

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0106**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 74352). The employer filed a timely request for hearing. On December 27, 2022 and December 28, 2022, ALJ Chiller conducted a hearing, and on December 30, 2022 issued Order No. 22-UI-211348, reversing decision # 74352 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective July 31, 2022. On January 17, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider the portion of claimant's written argument submitted in the body of her email to EAB when reaching this decision because claimant did not include a statement declaring that she provided a copy of that portion of the argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). However, EAB considered the portion of claimant's written argument that was submitted as an email attachment which did include a statement declaring a copy was provided to the opposing party.

**FINDINGS OF FACT:** (1) Northwest Community Alliance employed claimant as a direct support professional from approximately June 2013 until August 1, 2022.

(2) The employer expected that their employees would report to work as directed. Claimant generally understood this expectation.

(3) In May 2022, claimant's mother became ill and claimant began requesting time off periodically to care for her. Claimant's supervisor routinely approved claimant's use of accrued paid leave for this purpose through June 2022.

(4) On June 24, 2022, the employer's human resources representative contacted claimant to inform her of her eligibility for up to twelve weeks of unpaid family leave under applicable law in order to care for her mother. Claimant responded that she wished to take twelve weeks of leave beginning immediately. Claimant believed that such leave had been granted by giving this response to the employer. Claimant's mother died later that day.

(5) After learning of the death of claimant's mother, the employer concluded that claimant was no longer eligible for the twelve weeks of family leave she had requested to care for her mother. Claimant was allowed to exhaust her accrued paid leave, followed by two weeks of unpaid bereavement leave to which she was entitled under the Oregon Family Leave Act (OFLA). Claimant believed she was still using the twelve weeks of family leave during this time.

(6) Prior to July 29, 2022, claimant made plans for August 2022 and September 2022, relying upon her understanding that she had been granted family leave through September 16, 2022, twelve weeks from when she thought it had been approved. Claimant had made arrangements to stay home with her school-aged children during the summer break to assist them in grieving the loss of claimant's mother, though the children were old enough to care for themselves without supervision. Claimant also planned on using the time off to plan her mother's memorial service.

(7) On approximately July 29, 2022, the employer informed claimant that she was not eligible for the twelve weeks of family leave previously discussed and that she had exhausted all other available leave. The employer directed her to return to work on August 1, 2022.

(8) On July 31, 2022, claimant texted the employer that she was unable to return to work until her children returned to school in early September 2022.

(9) On August 1, 2022, the employer discharged claimant because she did not return to work as directed. At that time, the employer was willing to rehire claimant in September 2022 once her children had gone back to school and she was ready 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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence.

*Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer’s reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer’s reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant because she did not to return to work on August 1, 2022, as directed on July 29, 2022. The order under review concluded that claimant was discharged for misconduct because her refusal to report back to work on August 1, 2022 exceeded mere poor judgment because it made a continuing employment relationship impossible. Order No. 22-UI-211348 at 4. The record does not support this conclusion.

The employer reasonably expected that their employees would report to work as directed. Claimant texted the employer on July 31, 2022 that she could not return to work until September 2022 when her children returned to school. December 27, 2022 Transcript at 19. Claimant testified that the children were old enough that they did not need supervision, but she desired to spend the summer with them as they grieved the loss of claimant’s mother and planned her memorial service. December 28, 2022 Transcript at 13. Claimant stated that she thought she had been on the twelve weeks of family leave offered by the employer since her conversation of June 24, 2022 with human resources, and therefore did not expect to have to return to work until September 2022. December 28, 2022 Transcript at 12. The testimony offered by the employer corroborated claimant’s account that they offered her twelve weeks of family leave on June 24, 2022, but did not tell her that she later became ineligible for that leave until at least July 27, 2022. December 27, 2022 Transcript at 16.

As claimant believed that the employer had granted her leave through September 2022, it was reasonable for claimant to make plans for herself and her family during that time. However, the

employer asserted that claimant was not entitled to twelve weeks of family leave under applicable law because claimant no longer had to care for her mother once her mother was deceased. Transcript at 17. Claimant did not advance any theory under which she would have been entitled by law to twelve weeks of family leave after June 24, 2022.<sup>1</sup> Since claimant was not entitled to remain on leave as a matter of law after she exhausted the two weeks of bereavement leave provided under OFLA, the employer was permitted to rescind any remaining leave claimant thought she had been granted, and reasonably expected claimant to report to work as directed on August 1, 2022.

Claimant's reasons for refusing to return to work on August 1, 2022 included her desire to be with her children, who were old enough to care for themselves; her desire to plan a memorial service for her mother, though more than a month had elapsed since her death; and the misunderstanding over her entitlement to family leave. Although understandable, none of these reasons prevented claimant from returning to work on August 1, 2022, and therefore claimant's refusal to return to work on that date was a willful violation of the standards of behavior which an employer has the right to expect of an employee.

Nonetheless, claimant's refusal to return to work constituted an isolated instance of poor judgment. The record shows no evidence of prior willful or wantonly negligent violations of the employer's interests. Prior to August 1, 2022, claimant's time off from work was with claimant's understanding she was taking time off approved by the employer and was not a willful or wantonly negligent violation of the employer's interest. Thus, the act was isolated. Claimant acted consciously in refusing to return to work, and by refusing to return to work despite having the ability to do so, claimant exercised poor judgment. However, claimant's conduct did not involve dishonesty, claimant did not break the law, and claimant's conduct was not tantamount to unlawful conduct. Further, the employer testified that when they discharged claimant on August 1, 2022, they would have been willing to rehire claimant once she was ready to return to work in September 2022. December 27, 2022 Transcript at 19. This demonstrated that claimant's refusal to return to work did not make a continued employment relationship impossible, since the employer was willing to continue that relationship despite claimant's actions. As such, claimant's conduct did not exceed mere poor judgment. Therefore, claimant's refusal to return to work was an isolated instance of poor judgment and did not constitute misconduct.

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

**DECISION:** Order No. 22-UI-211348 is set aside, as outlined above.

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

**DATE of Service:** March 14, 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.

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<sup>1</sup> See U.S. Wage and Hour Division, Fact Sheet #28 The Family and Medical Leave Act (February 2023) (in relevant part, limiting FMLA leave entitlement to that needed to care for a parent who has a serious health condition); ORS 659A.162(2)(a) (limiting OFLA bereavement leave entitlement to two weeks).

**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.surveygizmo.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**

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**  
 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)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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