

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0317**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 13, 2023, 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 July 16, 2023 (decision # 145634). Claimant filed a timely request for hearing. On November 1, 2023, ALJ Goodrich conducted a hearing, and on November 9, 2023, issued Order No. 23-UI-240868, affirming decision # 145634. On November 17, 2023, claimant filed an application for review with the Employment Appeals Board (EAB). On January 5, 2024, EAB issued EAB Decision 2023-EAB-1273, reversing Order No. 23-UI-240868 and remanding the matter for further development of the record. On January 31, 2024, ALJ Goodrich conducted a hearing at which the employer failed to appear, and on March 12, 2024, issued Order No. 24-UI-249937, affirming decision # 145634. On March 27, 2024, claimant filed an application for review with EAB.

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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 hearings in this matter when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

EAB considered the entire hearing record. EAB agrees with the portions of Order No. 24-UI-249937 concluding that the employer did not meet their burden to prove that claimant's conduct constituted misconduct as to claimant's use of FMLA sick leave to cover his January 3, 2023 absence while he was in jail or his use of ordinary sick leave to cover his February 7, 2023 absence during which he spent part of the day attending a court hearing. Pursuant to ORS 657.275(2), those portions of Order No. 24-UI-249937 are **adopted**. The remainder of this decision relates to whether claimant breached the employer's expectation that employees be honest and truthful in the workplace by falsely stating to his manager that he was absent on January 3, 2023, because he was in the hospital.

**FINDINGS OF FACT:** (1) The United States Postal Service employed claimant, most recently as a labor relations specialist for the Idaho-Montana-Oregon district, from August 1994 until July 21, 2023.

(2) The employer expected their employees to be honest and truthful in the workplace and to conduct themselves in a manner that reflected favorably on the employer. Claimant understood this expectation.

(3) In mid-December 2022, claimant was hospitalized for hypoglycemia. Claimant missed some work due to being in the hospital. When he returned to work, he told some coworkers about the hospitalization.

(4) On December 31, 2022, the police arrested claimant for alleged domestic violence in connection with an incident between claimant and his wife. The police charged claimant with a crime related to the incident and placed him in jail.

(5) Claimant spent the remainder of Saturday, December 31, 2022, in jail. Claimant also spent Sunday, January 1, 2023, and Monday, January 2, 2023, in jail. January 2, 2023, was an observed holiday and claimant was not required to work that day.

(6) Claimant was scheduled to work on Tuesday, January 3, 2023. However, claimant could not work that day because he was still in jail. Claimant told his brother to call one of claimant's coworkers to convey to the employer that he was okay, but he would not be going to work on January 3, 2023.

(7) On January 3, 2023, claimant's brother called the coworker and did as claimant instructed. That night, claimant was released from jail and called the coworker himself. In the conversation, claimant told the coworker, among other things, that he would be in the office the next day, and also stated, falsely, that he had missed work on January 3, 2023, because he was in the hospital.

(8) On January 4, 2023, claimant returned to work. On that day, claimant's manager believed that claimant told the manager and another of claimant's coworkers (who was a different coworker than the individual claimant called the previous night) that he was hospitalized on January 3, 2023, and could not call the employer that day because he did not have his telephone.

(9) Claimant did not believe that on January 4, 2023, he told the manager and coworker that he had been hospitalized on January 3, 2023.

(10) In early 2023, the employer's Office of Inspector General conducted an investigation into whether claimant had been dishonest about his absence from work on January 3, 2023, whether he had improperly used FMLA sick leave to cover his January 3, 2023 absence while he was in jail, and whether he had improperly used ordinary sick leave to cover an absence on February 7, 2023 in which he spent part of the day attending a court hearing for the December 31, 2022 arrest. In connection with the investigation, a special agent of the employer's Office of Inspector General conducted interviews of claimant, the manager, the coworker claimant called the night of January 3, 2023, and the other coworker.

(11) On July 21, 2023, the employer discharged claimant because they determined claimant had falsely stated to his manager on January 4, 2023, that he was absent on January 3, 2023 because he was in the

hospital. The employer also discharged claimant because it determined that claimant's use of FMLA sick leave to cover his January 3, 2023, absence and his use of ordinary sick leave to cover his February 7, 2023, absence violated the employer's policies governing those types of leave.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct connected with work within the meaning of ORS 657.176(2).

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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that that the employer did not meet their burden to prove that claimant's conduct constituted misconduct as to claimant's use of FMLA sick leave to cover his January 3, 2023, absence while he was in jail or his use of ordinary sick leave to cover his February 7, 2023 absence during which he spent part of the day attending a court hearing. Order No. 24-UI-249937 at 7-8. The record supports these conclusions, and as mentioned above, this decision adopts the order's findings and conclusions on those issues. The order under review also concluded that claimant falsely told work colleagues that he had been hospitalized on January 3, 2023, and therefore violated the employer's expectation to be honest and truthful, and that this violation was not an isolated instance of poor judgment, and therefore constituted misconduct. Order No. 24-UI-249937 at 8-9. The record does not support this conclusion.

As pertinent here, the employer discharged claimant for allegedly falsely telling his manager when he returned to work on January 4, 2023, that he was absent the day before because he had been hospitalized. Claimant was in jail on January 3, 2023, and for that reason was absent from work. Therefore, if he had told his manager that he was absent on January 3, 2023, because he was in the hospital, that would be a falsehood and would breach the employer's expectation that claimant be honest and truthful in the workplace.

The parties offered conflicting evidence regarding whether claimant told his manager that he had been in the hospital on January 3, 2023. The manager testified that when claimant returned to work on January 4, 2023, claimant told her and one of claimant's coworkers "a story" that he could not call in himself on January 3, 2023, because he "was taken away via ambulance" and hospitalized for several days including January 3, 2023. November 1, 2023, Transcript at 10-12, 50-51. Claimant, in contrast, testified repeatedly that he did not recall stating to the manager and coworker that he had been hospitalized on January 3, 2023. November 1, 2023, Transcript at 30-31, 32, 33, 56-57; January 31, 2024 Transcript at

38, 39, 77, 80. The coworker who the manager alleged also heard claimant's "story" did not testify at hearing.

Another source of evidence is the hearing testimony of the coworker claimant called the night of January 3, 2023. She testified that the night of January 3, 2023, claimant called her and told her, among other things, that he would be in the next day and, falsely, that he had missed work that day because he was in the hospital. January 31, 2024 Transcript at 9-10. The coworker testified that, the next day, claimant came to work, and she observed claimant and the manager go into the manager's office, with the door shut, and could remember overhearing claimant request FMLA leave. January 31, 2024 Transcript at 10. However, the coworker did not state in her testimony that she heard claimant say to the manager that he had been hospitalized, which was significant because that was something she was described to have overheard in an interview report prepared by a special agent of the employer's Office of Inspector General. January 31, 2024 Transcript at 11-12; *see also* Exhibit 1 at 105. The coworker testified that the report was "accurate" and "correct," but also that she did not have the report before her to review. January 31, 2024 Transcript at 12. The coworker also testified that she had no independent recollection of claimant mentioning hospitalization to the manager on January 4, 2023. January 31, 2024 Transcript at 12.

Another source of evidence are the interview reports of the manager, the coworker claimant called the night of January 3, 2023, and the other coworker. In the report of the manager, the manager is described as stating, consistent with her testimony at hearing, that claimant told her that "he was taken to the hospital on New Year's Eve and had been admitted for a few days of observation." Exhibit 1 at 107. In the report of the coworker claimant called the night of January 3, 2023, as alluded to above, the coworker is described as stating that, on January 4, 2023, she "overheard [claimant] tell [the manager] he had been hospitalized and had not had either of his phones" on January 3, 2023. Exhibit 1 at 105. In the report of the other coworker, the coworker is described as stating that claimant "returned to the office on January 4, 2023. [Claimant] advised he had been taken in an ambulance to the hospital for a medical emergency and did not have his phone to call the office." Exhibit 1 at 109.

Weighing the evidence, the manager's assertion that claimant told her a falsehood regarding being in the hospital on January 3, 2023 was balanced equally with claimant's failure to recall stating he had been hospitalized. The testimony of the coworker claimant called the night of January 3, 2023 established that claimant falsely told her during their January 3, 2023 evening phone conversation that he had been in the hospital that day,<sup>1</sup> but that is of limited relevance to whether claimant told a falsehood to the manager on January 4, 2023. The coworker also testified that she did not remember overhearing claimant mention hospitalization to the manager on January 4, 2023, which tends to support claimant's account.

As to the three interview reports, they are hearsay and so are entitled to less weight than sworn testimony.<sup>2</sup> The account in the manager's report supports her testimony but is of limited weight beyond showing that the manager gave a prior consistent statement. The account in the report of the coworker claimant called the night of January 3, 2023, is given less weight in light of her hearing testimony that

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<sup>1</sup> Claimant did not admit or rebut this coworker's testimony that he told her on January 3, 2023 that he had been in the hospital on January 3, 2023.

<sup>2</sup> Hearsay is admissible in unemployment insurance hearings. The status of a piece of evidence as hearsay goes to the weight of the piece of evidence, not to its admissibility.

she had no independent recollection of claimant mentioning hospitalization to the manager on January 4, 2023. The weight of the account attributed to the other coworker is diminished because she did not appear as a witness at hearing, and so her account was not subject to cross-examination. Moreover, at hearing, claimant sought to explain the accounts of the manager and other coworker by positing that the two were thinking of statements claimant made following his hospitalization in mid-December 2022 and then incorrectly asserted that he made those statements about January 3, 2023 when he returned to work on January 4, 2023. November 1, 2023 Transcript at 32-33, 56-57; January 31, 2024 Transcript at 44. Claimant's explanation is plausible.

Thus, in the final analysis, because of the presence of evidence of no more than equal weight on both sides, and given that the burden of proof is on the employer, the employer failed to establish that claimant told a falsehood to his manager on January 4, 2023 by stating that he had been hospitalized on January 3, 2023. Therefore, the employer did not meet their burden to show that claimant breached the employer's expectation to be honest and truthful in the workplace.

For these reasons, claimant was discharged, but not for misconduct connected with work within the meaning of ORS 657.176(2)(a). Claimant is not disqualified from receiving benefits based on the work separation.

**DECISION:** Order No. 24-UI-249937 is set aside, as outlined above.

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

**DATE of Service:** May 10, 2024

**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**  
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