

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0011**

*Affirmed*  
(*Afirmada*)  
*No Disqualification*  
(*No Descalificación*)

**PROCEDURAL HISTORY:** On November 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154212). Claimant filed a timely request for hearing. December 10, 2018, ALJ S. Lee conducted an interpreted hearing, and on December 14, 2018, issued Order No. 18-UI-121279, concluding the employer discharged claimant, but not for misconduct. On December 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Willamette View Inc. employed claimant as a janitor from June 12, 2017 to September 14, 2018. Claimant worked for the employer at its residential campus for the elderly.

(2) The employer had a security policy that provided, in part, “In general, employees should not remain on Willamette View premises unless scheduled for work.” Transcript at 6. The employer allowed employees access to the gym and swimming pool area of the campus but expected employees to avoid being anywhere else on campus, outside of work hours, unless authorized by management. The employer’s security policy was contained in its handbook, a copy of which claimant acknowledged receiving on or about June 12, 2017.

(3) On a workday shortly before April 14, 2018, claimant was observed performing some recycling duties after he had clocked out for the day. Claimant worked after clocking out because he had been busy with cleaning duties and unable to perform his recycling duties during his shift and had forgotten to perform the latter. On April 14, 2018, the employer gave claimant a verbal coaching admonishing him against working while off the clock and remaining on the employer’s campus when not clocked in.

(4) On September 5, 2018, the employer gave claimant a final warning for a number of policy violations including occasionally working off the clock after hours in the evening. After clocking out later that day, claimant went to his “janitor’s closet” where he kept his personal belongings and waited there for approximately an hour for his bus to arrive. Transcript at 27-28. The employer’s security guard saw

claimant in that janitor's closet after claimant's shift had ended and claimant told him that he was there waiting for the bus.

(5) On September 12, 2018, the security guard made a "late report" to his supervisor that on September 7, 2018, he had found claimant in a janitor's closet after his shift had ended and that he was "in the dark crouching behind his janitor's cart." Transcript at 21-23. However, claimant had neither seen nor interacted with the security guard since September 5, 2018 and on September 7, 2018, had not been present anywhere on the employer's campus after his shift. Transcript at 17, 27. The security supervisor reported the security guard's observation to claimant's supervisor.

(6) On September 13, 2018, claimant's supervisor conducted an investigation concerning the report she had received by interviewing the security guard and checking claimant's time records for September 7, 2018, which showed that he had clocked out at 4:36 p.m. Claimant was not interviewed during the investigation. The employer eventually concluded that on September 7, 2018, claimant had violated the employer's security policy by being on the employer's campus, outside of work hours, without authorization by management. On September 14, 2018, the employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant, 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. 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. 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).

As a preliminary matter, claimant's first-hand testimony about the facts of September 7, 2018 that led to his discharge on September 14, 2018 differed from the testimony of the employer's witnesses. The employer's witnesses based their testimony on the hearsay reports of the security guard who did not testify at the hearing. In the absence of evidence demonstrating that claimant was not a credible witness, we agree with the ALJ that his first hand testimony was at least as credible as the employer's hearsay. Order No. 18-UI-121279 at 4. Where the evidence is no more than equally balanced, the party with the burden of persuasion, in this case the employer, has failed to satisfy its evidentiary burden. Therefore, we based our findings on claimant's evidence and found that on September 7, 2018 claimant had not been present anywhere on the employer's campus after his work hours.

The employer discharged claimant for violating its policy against being present on its campus after work hours without authorization on September 7, 2018. Transcript at 5-6. However, claimant did not work in the building in which he was reportedly seen that day, had not been anywhere on the employer's campus

after hours and had not seen the security guard since September 5, 2018. Accordingly, the employer failed to meet its burden to establish by a preponderance of the evidence that claimant engaged in the conduct for which he was discharged.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 18-UI-121279 is affirmed. *La Orden de la Audiencia 18-UI-121279 queda confirmada.*

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

**DATE of Service: February 1, 2019**

**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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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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

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## 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**

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**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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