

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0212**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective May 2, 2021 (decision # 83823). Claimant filed a timely request for hearing. On January 26, 2023, ALJ Clemons conducted a hearing, and on January 30, 2023 issued Order No. 23-UI-214170, affirming decision # 83823. On February 13, 2023, 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) Wild Side Smoke Shop employed claimant as a store manager from September 28, 2018 until May 5, 2021. The employer paid claimant a salary rather than an hourly wage.

(2) The employer expected that their managers would not change their own work schedules without authorization from their supervisor. Claimant was aware of this expectation. The employer also expected that that their managers would not make corrections to their own timecards, but would request that their supervisor do so instead. Claimant was unaware of this expectation and believed that she was expected to make such corrections herself as the need occurred.

(3) On April 30, 2021, prior to the scheduled start of her shift, claimant sent a text to her supervisor that she would be starting her shift an hour later than scheduled. Claimant then arrived at work an hour later than originally scheduled. Claimant corrected her timecard to reflect her actual starting time.

(4) On May 3, 2021, the employer discovered that claimant had corrected her April 30, 2021 timecard to reflect her actual start time and concluded that claimant had changed her schedule without a supervisor's authorization.

(5) On May 5, 2021, the employer discharged claimant because they believed that she changed her April 30, 2021 schedule and corrected her timecard without proper authorization.

**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 they believed she changed her schedule without authorization and corrected her own timecard for April 30, 2021 to reflect her late arrival at work. The order under review concluded that claimant was discharged for misconduct because claimant was aware of the employer's policy requiring her to get her supervisor's approval to correct her timecard, and was at least wantonly negligent when she corrected her April 30, 2021 timecard herself without authorization. Order No. 23-UI-214170 at 2-3. The record does not support this conclusion.

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). The employer's witness testified that despite issuing claimant seventeen "write-ups" over the course of an eight-month period, the final incident that caused the employer to discharge claimant was an "unauthorized schedule change." Transcript at 5-6, 13. This final incident had two components that the employer believed violated their policies. First, claimant altered her work schedule by arriving at work late, and second, claimant corrected her timecard to reflect the late arrival.

The employer expected that their managers would not change their own work schedules without authorization from their supervisor, and that their managers would not make corrections to their own timecards, but would request that their supervisor do so instead. Claimant testified that she understood the employer's policy with regard to not changing her own schedule without approval. Transcript at 18-19. However, when asked about her understanding of when she should submit timecard corrections, claimant testified she believed that she should submit corrections herself "as they have occurred or been brought to [her] attention." Transcript at 27. The employer's witness testified that he "believe[d] the

[timecard correction] policy is written in the employee handbook,” which claimant would have received upon hire. Transcript at 7-8. The record does not contain the language of the timecard correction policy as written in the handbook. Instead, the employer submitted copies of various counseling forms issued to claimant, some of which appeared at odds with the employer’s stated policy. For example, a counseling form dated December 2, 2020 directed, “Review time card daily and submit corrections as they occur.” Exhibit 1 at 23. On April 30, 2021, the date of the final incident, claimant was issued another form that stated, “Check your timecard daily to make sure there are no errors. Send in corrections as they occur to maintain company standards. Set alarms and reminders on your mobile device to ensure that your timecard is updated as your shifts progress.” Exhibit 1 at 19-20. Given the instructions on these forms, which suggest claimant was responsible for making her own corrections, claimant’s differing understanding of the timecard correction policy from what it was stated to be by the employer at hearing is understandable. As the employer bears the burden of proof in a discharge case by a preponderance of evidence, the record does not show that, more likely than not, claimant knew or should have known of the employer’s expectation that she not make corrections to her own timecard. Therefore, to the extent claimant violated this expectation, it was not done willfully or with wanton negligence, and did not constitute misconduct. As the timecard change was made only to accurately reflect the hours claimant worked that day, the employer has not shown that claimant acted with willful or wantonly negligent disregard of the employer’s interest.

Further, the employer’s witness testified that in the final incident, which occurred on April 30, 2021, claimant “changed her own schedule,” when she should have gotten approval from her supervisor for such a change. Transcript at 12. Claimant clarified in her testimony that the purported “schedule change” was that claimant arrived at work an hour after her scheduled start time, but had first sent a text message to her supervisor that she would be late. Transcript at 18-19. Claimant did not consider this to be making a “schedule change.” Transcript at 17. Claimant testified that she did not recall if her supervisor responded to the text. Transcript at 19. The employer did not offer evidence to show whether the supervisor responded to the text or otherwise communicated to claimant that they approved or disapproved of claimant being tardy on that occasion. As it is no more than equally likely that claimant’s supervisor approved, denied, or failed to respond at all to claimant’s notification that she would be late to work, the employer has not shown, by a preponderance of evidence, that claimant did not receive authorization to come to work late. As such, the employer has not proven that claimant willfully or with wanton negligence violated their policy against making an unauthorized schedule change. Additionally, claimant testified that the store had sufficient coverage during the missed hour from other employees, and because she was salaried, her absence for that hour did not affect the employer financially. Transcript at 17-18. Accordingly, the employer has not shown that claimant acted with willful or wantonly negligent disregard of the employer’s interest, and has therefore not proven that claimant was discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits as a result of the work separation.

**DECISION:** Order No. 23-UI-214170 is set aside, as outlined above.

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

**DATE of Service: April 4, 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.

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