

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0680**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 29, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective February 26, 2023 (decision # 95328). Claimant filed a timely request for hearing. On June 7, 2023, ALJ Kaneshiro conducted a hearing, and on June 8, 2023 issued Order No. 23-UI-227271, affirming decision # 95328. On June 16, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant submitted written arguments on June 16, 2023 and June 28, 2023. Claimant's arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. 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 claimant's arguments to the extent they were based on the record.

The employer submitted a written argument on July 17, 2023. 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. Under ORS 657.275(2) and OAR 471-041-0090, 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) Nighthawk Alarm Services employed claimant as an office worker from about August 2022 until March 3, 2023.

(2) The employer expected claimant to be at her desk and ready to work when her shifts started at 8:00 a.m. Claimant knew and understood this expectation.

(3) During claimant's tenure working for the employer, she was in an abusive relationship and was subjected to domestic violence. The abusive relationship caused her to develop Post Traumatic Stress

Disorder (PTSD). Claimant's PTSD symptoms caused her to "struggle[e] daily . . . every day, all day" and particularly made it difficult for claimant to sleep, which caused her to wake up late on some occasions. Transcript at 21.

(4) On March 3, 2023, claimant was scheduled to work at her usual 8:00 a.m. start time. It generally took claimant 25 to 30 minutes to commute to work. She typically left by 7:25 a.m. at latest in order to be at her desk by 8:00 a.m. The previous night, claimant set alarms on her cell phone and on her alarm clock in an attempt to wake up with sufficient time to leave for work by 7:25 a.m. However, claimant woke up late that morning. After waking up, claimant "made every effort to . . . kind of rush through [her] morning to be able to leave on time." Transcript at 13. Claimant believed she left home at her typical 7:25 a.m. leave time but may have left "a little later than she would like to from [her] home." Transcript at 14. Claimant then hit heavy traffic during her commute to work. Claimant got to her desk at 8:06 a.m.

(5) Later on March 3, 2023, the employer discharged claimant. The employer's main reason for doing so was that claimant was late for her 8:00 a.m. shift.

**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).

In a discharge case, the focus of the analysis is on the proximate cause of the discharge, that is, the incident without which the discharge would not have occurred when it did. *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). At hearing, the employer's witness testified generally about claimant often being absent and tardy, making personal calls during work time, and lacking productivity. Transcript at 8-10. However, the employer's witness testified that the reason for claimant's discharge on March 3, 2023 was "mostly the late" arrival that morning, as well as failing to keep "her timesheet up-to-date." Transcript at 5. When asked, if the timesheet had been up-to-date, whether claimant would have been discharged for arriving late anyway, the witness answered, "Well, yes." Transcript at 5-6. This evidence demonstrates that claimant's late arrival on March 3, 2023 was the proximate cause of her discharge. Thus, only if claimant's late arrival on March 3, 2023 was a willful or wantonly negligent violation of the employer's expectations, would claimant's discharge have been for misconduct and therefore disqualify her from receiving benefits.

The order under review concluded that claimant was wantonly negligent in being late for work on March 3, 2023, and the employer therefore discharged claimant for misconduct. Order No. 23-UI-227271 at 3. The record does not support this conclusion.

The employer did not meet their burden to prove that claimant's late arrival on March 3, 2023 was a willful or wantonly negligent violation of their expectations. Claimant's failure to be at her desk by 8:00 a.m. was not willful. The record shows that claimant did not intend to arrive late that morning.

The record also fails to show that claimant's late arrival on March 3, 2023 was wantonly negligent. Claimant's PTSD symptoms caused her daily struggles and, in particular, to wake up late on some occasions. Claimant was not indifferent to the consequences of being late due to oversleeping, however, and had set multiple alarms in an attempt to wake up on time on March 3, 2023. Claimant likely did oversleep that morning, in light of claimant's testimony that after she woke up, she had to rush through her morning to leave on time. The fact that, by rushing, claimant made an effort to leave home at her usual 7:25 a.m. leave time is further evidence that claimant did not act with indifference to being late. More likely than not, however, claimant left a few minutes later than usual. Then, after beginning her commute, claimant unexpectedly hit heavy traffic and was unable to get to her desk by 8:00 a.m.

These facts do not establish that claimant consciously engaged in conduct she knew or should have known would probably result in her being late, or that she was indifferent to the consequences of her actions. Accordingly, claimant's late arrival for work on March 3, 2023 was not wantonly negligent.

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

**DECISION:** Order No. 23-UI-227271 is set aside, as outlined above.

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

**DATE of Service:** July 28, 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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