

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1079**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83229). The employer filed a timely request for hearing. On October 26, 2018, ALJ Snyder conducted a hearing, at which claimant failed to appear, and on November 2, 2018 issued Order No. 18-UI-119121, affirming the Department's decision. On November 16, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Canfield Place Retirement Community employed claimant as a chef from June 20, 2014 to July 31, 2018.

(2) The employer had a policy that prohibited workplace violence, including "destroying property, or throwing objects in a manner reasonably perceived to be threatening." Exhibit 1. On May 28, 2015, the employer gave claimant a copy of the policy handbook including the workplace violence policy and acknowledged he was responsible for reading it.

(3) Prior to July 26, 2018, claimant repeatedly threw objects while at work out of frustration or anger, including a paper towel dispenser, a bucket of fruit, and other plates, breaking the objects. Other employees were in proximity to claimant when he threw the objects and felt fear. No one reported claimant's conduct to the employer because they were scared.

(4) On July 26, 2018, claimant became very frustrated while working and threw a plate on the floor in anger, breaking the plate. The servers, some of whom were less than two feet away from claimant when he threw the plate, felt scared because of claimant's behavior. On July 27, 2018, an employee reported claimant's conduct to the general manager.

(5) On July 30, 2018, the general manager asked claimant about the July 26<sup>th</sup> plate throwing incident. Claimant admitted he had done it but denied previously having thrown objects at work. The general manager told claimant that throwing plates was unacceptable and could not happen again.

(6) On July 31, 2018, the general manager interviewed other employees and asked them about claimant's behavior. Multiple employees reported that claimant had repeatedly thrown objects in anger prior to July 26, 2018; employees communicated to the general manager that there was an "atmosphere of fear" because of the way claimant acted when he was frustrated or angry. Exhibit 1. On July 31, 2018, the employer discharged claimant for repeatedly throwing objects at work.

**CONCLUSIONS AND REASONS:** We disagree with the Department and the ALJ and conclude that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was not for misconduct, reasoning that claimant's conduct was an isolated instance of poor judgment. Order No. 18-UI-119121 at 3. The ALJ stated, "Claimant had never previously been warned about similar behavior in the past, and the kitchen staff had never previously indicated that Claimant exhibited similar behavior in the past. The employer did not provide evidence of any previous incidents similar to Claimant throwing a plate on July 26, 2018, and the Employer relied on the kitchen staff's indication that the [*sic*] July 26, 2018 was not the first occasion when it decided to discharge claimant. \* \* \* Claimant's conduct [] was isolated because Claimant had never previously thrown something in the kitchen in a manner that caused the staff to feel that Claimant's conduct needed to be reported to the general manager." *Id.* We disagree with the ALJ that claimant's July 26, 2018 conduct was excusable as an isolated instance of poor judgment.

Although claimant had never been warned for throwing or breaking objects prior to July 26, 2018, he knew or should have known, whether based upon the employer's policy that expressly prohibited throwing objects at work or as a matter of common sense, that throwing and breaking the employer's property, particularly while angry or frustrated and in the vicinity of other employees, would likely violate the employer's reasonable expectations of him. By choosing to express his frustration on July 26<sup>th</sup> by violently throwing a plate to the floor and breaking it, while in the vicinity of other employees, claimant willfully violated the employer's policy and common sense expectations the employer had the right to hold of any employee.

Claimant's conduct was not excusable as an isolated instance of poor judgment because it was not isolated conduct. An "isolated" incident is one that is a single or infrequent occurrence of poor judgment

rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The ALJ wrote that the employer “did not provide evidence of any previous incidents similar to” the final incident. We disagree. Although claimant had never been warned for throwing objects before, multiple employees told the employer that claimant had in fact thrown a paper towel dispenser, bucket of fruit, and other plates on prior occasions, breaking them. The ALJ wrote that the employer “relied on the kitchen staff’s indication” that the final incident was not the only occasion upon which claimant had thrown items at work. The ALJ is correct. However, while the employer provided hearsay evidence from multiple employees stating that claimant repeatedly threw items in the kitchen, the only evidence suggesting that claimant might not have done so was the employer’s hearsay evidence that he had denied doing so. Multiple employees reported claimant’s conduct, told the employer they had been too scared to report the conduct, and reports that claimant’s behavior created an atmosphere of fear in the workplace, strongly suggests that claimant acted as alleged despite his denial to the employer that he had done so. It is more likely than not that claimant repeatedly and willfully violated the employer’s workplace violence policy and expectations by throwing objects out of anger and frustration while at work, breaking them. Each time claimant threw an object in anger or frustration while at work amounted to a separate willful exercise of poor judgment; claimant’s conduct therefore was not an isolated instance of poor judgment.

Nor was claimant’s conduct the result of a good faith error. Claimant did not attend the hearing, and did not provide any evidence suggesting either that he did not consider what he did a violation of the employer’s policy or common sense expectations that he not throw and break the employer’s property or cause employees to fear his behavior, nor did claimant suggest that he sincerely and reasonable thought the employer would condone his behavior. Accordingly, claimant’s conduct cannot be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Order No. 18-UI-119121 is set aside, as outlined above.

J. S. Cromwell and S. Alba;  
D. P. Hettle, not participating.

**DATE of Service: December 19, 2018**

**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](http://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 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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 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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