective August 23, 2020 (decision # 81958). Claimant filed a timely request for hearing. On June 9, 2022, ALJ McGorin conducted a hearing, and on June 10, 2022 issued Order No. 22-UI-195818, reversing decision # 81958 by concluding that claimant was discharged, not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 29, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Specifically, in their written argument, the employer asserts claimant and the employer agreed to a return to work date of November 9, 2020, that claimant "did not report for work between November 9 and November 12, 2020", and that "claimant failed to report to work at the end of his unpaid leave of absence as agreed upon with the employer." Written Argument at 1. These assertions either contradict the record or appear to be based on information extraneous to it. The record evidence is undisputed that the employer extended claimant's leave period multiple times then discharged claimant on November 12, 2020 because claimant remained unable to return to work due to his medical issues, and not because of a failure to report to work. *See* Audio Record at 15:23, 18:31 to 19:49, 23:23; Audio Record at 13:08, 24:24 to 24:54; Exhibit 1 at 1.

Nor is the employer's new information material to EAB's determination of whether claimant should be disqualified from receiving benefits based on his work separation from the employer. As discussed below, the information would show that the employer discharged claimant for absences due to illness or other physical or mental disabilities. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) The employer employed claimant as a sales and design consultant from August 12, 2019 until November 12, 2020.

(2) Claimant developed a medical condition, and on April 8, 2020 took a medical leave of absence from the employer. Claimant and the employer scheduled June 24, 2020 as claimant's anticipated return to work date.

(3) Claimant's condition caused him to undergo a series of emergency surgeries. Prior to June 24, 2020, claimant spoke to the employer's general manager and stated that he needed to extend the period of his leave due to the surgeries. The general manager approved the leave extension and told claimant to keep in touch and that his job would be available to him when he was better and ready to return to work.

(4) On or about July 15, 2020, claimant contacted the employer and stated that he thought he needed to be out an additional three months. The general manager approved extending claimant's leave period.

(5) As of early November 2020, claimant remained unable to return to work. On November 12, 2020, the employer decided they should discharge claimant because he could not return to work. On that date, the general manager called claimant, and told him that he was discharged, with the ability to be rehired, because the employer could not continue to wait for claimant to return to work.

**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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The record shows that claimant went on a medical leave of absence and during his leave underwent a series of emergency surgeries. Because of claimant's ongoing medical issues relating to the surgeries, claimant was unable to return to work. The record further shows that on multiple occasions, the employer's general manager approved extending claimant's leave period. Audio Record at 15:23, 18:31 to 19:49, 23:23. Then, when claimant remained unable to return to work as of early November 2020, the employer decided to discharge claimant, with the ability to be rehired, because he could not return to

work. Audio Record at 24:24 to 24:54. On November 12, 2020, the employer's general manager called claimant and told claimant he was discharged because "they just couldn't continue to wait for [claimant] to come back." Audio Record at 13:08. Further, on an employee termination form filled out by the employer when they discharged claimant, the employer marked "Failure to Return from LOA" as the reason for claimant's termination, but left the boxes for "Misconduct" and "Policy Violation" unmarked. Exhibit 1 at 1.

The above evidence demonstrates that the employer discharged claimant because they could no longer wait for claimant to return to work, not because they believed claimant had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him or a disregard of the employer's interests. The record fails to show that claimant violated any employer policy, let alone that he did so willfully or with wanton negligence. The employer therefore did not meet their burden to show that they discharged claimant for misconduct under ORS 657.176(2)(a).

In their written argument, the employer contends that there was an "agreed return [to work] date of November 9, 2020", that claimant "did not report for work between November 9 and November 12, 2020", and that "claimant failed to report to work at the end of his unpaid leave of absence as agreed upon with the employer." Written Argument at 1. As discussed above, the record does not support those assertions. The record lacks evidence that claimant and the employer agreed to a November 9, 2020 return to work date or that claimant ever failed to report to work. Rather, as reproduced above with citations to the audio record and exhibit page, it is undisputed that the employer extended claimant's leave period multiple times then discharged him on November 12, 2020 because he remained unable to return to work due to his medical issues.

Even if the record did show that the employer discharged claimant for being absent from work between November 9 and November 12, 2020, which it does not, claimant's conduct would not amount to misconduct. This is because absences due to illness or other physical or mental disabilities are not misconduct under OAR 471-030-0038(3)(b). Claimant's medical issues resulting from his emergency surgeries rendered him unable to return to work as of early November 2020. These medical issues would constitute an illness or physical disability. Therefore, any absence from work between November 9 and November 12, 2020 would be due to illness or physical disability, and therefore not misconduct under OAR 471-030-0038(3)(b).

For these reasons, the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 22-UI-195818 is affirmed.

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

**DATE of Service:** December 7, 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.

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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**

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**  
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