

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0039**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 23, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective October 30, 2022 (decision # 64041). Claimant filed a timely request for hearing. On December 19, 2022, ALJ Passmore conducted a hearing, and on December 20, 2022 issued Order No. 22-UI-210392, setting aside decision # 64041 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On December 31, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Aisling Trucking Academy employed claimant as an instructor from July 17, 2021 until November 3, 2022.

(2) The employer maintained an attendance policy that required employees to either receive prior approval to leave work early or be given permission to leave early before doing so. Claimant was aware of this policy.

(3) On October 7, 2022, claimant saw a schedule that did not have her scheduled to work on October 31, 2022. Claimant believed that this schedule would not change and made plans for the evening of October 31, 2022.

(4) On October 26, 2022, claimant received a new schedule. This schedule had claimant working a split shift on October 31, 2022. She was required to report to work at 10:00 a.m., work part of the morning shift until 4:30p.m., and then report back to work at 6:00 p.m. to work an evening shift until 10:00 p.m. Upon receiving this schedule, claimant immediately told the lead instructor that she could not work the evening shift on October 31, 2022. He responded that she had to work the evening shift on October 31, 2022.

(5) On October 31, 2022, around 7:00 a.m. claimant arrived early to her shift. She asked the lead instructor if she could clock in early. Previously, claimant had been sent home when she reported to work early, however, on this date the lead instructor allowed claimant to start early. Claimant presumed that if she worked the entire early shift, she could not report to the evening shift.

(6) On October 31, 2022, around 5:30 p.m. claimant clocked out of her shift and told the lead instructor she was leaving. The lead instructor stated that she would need to return to work the evening shift at 6:00 p.m. Claimant stated she couldn't work both the full day shift and evening shift, and reiterated that she was unable to work the evening shift on this day. The lead instructor responded "Well, then I guess I'll have to work it." Transcript at 23.

(7) On November 1, 2022, claimant called out sick for her shift.

(8) On November 2, 2022, claimant called out sick for her shift. The employer requested that she obtain a doctor's note for the absence.

(9) On November 3, 2022, claimant called out sick and had an appointment scheduled with her doctor. The employer told claimant to pick up her final check.

**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 discharged claimant because she did not work an evening shift on October 31, 2022, and not claimant's subsequent absences due to illness. Even though the employer did not discharge claimant until November 3, 2022, the employer testified that the final straw was claimant's absence on October 31, 2022. Transcript at 11. Accordingly, the discharge analysis must focus on whether claimant's behavior on this day constituted misconduct. *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).

On October 31, 2022, claimant left work after the first portion of her shift and did not return to work at 6:00 p.m. as scheduled. The employer has a right to expect that employees will work during their assigned shifts, therefore claimant's leaving work and failing to report to back at 6:00 p.m. was a

violation of a standard of behavior that the employer had a right to expect. However, the record does not show that claimant committed this act either willfully or with wanton negligence.

Claimant believed that by starting her shift earlier on October 31, 2022, she would be able to leave early and not work the evening portion of her assigned shift. The record shows that previously when she arrived early she was told that she could not clock in, but on this date, the lead instructor allowed her to begin three hours early. This led claimant to presume that she would not be able to work the evening hours as she already had worked a full shift. Further, when claimant informed the lead worker she was leaving, they debated about whether she needed to work the evening portion of the shift, and the lead worker eventually stated that he would work the shift. Transcript at 23. At this point, claimant believed that she had already worked the total hours she was permitted to, and that another employee had agreed to work the evening hours. Under these circumstances, claimant's failure to return to work at 6:00 p.m. did not show a willful disregard of the employer's expectation. Additionally, claimant's actions did not show that she was indifferent to the consequences of failing to return to work. She immediately informed the employer on October 26, 2022 that she could not work the second part of the October 31, 2022 shift and thought she had resolved the matter with the lead instructor when he ultimately agreed to work that part of the shift. By notifying her supervisor in advance of her unavailability, coming in early to make up some of the hours, and attempting to get another employee to work the hours she was unavailable, claimant demonstrated concern about the consequences of not working the second portion of her scheduled shift. Therefore, claimant's failure to return to her scheduled shift at 6:00 p.m. was neither a willful or wantonly negligent violation of a standard of behavior that the employer had a right to expect, and was not misconduct.

For the above reasons, the employer discharged claimant, but not for misconduct, and she is not disqualified from benefits based on the work separation.

**DECISION:** Order No. 22-UI-210392 is affirmed.

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

**DATE of Service:** February 27, 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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# 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 desisyong ito.

## 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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