

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0062

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 22, 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 September 8, 2024 (decision # L0006659383).¹ Claimant filed a timely request for hearing. On January 10, 2025, ALJ Adamson conducted a hearing, and on January 15, 2025 issued Order No. 25-UI-279955, reversing decision # L0006659383 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 25, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's argument in reaching this decision.

FINDINGS OF FACT: (1) Husted Enterprises Inc. employed claimant as a night janitor at their bowling alley from approximately 1978 until September 11, 2024.

(2) The employer expected that their employees would not report for work when the employer told them not to do so. Claimant understood this expectation.

¹ Decision # L0006659383 stated that claimant was denied benefits from September 29, 2024 to September 27, 2025. However, because decision # L0006659383 asserted that the work separation occurred on September 11, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, September 8, 2024 and until he earned four times his weekly benefit amount. *See* ORS 657.176.

(3) Claimant was scheduled to work beginning at 12:30 a.m. on September 11, 2024. On the afternoon of September 10, 2024, one of the employer's owners left a voicemail on claimant's mobile phone stating that his services were not needed that week because the bowling alley bathrooms were being remodeled overnight, and he should therefore not come into work that night.

(4) Claimant did not listen to the voicemail but saw a missed call from the business. Claimant called the business and spoke with an employee who told claimant that the owners were unavailable to speak with him, but that he knew why the employer had called. The employee told claimant about the bathroom remodeling and said that it was "up to [claimant] if [he] wanted to come in and work or not work." Transcript at 21. Claimant responded that he intended to work.

(5) The employee spoke with the owners about the phone call, then the other owner called claimant's phone, but claimant did not answer. That owner then sent claimant a text informing him "that he was not to come in for his shift." Transcript at 7. Claimant went to sleep after speaking with the employee at work. He woke up shortly before his shift had been scheduled to begin. Claimant was not aware of the text message or second missed call and reported to work without looking at his phone. Upon arriving at work, claimant used the phone to call his wife, but did not know how to access text messages and did not see the message. Claimant had always relied on his wife to take care of corresponding by text for him, including with the owners, due to his lack of proficiency in this area. Claimant worked his originally-scheduled shift despite the remodeling affecting a portion of the building.

(6) On September 11, 2024, after claimant had finished working and left the bowling alley, the owners arrived and discovered that claimant had worked overnight despite their directions not to do so. They immediately notified claimant by phone that he was discharged for this reason. Claimant did not work for the employer thereafter.

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 because he worked a shift that the employer had not wanted him to work. The employer reasonably expected that their employees would not work at times that the employer did not want them to work, and claimant understood this expectation. The record shows that the employer did not want claimant to work his regularly scheduled shift on September 11, 2024, and claimant worked that shift. However, the parties gave conflicting accounts regarding whether claimant knew or should have known that the employer did not want him to work that night.

The employer's witness, one of the owners, testified that the other owner reported having left a voicemail for claimant telling him not to come to work. Transcript at 6. She also testified that when claimant called back, that owner was present as the employee spoke with him, and both the employee and that owner told her that they told claimant not to come to work, but claimant's reply was that claimant "was coming in anyway" because he "needed the hours." Transcript at 6. She further testified that she also called claimant, with no answer, and texted him not to come to work. Transcript at 7. Additionally, she testified that surveillance video showed claimant "scrolling on his phone for probably two minutes before he clocked in," and that she had engaged in text exchanges with claimant "30 plus times" during his employment. Transcript at 12, 20.

In contrast, claimant testified that in the afternoon of September 10, 2024, he saw the employer's missed call but was unaware that the owner had left a voicemail. Transcript at 21-22. In response, claimant called the business and spoke to an employee who stated that the owners were unavailable, but that the purpose of the call had been to tell claimant about the remodeling and that "it was up to [claimant] if [he] wanted to come in and work or not work." Transcript at 21. Claimant responded that he would come to work, then went to sleep until it was time to get ready for work. Claimant testified that he was unaware that the other owner had called or texted him while he was sleeping, explaining that he did not know how to access text messaging on his phone and always relied on his wife to perform this function. Transcript at 24. Claimant's wife corroborated his testimony regarding his lack of texting proficiency and testified that she, rather than claimant, sent and received all prior texts with the employer. Transcript at 33. Claimant testified that upon arriving at work he called his wife, which he believed explained the actions depicted on the surveillance video. Transcript at 27.

Claimant's first-hand account of the call with the employee is entitled to greater weight than the hearsay accounts of what the employee and owner said occurred during the call, and the facts have been found accordingly. Further, claimant's first-hand testimony regarding what he saw and did, specifically that he did not see the text message or missed call and was placing a call rather than reviewing text messages in the surveillance video, is not outweighed by the employer's circumstantial evidence suggesting that claimant may have seen the text message. Therefore, the employer failed to show that, more likely than not, claimant knew or had reason to know that the employer did not want him to work on September 11, 2024. Accordingly, the employer has not proven by a preponderance of the evidence that claimant willfully or with wanton negligence violated a reasonable expectation by working that shift, and therefore did not show 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. 25-UI-279955 is affirmed.

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

DATE of Service: February 26, 2025

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 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.

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