

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0652**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 4, 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 # L0003456451). The employer filed a timely request for hearing. On August 26, 2024, ALJ Wardlow conducted a hearing and issued Order No. 24-UI-263750, affirming decision # L0003456451. On September 12, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Winco Holdings, Inc. employed claimant as a grocery store clerk from June 13, 2023, until January 14, 2024.

(2) The employer had a point-based attendance policy. Being tardy to a shift accrued an employee two points, and an employee who accumulated more than 9 points in a 3-month period could be discharged for attendance violations. Claimant understood this policy.

(3) Over the course of claimant's employment with the employer, claimant was separating from her husband. The separation turned claimant's life "completely upside-down." Audio Record at 28:29. The separation began shortly before claimant's date of hire and was the reason claimant got a job, as she had previously been a stay-at-home mother. Claimant did not drive. Because of the separation, there were occasions when her husband refused to drive her to work, causing her to have to find alternate transportation and be unexpectedly late for work. Similarly, there were occasions when claimant's husband would not want to watch their children when claimant was scheduled to work, which caused claimant to miss or be late for work. The separation caused claimant to lose her apartment and live in a motel for a period of time, which also hindered claimant's ability to get to work on time. Claimant made her manager aware of the transportation difficulties caused by her separation.

(4) In October, November, and December 2023, claimant was late for work, and received written warnings for her accumulation of attendance points.

(5) On January 3, 2024, claimant was again late for work. The January 3, 2024, tardiness increased claimant's attendance point total to 18 points in a three-month period. The employer determined that claimant's point accumulation was excessive and warranted discharge.

(6) On January 14, 2024, the employer discharged claimant because, due to her January 3, 2024, tardiness, she had accrued 18 attendance points in a three-month period.

**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 reason the employer discharged claimant when they did was because claimant's tardiness that occurred on January 3, 2024, caused her to accrue 18 attendance points in a three-month period. The employer did not meet their burden to show that the claimant's tardiness that occurred on January 3, 2024, was a willful or wantonly negligent violation. The record shows that during claimant's time working for the employer, her ongoing separation from her husband caused her to sometimes be late for work because her husband either refused to drive her to work or refused to watch their children; or because claimant's ability to get to work on time was hindered by the fact that she lost her apartment and lived in a motel for a time. More likely than not, the reason claimant was late to work on January 3, 2024, was because of one or more of these difficulties caused by the separation. Therefore, claimant was not purposefully tardy on January 3, 2024, and so did not willfully violate the attendance policy on that date.

The record also does not show that claimant was late with wanton negligence on January 3, 2024. The transportation difficulties owing, for example, to claimant's husband's refusal to give claimant a ride may have been foreseeable, and therefore claimant potentially could have planned around them by making diligent efforts to take public transportation to work that arrived before the start of her shift, or to begin walking to work with a buffer of time before the shift began. While a failure to develop such a workaround may have been the result of ordinary negligence, the record does not show that it rose to the level of wanton negligence. For an individual's conduct to amount to wanton negligence, the record must show that they acted with indifference to the consequences of their actions. Here, given that claimant was proactive in making her manager aware of the transportation difficulties caused by her separation, the employer did not show that claimant acted with indifference to the consequences of her

actions. As a result, claimant's tardiness on January 3, 2024, was not a wantonly negligent violation of the employer's attendance policy.

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

**DECISION:** Order No. 24-UI-263750 is affirmed.

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

**DATE of Service:** September 27, 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 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**

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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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