

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1095**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143702). Claimant filed a timely request for hearing. On November 8, 2018, ALJ Murdock conducted a hearing, and on November 15, 2018 issued Order No. 18-UI-119790, affirming the Department's decision. On November 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) O'Reilly Auto Parts employed claimant as a store manager, last from March 9, 2017 to August 24, 2018. One of the essential functions of claimant's job was to be available to supervise the work performed by all "team members" assigned to his store. Exhibit 1 at 50.

(2) The employer expected claimant to work his entire scheduled shift and refrain from leaving work early unless he obtained prior approval from his district manager. Claimant was aware of and understood the employer's expectations.

(3) When claimant was hired as a store manager in March 2017, the employer made him a salaried employee and reportedly based his salary on working 95 hours over a two-week pay period. When claimant believed he would end up working more than 95 hours over his pay period, he often left work early to compensate. Sometimes, he notified his district manager and obtained the expected approval to leave early, but often times he did not. Prior to August 1, 2018, when the district manager became aware that claimant had left work early without his approval, he verbally warned claimant about the employer's policy but did not impose any formal discipline.

(4) On or about August 1, 2018, the district manager received a report from a "team member" at claimant's store that claimant was "continually leaving early without DM [district manager] approval." Exhibit 1 at 34. On August 2, 2018, the district manager received a similar report from a loss prevention employee that he had evidence that claimant was leaving his store early without obtaining the required approval. Exhibit 1 at 34.

(5) On August 3, 2018, claimant met with and was given a formal written warning for various policy violations, including his attendance policy violations, by his regional manager. At that meeting, claimant was told that he was expected to follow the employer's attendance expectations and that his failure to do so in the future could result in further disciplinary action, up to and including termination of employment. At that meeting, the regional manager told claimant, "If I want you to work 7 days a week, you will work seven days a week." Audio Record ~ 26:30 to 27:00.

(6) On August 10, 2018, claimant was aware that the district manager was on an employer-sponsored float trip for management employees and believed that he was probably unreachable by phone. Although claimant's shift that day lasted until 5:00 p.m., he left his store at 2:00 p.m. Claimant decided to leave early because he was intending to work extra hours the following day, a Saturday, to allow a team member to take some time off. Claimant declined to participate in the float trip because he knew he would be working on that Saturday for the team member.

(7) After the district manager returned from the float trip, he learned that claimant may have left his store before the end of his scheduled shift on August 10, 2018. When he asked claimant if he had left early that day, claimant denied that he had. The district manager then conducted an investigation that included interviewing claimant's team members, and learned that claimant had in fact left his store early that day and that as he departed, told team members, "Shawn [the district manager] is on the float trip, and I am leaving early. No one needs to bother him." Exhibit 1 at 33.

(8) On August 24, 2018, the employer discharged claimant, in part, for violating its attendance expectations on August 10, 2018 by leaving his store before the end of his scheduled shift without manager approval.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant 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 the 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 the 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 the employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to work his entire scheduled shifts, unless he had obtained prior approval from his district manager to leave early. At hearing, claimant acknowledged that he was aware of those expectations. Audio Record ~ 17:00 to 19:00. Claimant violated them on August 10, 2018 when he left his store three hours early without obtaining the required approval. At hearing, claimant acknowledged that he knew he was violating the attendance expectations that day but explained that he believed the district manager "was unreachable" because of the float trip and "took it upon

myself...to leave a little bit early” because he was going to work the next day for his team member and knew it would take him over 95 hours for the pay period. Audio Record ~ 28:00 to 32:00. However, claimant had decided earlier in the week to not participate in the float trip because he planned to work that Saturday and, viewed objectively, could have requested permission from his district manager to leave early on August 10, 2018 before the district manager left for the trip. And his statement to team members as he was leaving that, “Shawn [the district manager] is on the float trip, and I am leaving early. No one needs to bother him” showed he was conscious of the fact he was violating employer policy. Claimant’s conduct in violating the employer’s attendance expectations that day demonstrated conscious indifference to the potential consequences of his absence and inability to supervise for the employer and constituted a wantonly negligent, if not willful, violation of its attendance expectations.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant’s wantonly negligent conduct on August 10 was not an isolated instance. Claimant’s multiple instances of leaving work early without prior approval on or around August 2, 2018, for which he was formally warned on August 3, 2018, also demonstrated conscious indifference to the employer’s interests in maintaining a supervisory presence at his store, particularly after receiving multiple prior verbal warnings against such conduct. Accordingly, claimant’s conduct on August 10 does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant’s conduct be excused as the result of a good faith error in his understanding of the employer’s attendance expectations. Claimant did not assert, and the record does not show, that he sincerely believed, or had a factual basis for believing, that the employer would condone his early departure on August 10 without obtaining prior district manager approval, especially given claimant’s denial that he did so when first questioned by the district manager shortly thereafter.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

**DECISION:** Order No. 18-UI-119790 is affirmed.

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

**DATE of Service: December 21, 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 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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