

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0301

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 24, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0009318087). The employer filed a timely request for hearing. On April 25, 2025, ALJ Bender conducted a hearing, and on April 30, 2025, issued Order No. 25-UI-291032, affirming decision # L0009318087. On May 20, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kendall Dealership Holdings, LLC employed claimant as a car wash attendant from October 16, 2023, through November 21, 2024.

(2) The employer expected employees to work their regularly scheduled shifts, unless they either used accrued paid time off or were approved for protected leave such as leave covered by Paid Leave Oregon. Claimant was generally aware of this expectation.

(3) On June 7, 2024, July 15, 2024, and September 26, 2024, the employer issued claimant written warnings regarding his attendance because he had been absent from work at various points between May and September 2024. The September 26, 2024, warning indicated that further attendance violations could lead to discharge.

(4) On November 17 and 18, 2024, claimant called out of work because he was sick. Later on November 18, 2024, claimant received a call from his ex-wife informing him that their daughter had been sexually assaulted. Shortly thereafter, claimant drove to the Portland, Oregon area to help support and comfort his daughter. Claimant was regularly scheduled off of work on November 19 and 20, 2024, and returned to his home on November 20, 2024.

(5) On November 21, 2024, claimant was home but still had to attend to matters involving his daughter's assault, and realized that it would not be possible to work while on the phone with his daughter or ex-wife for much of the day. Claimant therefore sent a text message to the employer's general manager

stating that he would be absent from work that day for personal reasons and he “understood if he no longer can be employed by” the employer. Transcript at 5. Claimant did not give a further explanation for his absence. Claimant also did not state that he was resigning, and he wished to continue working for the employer. Nevertheless, the general manager responded to claimant by stating that he took claimant’s message as his “resignation.” Transcript at 5. Claimant did not work for the employer thereafter.

(6) If claimant had simply informed the general manager that he would be absent on November 21, 2024, without stating that he “understood if he no longer can be employed by” the employer, the employer would not have allowed claimant to continue working for them for an additional period of time unless claimant had applied for protected leave to cover his absence that day, which he had not done.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

At hearing, the parties appeared to dispute the nature of the work separation, as the employer asserted that the general manager understood claimant’s text message on November 21, 2024, to be his resignation, whereas claimant asserted that he had been discharged. Transcript at 5, 10. Despite the general manager’s statement to claimant that the manager took claimant’s message as his resignation, the record shows that the employer discharged claimant.

In the text message in question, claimant stated that he “understood if he no longer can be employed by” the employer. In light of the final written warning issued to claimant on September 26, 2024, which indicated that further attendance violations could lead to his discharge, it can be reasonably inferred that claimant was merely acknowledging the fact that the employer might consider the absence to be grounds for discharge. Additionally, claimant did not state that he was quitting, and he wished to continue working for the employer. Therefore, the records shows, by a preponderance of the evidence, that claimant did not intend his text message to be a resignation, and that he was willing to continue working for the employer for an additional period of time.

By contrast, the record does not show that the employer would have permitted claimant to continue working for them for an additional period of time. Even if claimant had not stated that he “understood if he no longer can be employed by” the employer, the employer would have discharged claimant for his absence that day unless he had applied for protected leave to cover the absence, which he did not. Therefore, the separation was a discharge which occurred on November 21, 2024.

Discharge. 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). "[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 on November 21, 2024, after claimant called out from work that day. As a preliminary matter, while the employer did not explicitly state why they discharged claimant (as they maintained that he had resigned), it can be reasonably inferred that they discharged claimant because of his absence that day. The record shows that the discharge occurred shortly after claimant notified the employer of his absence that day, after a series of previous absences and three separate warnings related to his attendance. The record also shows that even if claimant had not made the statement that led the employer to conclude that he had resigned, the employer still would have discharged claimant unless he had applied for protected leave for the absence. Given the timing of these events and the lack of evidence regarding any other reasons for discharge, the employer most likely discharged claimant because of his attendance. Further, as claimant's most recent absence was the same day as his discharge, the record supports the inference that this absence was the final incident which led to the employer's decision to discharge him. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). *See generally* June 27, 2005, Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge).

Claimant's absence on November 21, 2024, was not misconduct. On that day, claimant called out from work because he was busy attending to the matter of his daughter's recent sexual assault, and would need to be on the phone to speak to her and his ex-wife to offer support. This absence violated the employer's expectation that employees work their regularly scheduled shifts, unless they either used accrued paid time off or were approved for protected leave. While that expectation is generally reasonable, it would not be reasonable in these circumstances to expect an employee to work as scheduled when the employee was needed by their child who had recently experienced a traumatic event such as sexual assault. Therefore, even though claimant's absence violated the employer's expectation, it was not a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. As such, 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-291032 is affirmed.

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

DATE of Service: June 18, 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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