

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-1184**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 19, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and therefore claimant was disqualified from receiving unemployment insurance benefits effective April 18, 2021 (decision # 73717). Claimant filed a timely request for hearing. On December 3, 2021, ALJ Ramey conducted a hearing at which the employer failed to appear, and on December 9, 2021, issued Order No. 21-UI-181502, reversing decision # 73717 and concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation. On December 28, 2021, the employer filed a timely request to reopen the hearing on decision # 73717. On April 26, 2022, ALJ Ramey held a hearing, and on May 6, 2022, issued Order No. 22-UI-193148, concluding that the employer had shown good cause to reopen the hearing on decision #73717, and cancelling Order No. 21-UI-181502. The reopened hearing on the merits of decision # 73717 was scheduled for July 26, 2022. On July 26, 2022, ALJ Frank conducted a hearing which was continued on September 27, 2022 and November 14, 2022, and on November 23, 2022, issued Order No. 22-UI-208178, affirming decision # 73717. On November 29, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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

**FINDINGS OF FACT:** (1) The employer was a trust established to oversee the care of the trust beneficiary, H.S.O., who was an elderly woman. The employer employed claimant as an in-home caregiver for H.S.O. from September 1, 2012 until April 23, 2021.

(2) The employer expected claimant not to be physically aggressive or to direct foul language toward H.S.O. or other employees. The employer also expected claimant would comply with their instructions.

Claimant knew and understood these expectations as a matter of common sense. The employer also expected claimant would only work when authorized by the employer to work, and to submit time cards that accurately reflected the time claimant worked. This expectation was contained in the employee handbook the employer gave claimant and which claimant signed when she was hired in September 2012.

(3) A printed schedule was typically posted by the employer each month listing each employee's schedule. The employer allowed their employees to modify the schedule amongst themselves and often verbally authorized additional or different work hours beyond what was in the printed schedule. In March 2021, claimant worked all of the hours claimed on her timecards, and all hours worked had been authorized by the employer in accordance with these practices.

(4) The employer's trustee, who was claimant's direct supervisor, brought alcohol into H.S.O.'s home and directed employees, including claimant, to purchase and store alcohol in the home on the employer's behalf. Claimant sometimes stored alcohol belonging to her or other employees in the home. The employer's trustee would occasionally drink alcohol with claimant in the home, but claimant did not otherwise consume alcohol there.

(5) On or about March 30, 2021, the employer's trustee notified all employees of changes regarding how food would be purchased for the household. Claimant was upset that this change altered her work duties and confronted the employer's trustee and another employee, A.U., who happened to be standing nearby, by getting in their faces while shouting foul language at them. The employer did not discipline claimant at that time.

(6) On April 12, 2021, the employer's trustee sent an email to all employees warning that, "[W]hile it is understandable that tempers may flare. . . this does not give license to anyone tearing down a team member without thinking first before speaking." Exhibit 1 at 45. This warning was in response to claimant's actions toward the employer's trustee and A.U., and constituted the only discipline imposed on claimant for the March 30, 2021 incident.

(7) On April 12, 2021, the employer's trustee sent a separate email to claimant and one other employee, A.H., directing them to "remove the hard stuff in large bottles," referring to liquor. July 24, 2022 Transcript at 60-61. The email further stated, "I don't mind the regular bottle of vodka or whiskey in a one- or two-bottle supply." July 24, 2022 Transcript at 60-61. Claimant replied, explaining that she had purchased some of the liquor in California at a reduced tax rate on behalf of some coworkers, and they had not yet picked it up from the home. Claimant removed some large bottles of liquor from the home the following day, but other liquor remained.

(8) In mid-April 2021, the employer's trustee was told of various misdeeds allegedly committed by claimant and nearly every other employee working at H.S.O.'s home. This prompted the employer's trustee to commence an audit of claimant's timecards for March 2021.

(9) On April 19, 2021, the employer's trustee requested that A.U. take and send a photo of any alcohol remaining in the home, which she did. The trustee then sent an email to all employees stating that no alcohol was allowed on the premises.

(10) On April 20, 2021, claimant and a coworker discarded all alcohol within the home with the exception of two or three bottles, and made photographic evidence of themselves doing so. The two or three bottles, of unknown ownership, remained in the home.

(11) The employer's trustee's audit of claimant's March 2021 time and pay records caused the trustee to conclude that claimant had claimed and been paid for unauthorized or unworked hours throughout that month.

(12) On April 23, 2021, the employer's trustee found the remaining liquor at the home and believed it belonged to claimant. The trustee discharged claimant, and in a written notice of termination, cited three reasons for her discharge: claimant's failure to follow instructions; harassing teammates; and theft by intentionally falsifying timecards. A.H. was also discharged, along with several other employees. A.U. remained employed by the employer through the time of her testimony at hearing.

**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).

The employer alleged numerous instances of past misconduct by claimant at hearing, despite citing only three at the time of her discharge. A discharge analysis focuses on the proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision* 09-AB-1767, June 29, 2009; *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). More likely than not, given the timing of the incidents in relation to when the trustee decided to discharge claimant, only two incidents occurred without which the employer would not have discharged claimant when they did.

The employer's audit of claimant's timecards, schedule, and pay was undertaken sometime "in mid-April." July 26, 2022 Transcript at 26. Because the trustee sent claimant an email on April 19, 2021, implying that claimant's employment was expected to continue by setting forth additional household rules that applied to her, it is reasonable to infer that the results of the audit were received by the trustee sometime between April 19, 2021, and April 23, 2021. Therefore, the record supports that the trustee's discovery of what she believed to be falsified timecards was one of the last incidents of misconduct, and a proximate cause of claimant's discharge.

Similarly, the trustee's discovery on April 23, 2021, of remaining alcohol in the home despite her April 19, 2021 email to all employees instructing them that no alcohol was permitted in the home led the trustee to conclude that claimant had not followed this instruction. This was a last incident of misconduct essentially simultaneous to the employer's discovery regarding the timecards that constituted a proximate cause of claimant's discharge the same day.

In contrast, the third reason cited in the written termination notice, "harassment of teammates," more likely than not occurred between March 30, 2021, and April 12, 2021. Exhibit 1 at 16. The changes to claimant's shopping duties, which the employer's trustee and A.U. both testified caused claimant to get in their faces and shout foul language at them, logically would have occurred in close proximity to the trustee's March 30, 2021 email announcing those changes. The employer's trustee testified the incident occurred in "early April," or "a couple weeks" before April 23, 2021. July 26, 2022 Transcript at 41. A.U. testified that it "probably" occurred in March 2021. September 27, 2022 Transcript at 40. The employer's trustee, though a witness to the incident, did not discipline claimant at that time. On April 12, 2021, the trustee sent an email to all employees, warning them against "tearing down team members" when "tempers flare." Exhibit 1 at 45. The record shows that, more likely than not, the employer concluded that claimant's conduct in this incident did not merit discharging her and imposed this lesser discipline of a group warning. A.U. alleged an additional incident of verbal harassment by claimant involving cleaning on oven, but the record is not sufficient to conclude when the incident took place or that the employer's trustee was aware of it when she discharged claimant. September 27, 2022 Transcript at 12-13. Therefore, the employer has not established by a preponderance of evidence that claimant's use of foul language and aggression toward the trustee and A.U. were a proximate cause of her discharge.

Accordingly, the misconduct analysis will focus on the two allegations supported by the record as constituting the proximate cause of claimant's discharge: claimant working and claiming pay for time not scheduled or worked, and claimant's failure to follow the employer's instructions regarding alcohol on the premises.

The employer's trustee initially testified that she believed claimant's timecards showed work for hours that the employer had not scheduled or authorized on at least eleven dates throughout March 2021. July 26, 2022 Transcript at 15-36. After the trustee reviewed additional evidence, she concluded she had authorized claimant to work additional hours throughout the month, but still questioned claimant's work hours on March 6, 2021, March 13, 2021, March 16, 2021, and March 31, 2021. September 27, 2022 Transcript at 4-6. The trustee also testified to numerous times in March 2021 when employees were verbally authorized to work additional hours that were not reflected in the printed schedule. July 26, 2022 Transcript at 68-73.

On March 6, 2021, the employer contended claimant was not scheduled for work, and did not work, but nevertheless appeared at H.S.O.'s home. July 26, 2022 Transcript at 18-20. Claimant did not recall being at the home on March 6, 2021. September 27, 2021 Transcript at 88-89. The timecard submitted in evidence by the employer shows claimant did not claim to have worked on March 6, 2021. Exhibit 1 at 81. Because claimant did not claim to have worked on her timecard, and the record does not establish that she worked, the employer has not demonstrated any impropriety with claimant's timecard regarding this date.

On March 13, 2021, the employer alleged that claimant's timecard showed she worked from 10:00 a.m. to 2:00 p.m. which was not authorized and which claimant did not work despite listing the time on her card. Exhibit 1 at 81; July 26, 2021 Transcript at 23-25. Claimant testified that she had been authorized to work at a condo owned by the employer during that time and worked with A.H. unpacking belongings that had been moved to the condo a month prior. September 27, 2022 Transcript at 62, 89. A.H. corroborated that claimant's hours were verbally authorized by the employer and actually worked by claimant. November 14, 2022 Transcript at 17. The employer did not rebut claimant's first-hand accounts that she performed this work. Based on the frequent verbal additions and alterations to the printed schedule, which the employer's trustee apparently did not readily remember, as evidenced by her changing testimony regarding authorizations for other dates, it is more likely than not that claimant was authorized to work these hours, and in fact, worked them.

On March 16, 2021, and March 31, 2021, the employer alleged that claimant worked and claimed her hours as scheduled, but that A.H. also worked on those dates without authorization, in "collusion" with claimant. July 26, 2022 Transcript at 30, 36. Claimant testified that A.H. told her that the trustee had authorized A.H.'s additional hours for those shifts to monitor H.S.O.'s condition through the night. September 27, 2022 Transcript at 91-92. A.H. testified that the employer's trustee "gave [A.H.] permission to stay the night with any caregiver, at any time, and it didn't have to be on the schedule." November 14, 2022 Transcript at 22. The employer has not proven by a preponderance of evidence that claimant knew A.H. was not authorized to work those shifts, nor that claimant should have been held responsible for determining whether A.H. was authorized to work them. Therefore, the record does not show that claimant colluded with A.H. to allow A.H. to work without authorization in violation of the employer's expectations.

Accordingly, the employer did not meet their burden to show that claimant, willfully or with wanton negligence, violated the employer's expectation regarding working hours that were not authorized or submitting inaccurate time cards.

The employer's contention that claimant failed to follow the trustee's reasonable instructions stems from directives regarding alcohol made on April 12, 2021, and April 19, 2021. In the initial email, claimant and A.H. were directed only to "remove the hard stuff in large bottles," but not rid the home of alcohol entirely. Claimant recalled getting rid of two gallons of vodka on April 13, 2021, but left the remaining liquor in the home, some or all of which the trustee had placed there, because claimant believed that was what she was instructed to do by the email. September 27, 2022 Transcript at 79-82. Given how vague the instruction was as to what alcohol could remain in the home, claimant did not willfully or with wanton negligence violate the employer's expectations in leaving the bottles of alcohol she did.

A.U. sent pictures of the remaining alcohol to the employer's trustee on April 19, 2021, prompting the trustee to send an email to all employees that day forbidding all alcohol in the home. Claimant testified when she arrived at work on April 20, 2021, some alcohol had been taken home by employees working the previous shift, and claimant and a coworker poured the remaining alcohol down the drain, except for two bottles. September 27, 2022 Transcript at 69. Claimant and the other coworker on duty did not know why the remaining two bottles were in the home or to whom they belonged, so they did not discard them at that time. September 27, 2022 Transcript at 70. The employer's trustee testified that on April 23, 2021, she discovered "three large bottles of vodka" in the home. July 26, 2022 Transcript at 64. The trustee did not know whether the alcohol belonged to claimant or someone else. July 26, 2022 Transcript

at 14. While the total prohibition of alcohol in the April 19, 2021 email was unambiguous, the timeframe for removing alcohol from the home, and which employee bore responsibility for disposing of unclaimed alcohol, remained unclear. Claimant's decision to leave the remaining two or three bottles for their owners to claim, after disposing of the rest of the bottles, demonstrated compliance with the employer's instructions and was not unreasonable under the circumstances. The record does not show that by claimant and her coworker allowing time for other employees to claim or discard the remaining bottles as those employees reported to work over the next few days, that claimant committed a willful or wantonly negligent violation of the employer's expectations.

Therefore, the employer has not established by a preponderance of evidence that the incidents constituting proximate cause for discharging claimant were misconduct under ORS 657.176(2)(a). Accordingly, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

**DECISION:** Order No. 22-UI-208178 is set aside, as outlined above.

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

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

**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.surveymoz.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**

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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.

**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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