

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0351**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On February 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 103351). The employer filed a timely request for hearing. On March 26, 2019, ALJ Schmidt conducted a hearing, and on April 2, 2019 issued Order 19-UI-127464, affirming the Department's decision. On April 9, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Shari's Management Inc. employed claimant as an assistant general manager at its restaurant in Lebanon, Oregon from March 2, 2018 until February 1, 2019.

(2) Lebanon was a small community. The employer was concerned about the impact that actions taken by one of its restaurant managers could have on the restaurant's customer relations, business reputation and revenues.

(3) The employer expected claimant not to authorize the closing of the restaurant on any day before 2:00 a.m., which was the closing time posted on the front doors of the restaurant and on the employer's website. Claimant understood the employer's expectations.

(4) On January 9, 2019, the general manager of the restaurant held a meeting at which he went over the closing time for the restaurant and closing procedures. Claimant was in attendance at that meeting. On January 18, 2019, while discussing a written warning that was issued to claimant, the general manager again advised claimant of the 2:00 a.m. closing time for the restaurant.

(5) On January 31, 2019, claimant decided to close the restaurant early due to slow business. At around 12:30 a.m., claimant had the kitchen close down, after which time the restaurant was unable to serve food. Sometime after, claimant notified the remaining customers in the dining room that the restaurant was closing and escorted those customers from the restaurant. At around 1:15 a.m., claimant locked the restaurant doors and closed the restaurant to customers. Sometime between 1:15 a.m. and 2:00 a.m., a

customer who wanted to purchase food arrived at the restaurant and found it closed. The customer complained to the employer.

(6) On February 1, 2019, the employer discharged claimant for closing the restaurant early on January 31, 2019.

**CONCLUSIONS AND REASONS:** 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 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 employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although Order No. 19-UI-127464 concluded that claimant's behavior in closing the restaurant early on January 31 was at least a wantonly negligent violation of the employer's standards, it further concluded that it was not disqualifying misconduct because it was excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The Order first found that claimant's behavior on January 31 was excused because the employer failed to show that claimant's closing of the restaurant on that date was other than a single instance of wanton negligence. Order No. 19-UI-127464 at 3. The basis for this finding was that the employer "did not provide specific information about any other prior incidents [of willful or wanton violations of the employer's standards]." Order No. 19-UI-127464 at 3. The Order further found that claimant's behavior on January 31 did not exceed mere poor judgment, and met the final requirement to be excused as an isolated instance of poor judgment, because "there was no evidence that her [claimant's] actions [on January 31] broke the law, created an irreparable breach of trust, or made a continued employment relationship impossible." Order No. 19-UI-127464 at 3. However, on the facts in the record, Order 19-UI-127464 was incorrect in concluding that claimant's behavior was excused as an isolated instance of poor judgment.

At the outset, Order No. 19-UI-127464 correctly concluded that claimant's behavior in closing the restaurant early on January 31 was at least a wantonly negligent violation of the employer's standards. Claimant was informed of the restaurant's expected closing time on January 9 and again on January 18. The preponderance of the evidence in the record was that the employer had not delegated to claimant the authority or discretion to close the restaurant early. Audio at ~16:40, ~19:30. Under these circumstances, that claimant decided on her own initiative to close the restaurant early showed that she was indifferent to the employer's standards. Claimant's behavior was at least wantonly negligent.

The remaining issue is whether claimant's wantonly negligent behavior should be excused from constituting misconduct as an isolated instance of poor judgment. As was pointed out in Order No. 19-

UI-127464, behavior may not be excused even if it was “isolated “ if, among other things, it exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D); *see* Order No. 19-UI-127464 at 3. Despite the conclusion in Order No. 19-UI-127464, there was substantial evidence in the record showing that a reasonable employer likely would have concluded that claimant’s behavior on January 31 exceeded mere poor judgment.

The employer was very clear that one of the reasons it decided to discharge claimant was because, in addition merely to closing the restaurant early, she “rushed out” and “ran off” customers that were in the restaurant in order to achieve that closing. Audio at ~17:10, ~31:50. On these facts, a reasonable employer would infer that claimant was willing to take actions that inconvenienced customers to accomplish her own ends. The employer’s concern that in a small community, such as Lebanon, actions like claimant’s that disrupted and inconvenienced customers would spread throughout the community, give the employer a “black eye,” and have a negative impact on customer relations was not unreasonable. Audio at ~23:55. On these facts, a reasonable employer would conclude that claimant’s behavior surrounding the early closure of the restaurant on January 31 caused an irreparable breach of trust in the employment relationship and made a continued employment relationship impossible. Because claimant’s behavior exceeded mere poor judgment, it may not be excused as an isolated instance of poor judgment.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from unemployment insurance benefits.

**DECISION:** Order No. 19-UI-127464 is set aside, as outlined above.

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

**DATE of Service:** May 10, 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

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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 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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