

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0414**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 4, 2021, 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 30, 2021 (decision # 145832). On October 25, 2021, decision # 145832 became final without claimant having filed a request for hearing.

On July 14, 2023, claimant filed a late request for hearing. ALJ Scott considered claimant's request, and on January 18, 2024, issued Order No. 24-UI-245904, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by February 1, 2024. On January 21, 2024, claimant filed a timely response to the appellant questionnaire. On February 14, 2024, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 24-UI-245904 was vacated and that a hearing would be scheduled to determine whether claimant's late request for hearing should be allowed and, if so, the merits of decision # 145832.

On April 18, 2024, ALJ Strauch conducted a hearing, and on April 26, 2024, issued Order No. 24-UI-253012, allowing claimant's late request for hearing and modifying decision # 145832 by concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective May 31, 2020.<sup>1</sup> On April 30, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. EAB agrees with the portion of Order No. 24-UI-253012 allowing claimant's late request for hearing. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-253012 is **adopted**. The rest of this decision addresses the merits of decision # 145832.

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<sup>1</sup> Although Order No. 24-UI-253012 stated that it affirmed decision # 145832, it modified that decision by changing the effective date of the disqualification from May 30, 2021 to May 31, 2020. Order No. 24-UI-253012 at 7.

**FINDINGS OF FACT:** (1) NW Navigator, LLC employed claimant as a sales manager at their charter transportation business from January 2017 until June 5, 2020. Claimant was paid a weekly salary regardless of the number of hours worked.

(2) From March 2020 until May 25, 2020, claimant was furloughed due to the COVID-19 pandemic. On May 26, 2020, claimant resumed actively working for the employer.

(3) When the employer recalled claimant to work, claimant advised them that he needed to care for his daughter during the day, who was unable to attend school in person due pandemic closures. The employer allowed claimant to work from home and told him that the schedule “would be very flexible” and that he “could log in basically whenever [he] needed to or whenever they needed [him] to.” Transcript at 45. This included “mak[ing] up” hours missed during the traditional workday “in the evening and the early mornings if needed.” Transcript at 45. Claimant understood that he was expected to work approximately 40 hours per week. The employer did not provide claimant with a computer or phone.

(4) On May 26 and 27, 2020, claimant was unable to access the employer’s network through his personal computer due to a network password issue. The employer did not resolve claimant’s requests for assistance during this time. This limited or prevented claimant from accessing communications not sent to his personal email or phone. The employer was dissatisfied with claimant’s lack of productivity and communication during this time.

(5) On approximately May 28 or 29, 2020, the employer warned claimant about his performance and notified him that he had to “be logged in more often” and be “more available,” but did not set a specific schedule or number of work hours. Transcript at 49. At that time, claimant understood that the employer expected him “to just manage the spreadsheet of calling potential customers” and that another employee had been promoted to the position of sales manager and was responsible for ensuring that the sales team, including claimant, telephoned the customers on that spreadsheet. Transcript at 49.

(6) As of the week of May 26, 2020, the employer expected that claimant would both manage the potential customer spreadsheet and ensure that the customers on it, numbering more than one thousand, would be telephoned by the sales team and informed that the employer had reopened and was soliciting their business. The employer also expected claimant to make some of these calls personally, but claimant requested that the employer provide him with a phone with which to do this, and the employer told him that they would “look into it” but never provided a phone. Transcript at 51. Claimant understood the expectations regarding managing the spreadsheet and personally making calls to customers, though he considered the matter of the calls unsettled until the employer decided whether to provide him with a phone. He therefore sent emails to customers rather than calling them. Claimant did not understand that the employer expected him, rather than the newly promoted sales manager, to ensure that other sales team members called the customers on the spreadsheet.

(7) On the evening of June 2, 2020, the employer sent notice of a mandatory meeting to employees, including claimant, via company email and Microsoft Teams. The meeting was scheduled for 9:00 a.m. the following morning. Claimant did not log into the employer’s network between the time the meeting was scheduled and the time it was held, and did not attend the meeting because he was unaware it was taking place. Claimant did not otherwise communicate with anyone at the employer on June 3, 2020.

(8) At 4:55 p.m. on June 4, 2020, the employer sent claimant an email constituting a “last written warning” about his job performance, citing his lack of time logged into the network, lack of communication, failure to attend the June 3, 2020, meeting, failing to contact customers by phone, and failing to manage the sales team in contacting the customers on the spreadsheet. Transcript at 24. At 6:30 p.m., claimant replied to the email. The employer interpreted the response as “combative and wanting to argue.” Transcript at 32. Claimant and the employer then spoke on the phone, where misunderstandings between the employer and claimant regarding what had been expected of him came to light.

(9) On June 5, 2020, at 9:33 a.m., the employer emailed claimant “detailing exactly what is expected of him to keep his job.” Transcript at 32. The employer felt, based on their communications since the previous day, that claimant did not intend to improve his work performance and preferred to return to claiming unemployment benefits, as he did during the furlough. Later that afternoon, the employer held a meeting regarding claimant’s employment status at which claimant was not present, then emailed claimant that he was discharged. Claimant did not work for the employer after June 5, 2020.

**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 he was not performing his work to their expectations in several respects upon his return from furlough. The order under review concluded that this was a wantonly negligent violation of the employer’s expectations. Order No. 24-UI-253012 at 6. The record does not support this conclusion.

As a preliminary matter, the parties offered differing accounts of what was communicated to claimant regarding work expectations, and of what claimant communicated to them regarding his willingness to work. As the employer bears the burden of proof when a claimant has been discharged, and the accounts here are no more than equally balanced, the employer has not met their burden and therefore where the accounts conflict, the facts have been found in accordance with claimant’s testimony.

Upon claimant’s return from furlough, claimant understood the employer’s expectations to include that he work approximately 40 hours per week while logged into the employer’s network, that he maintain communications with the employer and the sales team, and that he work toward maintaining the customer spreadsheet and contacting the customers on the spreadsheet by phone. These are expectations that the employer had the right to expect of an employee. After being unable to connect to the

employer's network, including email, for the first two days after returning from furlough, and working non-standard hours thereafter, the employer warned claimant of their dissatisfaction with his performance that week. However, the employer did not establish at hearing specifically what expectations were clarified, added, or otherwise communicated to claimant as part of that May 28 or 29 warning. More likely than not, claimant's violations of the employer's expectations prior to this warning resulted from connectivity issues which the employer was slow to resolve, and a misunderstanding between the parties as to the flexibility of claimant's new work arrangement. The employer has not shown that claimant was indifferent to the consequences of his actions, or of the employer's interests, during this period.

The following week, claimant missed a June 3, 2020, mandatory meeting because he had not checked his work email early that morning or in the preceding evening. He did not communicate with his team or the employer that day for unexplained reasons. Additionally, the employer discovered that claimant had been emailing rather than calling prospective customers listed on the spreadsheet, which claimant did because the employer had not decided on his request for a phone with which to make the calls. The employer considered these actions or failures to act to be continued violations of their expectations.

However, on June 4, 2020, rather than discharging claimant, they issued claimant a "last written warning" by email at the end of that workday. Claimant responded by email a short time later, leading to one or more phone calls between the parties that evening. The record does not show specifically what claimant's response was to that warning, though the employer testified that claimant asked them to "let me stay home and collect unemployment," which claimant denied saying. *See* Transcript at 19, 33, 52. It can nonetheless be inferred that the nature of claimant's response, which the employer considered "combative and wanting to argue," was expressing disagreement with the allegations in the warning and asserting a lack of understanding of the employer's expectations. Transcript at 32. It can also be inferred that those explanations had not been fully detailed in the May 28 or 29 warning. These inferences are supported by the employer having sent an email to claimant the morning of June 5, 2020, "detailing exactly what is expected of him to keep his job." Transcript at 32. Therefore, claimant's actions during the period of June 1, 2020, through June 4, 2020 demonstrated, as in the previous week, a lack of understanding of the employer's expectations rather than an indifference to fulfilling them. Claimant may have been negligent in not ensuring that he fully understood the employer's expectations after the May 28 or 29 warning, but this did not rise to the level of *wanton* negligence, given his attempts to achieve the employer's goal of notifying customers they were open and soliciting their business.

The employer did not allege that after they detailed their expectations to claimant by email in the morning of June 5, 2020, claimant violated those or other expectations. Instead, it can be inferred that the employer changed their mind about warning claimant for their dissatisfaction with his performance from May 26, 2020, through June 4, 2020 and decided that afternoon to discharge him for his performance during that period. As previously discussed, the employer has not shown by a preponderance of the evidence that claimant violated the employer's expectations willfully or with *wanton* negligence during that period, and therefore they have not shown 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 based on the work separation.

**DECISION:** Order No. 24-UI-253012 is set aside, as outlined above.

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

**DATE of Service: June 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.

**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 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**

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 الاستئناف 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)

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.