

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0338**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150528). Claimant filed a timely request for hearing. On March 21, 2019, ALJ Snyder conducted a hearing, and on March 26, 2019, issued Order No. 19-UI-127084, affirming the Department's decision. On April 2, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but 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 considered the entire record, but did not consider claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Central Oregon Pizza Inc. employed claimant as a delivery driver from June 2018 to October 28, 2018.

(2) The employer expected claimant to report for work as scheduled or notify the employer if he would be absent. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Claimant last worked for the employer on September 27, 2018, when he injured his knee. Claimant filed a worker's compensation claim for his injury and was not released to return to work for a period thereafter.

(4) On or about October 22, 2018, the employer received a note from claimant's treating physician that indicated that claimant was released to modified light duty work only. When claimant spoke to his manager that day about the physician's release, the manager told claimant that he would give him two hours to work on October 26, 2018. Claimant contacted his worker's compensation attorney who told him that by law he needed to be put back on a full time schedule consistent with his modified light duty release. After claimant gave that information to his manager, the manager texted claimant that he "needed" to contact "worker's compensation" or someone else "to get advice." Transcript at 11. Thereafter, the manager never got back to claimant regarding the issue and when claimant attempted to

contact the manager by text message on October 23 to clarify his work schedule, his phone indicated that the messages he was sending to the manager “were not being sent and they were blocked.” Transcript at 13. Claimant sent the same messages by email to the employer and never received a reply. When he tried to contact the manager at the workplace by phone three times each day, on October 23, October 24, and October 25, as soon as he identified himself, he “was hung up on.” Transcript at 14. Although the manager apparently had put claimant on the schedule for a few hours on October 27, 2018, he never notified claimant of that work assignment.

(5) Claimant was never able to speak with his manager and did not report for work on October 26 and October 27, 2018.

(6) On October 28, 2018, the employer discharged claimant for failing to report for work on October 26 and October 27, 2018 or notify the employer that he would be absent. The employer never notified claimant that he was discharged or why he was discharged at that time. Claimant later found out from the employer’s worker’s compensation carrier that claimant’s manager had scribbled on a note dated November 20, 2018 that he “had offered a couple of hours on the 26<sup>th</sup> and [claimant] did not show up.” Transcript at 15.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of standards of behavior the employer has the right to expect of the 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably violate a standard of behavior the employer had the right to expect him. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, only claimant testified regarding the content of claimant’s conversation with his manager on or about October 22, 2018 regarding if and when claimant should report for work on October 26, 2018. However, the employer provided hearsay evidence that claimant was told on October 25, 2018 that he was to report for work on October 26 and October 27, 2018 without specifying what hours he was expected to work. Transcript at 6. When asked by the ALJ how claimant was notified that he had been put on the schedule for October 26 and October 27, 2018, the employer’s witness responded that claimant “communicated with the manager via his cell phone. A text, e-mail, I suppose. I suppose.” Transcript at 5, 8. Absent a basis for concluding that claimant was not a credible witness, we gave his firsthand testimony under oath more weight than the employer’s hearsay evidence, and have therefore found facts in accordance with his testimony.

Order No. 19-UI-127084 concluded the employer discharged claimant for misconduct based on the following reasoning:

Claimant was discharged by the Employer for failing to report for two shifts, and failing to notify the employer that he would not be reporting for work... Claimant knew that he was expected to report for work on October 26, 2018, and he did not. Claimant was wantonly negligent in failing to report for work, because Claimant knew or should have known that not reporting for work as scheduled would probably result in a violation of the Employer's expectation.

Order No. 19-UI-127084 at 3. We disagree and conclude that the record contains insufficient evidence that claimant's failure to report for work as scheduled on either October 26 or October 27, 2018 was either willful or the result of conscious indifference to the employer's interests or expectations, i.e. wantonly negligent.

The evidence shows that claimant was not notified that he was expected to work on October 27, 2018. In addition, claimant attempted to clarify his work status for October 26, 2018 after the manager told claimant that the manager "needed" to contact the worker's compensation or someone else "to get advice" about the type of shifts it needed to offer claimant. However, the manager never contacted claimant to clarify his work status and the record fails to show that claimant was ever notified about what hours he was expected to work on October 26, 2018. Thereafter, claimant discovered that his text messages to the manager, which we infer requested clarification, were being blocked. In addition, claimant's emails to the employer with the same messages were never replied to and it was undisputed that claimant was hung up on when he identified himself in attempting to contact the manager by phone at least three times each day on October 23, 24 and 25, 2018 to clarify his work status. Accordingly, on this record, the evidence was insufficient for the employer to meet its burden to establish that claimant was consciously indifferent to the employer's work expectations, as defined under OAR 471-030-0038(1)(c).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.<sup>1</sup>

**DECISION:** Order No. 19-UI-127084 is set aside, as outlined above.

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

**DATE of Service:** May 7, 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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<sup>1</sup> This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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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