

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0051**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120640). Claimant filed a timely request for hearing. On January 4, 2019, ALJ R. Frank conducted a hearing, and on January 7, 2019 issued Order No. 19-UI-122211, affirming the Department's decision. On January 12, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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. To the extent claimant's argument alleged a due process violation by arguing that the ALJ did not give him a full and fair opportunity to present his case, when the ALJ finished asking claimant questions, and before he ended the hearing, he asked claimant if there was anything else claimant wanted to add to his testimony and claimant replied "No." Audio recording at ~ 29:50-30:00. Since claimant chose not to add testimony when given the opportunity, it does not appear that he was deprived of his right to a full and fair hearing.

**FINDINGS OF FACT:** (1) Seven Feathers Hotel & Casino Resort Corporation employed claimant as a warehouse person 2 from April 21, 2014 to November 2, 2018.

(2) The employer had policies that prohibited employees from being rude or discourteous to coworkers, engaging in poor coworker relations, failing to get along with other team members, showing discourtesy or disrespect to coworkers, and failing to contribute to good morale. The employer gave claimant a copy of its policies and required him to read them. Claimant understood the employer's policies.

(3) Prior to April 2018, claimant spoke negatively about some coworkers to other coworkers. From April 28, 2018 to May 4, 2018, the employer suspended claimant for reasons including that behavior. Claimant admitted to the employer that he had talked about coworkers to other coworkers, and understood the employer considered his behavior bullying.

(4) On May 5, 2018, claimant returned to work from suspension. The employment manager discussed appropriate workplace behavior with claimant at that time and reinstated him with the warning that he was not to openly vent his feelings or talk about coworkers to other coworkers.

(5) Between May and October 2018, claimant repeatedly made negative remarks about at least one employee to the employee and to others. Claimant's supervisor stopped scheduling claimant to work with that employee because of how claimant spoke to and about him.

(6) On October 26, 2018, when the employee was leaving the workplace, claimant commented to a coworker that he was glad the employee was leaving. When the employee returned to the workplace, claimant made a negative comment to a coworker questioning why the employee had returned.

(7) The employee and another coworker complained about claimant's behavior to the employer. The employee reported that he had tried to ignore claimant's behavior toward him but that claimant had created a hostile environment for him by treating him hatefully. The complaining coworker confirmed that claimant had made negative comments about the employee.

(8) The employer interviewed claimant about his behavior. Claimant denied making the specific statements the employee and coworker had alleged, but agreed that he had made some comments to a coworker about the employee's departure and return to work on that occasion.

(9) On November 2, 2018, the employer discharged claimant because his comments on October 26<sup>th</sup> violated its policies.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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.

The employer had the right to expect claimant to treat his coworkers with courtesy and respect while at work. Based on those policies and the April-May 2018 suspension, the employer also had the right to expect claimant to refrain from speaking negatively about his coworkers to others. Although claimant disputed the specific statements the employer alleged he made about his coworker on October 26<sup>th</sup>, the preponderance of the evidence in the record, including hearsay reports of claimant's conduct and claimant's confirmatory remarks to the employer that he had, in fact, made negative comments about the employee's departure and return in the final incident, suggests that claimant violated the employer's reasonable expectation in the final incident. Claimant knew or should have known that making any

comments about one employee to another, regardless whether the comments included foul language, would probably result in a violation of the standards of behavior the employer had the right to expect of him. Claimant's violation was therefore wantonly negligent.

Claimant's conduct is not excusable as an isolated instance of poor judgment or a good faith error 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 had regularly made negative comments about the same employee to the employee and others, to the extent that claimant's supervisor had to stop scheduling claimant and the employee to work together. He had also been making negative comments about other coworkers behind their backs prior to May 2018. Claimant's conduct was not a single or infrequent occurrence, and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct in the final instance was also not excusable as a good faith error. He had been warned and suspended in April-May 2018, and on May 5, 2018 he was specifically counseled not to talk about coworkers to other coworkers. The record does not show that claimant sincerely believed that he had not talked about the employee behind his back on October 26<sup>th</sup>. In fact, he admitted to the employer that he had made some comments about the employee. Nor did claimant sincerely believe or have a reasonable basis for believing that the employer would condone talking about the employee to another coworker on that occasion, especially given his receipt of the prior warning and suspension. Claimant did not act in good faith on October 26<sup>th</sup>, and his conduct on that date is not excusable as a good faith error.

For those reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Order No. 19-UI-122211 is affirmed.

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

**DATE of Service: February 13, 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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# 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

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