

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0818**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 25, 2024, 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 19, 2024 (decision # L0004718591).<sup>1</sup> Claimant filed a timely request for hearing. On November 19, 2024, ALJ Fraser conducted a hearing and issued Order No. 24-UI-273825, reversing decision # L0004718591 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On November 23, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of documents the employer submitted to the Office of Administrative Hearings (OAH) prior to the hearing but were not considered at that time due to a delay in processing. The evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

**WRITTEN ARGUMENT:** EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Top Hydraulics, Inc. employed claimant as a technician from December 18, 2013, until May 28, 2024.

<sup>1</sup> Decision # L0004718591 stated that claimant was denied benefits from May 24, 2024, through May 24, 2025. However, decision # L0004718591 should have stated that claimant was disqualified from receiving benefits beginning Sunday, May 19, 2024, and until he earned four times his weekly benefit amount. See ORS 657.176.

(2) The employer expected that their employees would not be tardy or absent from work without prior approval except in exigent circumstances, and that notice would be given before 8:00 a.m. or as soon as possible of an unexpected absence or instance of tardiness. Claimant understood this expectation.

(3) The employer believed that claimant had been unexpectedly late or absent from work without timely giving notice on several occasions prior to May 2024. On April 17, 2024, claimant was unexpectedly absent from work but did not give the employer notice until 8:55 a.m. On that occasion, the employer warned claimant that his failure to timely give notice “happens all too often.” EAB Exhibit 1 at 2.

(4) On May 28, 2024, claimant was absent from work due to illness. At approximately 7:12 a.m., claimant’s girlfriend emailed claimant’s supervisor to notify him of the absence. The supervisor did not receive the email and did not have notice of the absence until communicating with claimant at approximately 11:00 a.m.

(5) Later on May 28, 2024, the employer discharged claimant because they believed that he failed to timely report that he would be absent. Claimant was discharged rather than receiving lesser discipline because of a pattern of tardiness and absences in which he failed to timely notify the employer.

**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). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because they believed he failed to timely report his unexpected absence on May 28, 2024. Though the employer asserted that this was part of a pattern of excessive absenteeism and failure to timely give notice, the 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. Therefore, the subject of the analysis is the May 28, 2024, absence.

To the extent the employer discharged claimant due to his unexpected absence from work, the absence itself did not constitute misconduct. Claimant testified that he was absent on May 28, 2024, because he was “very ill.” Audio Record at 20:53. The employer did not rebut this testimony. Therefore, under OAR 471-030-0038(3)(b), claimant’s absence itself was not misconduct.

However, the employer's belief that claimant failed to timely report that he would be absent from work was also a proximate cause of the discharge. Claimant initially testified that he was "violently sick all night long" and "wasn't able to call" to notify the employer prior to 8:00 a.m. Audio Record at 22:35. Claimant later testified that his girlfriend had emailed claimant's supervisor at approximately 7:12 a.m. that claimant would be absent due to illness. Audio Record at 25:15. In contrast, the employer's witness testified that the employer never received any email or other notice of the absence and that they first had contact with claimant at approximately 11:00 a.m. when claimant's supervisor inquired why he was not at work. Audio Record at 12:10. The witness also testified that during the 11:00 a.m. conversation, claimant said that he "was sick and. . . sent a message that didn't send earlier," but that the employer "had heard that before from him" on other occasions, implying that they did not believe him. Audio Record at 12:28.

Despite claimant's history of claiming that he had sent notice to the employer that he would be absent or tardy that they never received, evidence of whether an email was sent by claimant's girlfriend to the employer at approximately 7:12 a.m. on May 28, 2024, is no more than equally balanced. Further, the employer's account that they failed to receive claimant's email is not necessarily inconsistent with claimant's account that it was sent, as it is possible that it was sent but not delivered for reasons unknown to either party. The employer has therefore not met their burden of showing by a preponderance of the evidence that claimant willfully or with wanton negligence failed to give notice of his absence before 8:00 a.m. Accordingly, misconduct has not been shown with respect to the final incident.

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-273825 is affirmed.

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

**DATE of Service:** December 20, 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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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**

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 محكمة 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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