

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0437**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 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 not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0003067178). The employer filed a timely request for hearing. On April 18, 2024, ALJ Christon conducted a hearing, and on April 26, 2024, issued Order No. 24-UI-253047, reversing decision # L0003067178 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective January 28, 2024. On May 9, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) St. Vincent De Paul Society of Lane County, Inc. employed claimant as shelter support staff from February 25, 2022, until January 30, 2024. Claimant worked overnight shifts at the employer's facility.

(2) The employer's policy forbids employees from sleeping while on the job. Claimant was aware of and understood this policy.

(3) In late October 2023, claimant took medical leave for a major surgery. Claimant returned to work around late December 2023. As part of her recovery from surgery, claimant was prescribed a medication that caused drowsiness and sometimes caused her to fall asleep during waking hours.

(4) On January 1, 2024, the employer's technology and security director observed, via video surveillance, that claimant was sleeping on the job. Claimant did not fall asleep intentionally. She fell asleep due to the medication she had been taking. The technology and security director reported this to the site supervisor, who reviewed prior video footage and found that claimant had fallen asleep for ten- to 20-minute periods "on various shifts" prior to that date. Transcript at 6-7. On January 2, 2024, because claimant had fallen asleep while on duty during several shifts, the employer issued claimant a written warning for violating the employer's policy forbidding sleeping on the job.

(5) Following the January 2, 2024, warning, claimant made an appointment with her doctor in order to switch to a different medication that would not cause her to fall asleep at work. Additionally, to keep herself awake, claimant set a reminder on her telephone to get up from her workstation and walk around every 30 minutes. On January 16, 2024, claimant visited with her doctor, who prescribed her a different medication. Claimant started the new medication on or around January 18, 2024.

(6) After beginning the new medication, claimant notified the site supervisor of the medication change, and that there would likely be a transition period of approximately 10 days between the effects of the different medications.

(7) On January 23, 2024, the site supervisor reported to the employer's human resources department that he had again observed claimant sleeping on the job on January 22, 2024. The human resources director reviewed video footage and determined that claimant had been asleep on the job on four separate occasions during the previous week.

(8) On January 26, 2024, claimant worked her final shift for the employer. On January 30, 2024, the employer discharged claimant for having slept on the job during the previous week.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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 for having allegedly fallen asleep during her shift on four separate occasions during the week of January 15, 2024. The order under review concluded that this constituted misconduct because claimant "was conscious that her conduct . . . would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee," and was not an isolated instance of poor judgment because of claimant's "repeated failures to remain awake on duty[.]" Order No. 24-UI-253047 at 4. The record does not support this conclusion.

As a preliminary matter, it should be noted that the parties offered conflicting accounts of whether claimant was asleep on the job at any time after the January 2, 2024, warning was issued. The employer's witness testified that she personally reviewed the video footage purporting to show claimant asleep on four separate occasions during the week in question. Transcript at 44. By contrast, claimant denied having ever fallen asleep on the job after the January 2, 2024, warning was issued. Transcript at 40. It is not necessary to resolve this conflict, however, because even if the employer's account is taken

as more accurate, these facts do not show that claimant's conduct amounted to a willful or wantonly negligent violation of the employer's standards of behavior.

It is undisputed in the record that claimant did not intentionally fall asleep on the job at any point but that, rather, her falling asleep was the result of medication she had been recently prescribed after major surgery. Therefore, claimant's conduct was not willful. For claimant's conduct to be considered wantonly negligent, the record must show not only that claimant was aware that her conduct would probably result in a violation of the employer's standards of behavior, but that she was indifferent to the consequences of her conduct. The record shows that claimant was aware of the possibility of falling asleep on the job because of her medication, and that doing so would violate the employer's policy. However, it also shows that claimant took specific steps to avoid falling asleep at work. First, claimant set a recurring reminder for herself to get up and walk around to try to keep herself awake. Additionally, claimant made an appointment with her doctor to change to a different medication, and changed her medication shortly after that appointment. These efforts clearly show that claimant was *not* indifferent to the consequences of her actions, but instead that she actively sought to avoid further violations of the employer's policy. To the extent that she nevertheless did violate the employer's policy despite taking those steps, those violations amounted to, at worst, ordinary negligence, which is not misconduct.

For the above 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-253047 is set aside, as outlined above.

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

**DATE of Service:** June 21, 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.

**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.

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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

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## 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 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**  
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