

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0232**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 12, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 133209). The employer filed a timely request for hearing. On February 22, 2024, ALJ Goodrich conducted a hearing, and on February 27, 2024, issued Order No. 24-UI-248959, affirming decision # 133209. On March 4, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered arguments from claimant and the employer in reaching this decision.

The employer argued that the order under review erred in several respects, most notably in that it disregarded claimant's attendance record prior to September 15, 2023 in the misconduct analysis; and that it incorrectly concluded that claimant had received permission to arrive at work on that date between 10:00 a.m. and 11:00 a.m., despite having requested only one hour off in the attendance system more than two weeks prior. Employer's Written Argument at 2-3.

A discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of misconduct before the discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012. The last occurrence of an attendance policy violation is considered the reason for the discharge. *See generally* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division. Claimant was discharged because she was more than one hour late for work on September 15, 2023, allegedly without notifying the employer of when she would arrive. Though the employer asserted that claimant was late on numerous other occasions during her employment, the record shows that on each of those occasions, the employer chose either to warn claimant or impose no discipline at all, rather than discharge her. Further, the record shows that, had claimant been less than an hour late for work on September 15, 2023, the discharge would not have occurred when it did. Accordingly, the order under review correctly evaluated only the alleged

attendance violation on September 15, 2023 to determine whether claimant was discharged for misconduct because it, alone, was the proximate cause of her discharge.

The employer's remaining arguments rely on their assertion that claimant neither notified the employer that she would be arriving at work more than one hour late, nor received approval to do so, before she arrived at work that day. The employer argued that this showed that claimant was indifferent to the consequences of her actions, and that claimant knew or should have known this would violate their attendance policy, thereby constituting a wantonly negligent violation. Employer's Written Argument at 2-3. However, the employer failed to prove the factual assertion on which this, and their other arguments, were premised.

In a discharge case, the employer bears the burden of proof by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The record shows that on August 28, 2023, claimant requested time off in the employer's attendance system for September 15, 2023 from 8:30 a.m. to 9:30 a.m., and that this request remained unchanged in the system by claimant thereafter. This evidence tends to support the employer's assertion that notice was not given that claimant would likely arrive after 9:30 a.m. However, claimant testified that after she arrived late for work at 9:09 a.m. on September 14, 2023, she explained to her manager that she had been tardy because she mistakenly thought her child's medical appointment had been for 8:20 a.m. that day, rather than September 15, and only discovered the mistake after arriving at the medical office. Transcript at 21-22. Claimant further testified that she then requested and received permission from the manager to be late for work on September 15 for that reason, and that she was unaware that she had only requested one hour off in the attendance system more than two weeks previously. Transcript at 21, 23. Additionally, claimant testified that she informed her "team" on September 14, 2023 about the mistaken appointment and that they were "expecting me to be in between 10:00 a.m. and 11:00 a.m." on September 15. Transcript at 22. In response to claimant's testimony, claimant's manager testified she "[didn't] recall speaking with [claimant] the day before we discharged her" or speaking with her about the appointment at all. Transcript at 35.

Because the employer bears the burden of proof, claimant's detailed account of her conversation with the manager and her team is entitled to greater weight than the manager's lack of recollection as to whether the conversation transpired. The employer did not rebut that claimant informed her team that she might be in as late as 11:00 a.m. due to the appointment. The order under review therefore properly found that claimant had conversations with her team and the manager about how late she would arrive, and that claimant had likely unconsciously made a mistake by incorrectly entering the duration of the absence in the employer's system as one hour.<sup>1</sup> Order No. 24-UI-248959 at 2. Based on these findings, it is more likely than not that the employer knew of, and approved in advance, claimant's late arrival at work on September 15 between 10:00 a.m. and 11:00 a.m., despite claimant's older, mistaken request in the attendance system to arrive only one hour late. Accordingly, the order under review correctly concluded that the employer did not meet their burden to show that claimant failed to inform them of, and obtain approval for, her late arrival on September 15, 2023. Order No. 24-UI-248959 at 2. Claimant was therefore not discharged for misconduct.

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<sup>1</sup> Claimant arrived at work at 9:09 a.m. on September 14, 2023, and told the manager she learned of the scheduling mistake at the medical office prior to 8:20 a.m. It is reasonable to infer from this fact that the manager understood that claimant would likely arrive at work one to two hours later than 9:09 a.m. the following day, considering the additional time it would take to be seen by the medical provider.

EAB considered the entire hearing record. EAB agrees with Order No. 24-UI-248959's findings of fact, reasoning, and conclusion that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving unemployment insurance benefits based on the work separation. Pursuant to ORS 657.275(2), Order No. 24-UI-248959 is **adopted**.

**DECISION:** Order No. 24-UI-248959 is affirmed.

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

**DATE of Service:** April 15, 2024

**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**

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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.

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