

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0368**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93500). Claimant filed a timely request for hearing. On March 20, 2019, ALJ Monroe conducted a hearing, and on March 28, 2019, issued Order No. 19-UI-127253, concluding that claimant voluntarily left work without good cause. On April 11, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision, and claimant's argument to the extent it was based on the hearing record.

**FINDINGS OF FACT:** (1) Capitol Chevrolet Cadillac Inc. employed claimant from August 6, 2017 until January 31, 2019 as a salesperson. Claimant worked in the employer's store in Dallas, Oregon.

(2) The employer expected claimant to report on time for his appointments with customers. The employer also expected claimant to work his scheduled shifts and notify a manager if he was unable to complete a scheduled shift.

(3) On January 29, 2019, claimant attended a work meeting with the employer's owner who told claimant and other employees, "I've got an open door. If you got a problem I'm always available, just walk in my office or give me a call." Transcript at 28. Before January 31, 2019, claimant had not missed any work appointments or left work without permission.

(4) On January 30, 2019, claimant met for the fifth time with a "tough customer" regarding a potential vehicle sale. Transcript at 30. Claimant met with the customer for three hours on his day off work and

discussed a discounted price for a vehicle, but had to get his sales manager's approval for the discount before he finalized the sale.

(5) On January 31, 2019, the employer scheduled claimant to work from 9:00 a.m. to 6:00 p.m. at the Dallas location. Claimant reported to work in Dallas. He did not check his email when he arrived at work because he was working on the sale from the prior day. He did not see an email telling him he had an appointment with a customer at the employer's Salem location at 10:00 a.m., and missed the appointment.

(6) The morning of January 31, 2019, claimant presented the price he had negotiated with the "tough customer" the prior day to his sales manager for approval, and the manager did not approve the price. Claimant texted the customer that the price was "firm." Transcript at 30. The customer told claimant he would no longer do business with him. Claimant told the manager what the customer said, and the manager replied, "Okay." Transcript 32. Claimant was "really upset . . . [t]hat his only answer was okay," and at 11:00 a.m., left for lunch to his home, which was only about a three-minute drive from work. Transcript at 32. Claimant did not tell the manager that he quit.

(7) At 11:03 a.m., just as claimant arrived at his home, a sales manager from the Salem location called claimant about the appointment he had missed in Salem. Claimant asked that manager if they could reschedule the appointment for the Dallas location, because the Dallas location had more stock within the customer's price range.

(8) The employer's general sales manager called claimant's sales manager in Dallas and told him to give claimant a written warning for missing the appointment in Salem. Transcript at 11. The employer did not plan to discharge claimant for missing the appointment.

(9) The sales manager from the Salem location called claimant back at about 11:12 a.m. and told claimant, "Hey, you know what, we'll just take care of [the appointment] over here. Don't worry about it." Transcript at 28. At about 11:20 a.m., a coworker called claimant and told him, "[T]hey're writing you up for missing that appointment and they're talking about maybe terminating you . . ." Transcript at 28. The coworker called claimant again and told him, "Yeah, it looks like . . . they're gonna terminate you." Transcript at 28.

(10) Claimant remembered the owner's "open door" policy and called him to discuss what had occurred at work that morning and, when the owner did not answer, claimant left him a message asking that he return claimant's call. The owner did not call claimant back. Claimant spoke to an office staff person, and told her that the owner did not return his call. She told claimant that claimant "need[ed] to talk to . . . [the owner's] son." Transcript at 29. Claimant called the owner's son and left a message with him. The son did not call claimant back that day.

(11) On January 31, 2019, the sales manager at the Dallas store sent an email to human resources stating that claimant had left work and did not return. Human resources asked the sales manager if claimant was "upset" and if claimant quit. Transcript at 20. The sales manager responded, "yes," and sent human resources a "separation summary." Transcript at 20.

(12) Sometime between 12:30 and 1:00 p.m., claimant tried to log on to his work time log and customer data log from his home computer, and found that the employer had canceled his passwords. Transcript at 32.

(13) On the morning of Friday, February 1, 2019, claimant called the sales manager at the Dallas location and asked him if he “was terminated,” and the sales manager responded, “No, you left the job.” Transcript at 10. Claimant responded, “We’ll see about that.” Transcript at 10. Claimant did not return to work.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

**The Work Separation.** It is first necessary to determine if claimant quit or was discharged. OAR 471-030-0038(3) (December 23, 2018) provides the standard to determine the type of work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Order No. 19-UI-127253 concluded that claimant quit work, reasoning that the employer did not notify claimant that he was discharged, and removed claimant’s online time log authorization “only after claimant became upset, left the workplace for two hours . . . and failed to return to work.”<sup>1</sup> However, the record shows that the employer, and not claimant, severed the employment relationship.

Claimant’s sales manager told human resources that claimant was upset and quit, and the employer removed claimant’s online access to his work accounts before 1:00 p.m. on January 31, 2019. Claimant did not tell his manager that he quit. To the contrary, claimant pursued continued employment just a few minutes after he left work by trying to reschedule the appointment he had missed in the Salem store. He continued to pursue his employment by contacting the owner, the office staff, and the owner’s son when he heard from a coworker that the employer was going to discharge him. Claimant showed further efforts to continue his employment by trying to clock in and out and access his customer database from his home computer. Claimant also contacted the Dallas store sales manager early on February 1, 2019, and expressed his disagreement that he had quit. The record shows the employer ended the employment relationship, and told claimant he could not return to work when the sales manager told claimant that he had “left the job.”

The weight of the evidence shows that claimant was willing to continue working for the employer, but that the employer did not allow him to do so. The work separation was a discharge.

**Discharge.** 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) 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

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<sup>1</sup> Order No. 19-UI-127253 at 3.

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 their conduct and knew or should have known that their conduct would probably violate a standard of behavior the employer had the right to expect him. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

After concluding that claimant voluntarily left work, Order No. 19-UI-127253 found that claimant was disqualified from receiving benefits, concluding that claimant's quit was without good cause because "he mistakenly believed he had been discharged [and] . . . any such belief would not be reasonable under the circumstances . . ."<sup>2</sup> However, because the employer discharged claimant, the employer had the burden to show by a preponderance of the evidence that it discharged claimant for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record shows that the employer discharged claimant on January 31 because he left work and did not return to work for approximately two hours. The employer had a right to expect claimant to work his scheduled shift and notify a superior if he was unable to complete a shift. However, claimant was uncertain about his employment status and was attempting to communicate with the owner and the owner's son to discuss what had occurred that morning. The record fails to show that, under the circumstances, claimant knew or should have known he was expected to return to work and was indifferent to the consequences of his actions. The record therefore fails to establish that claimant violated the employer's expectation that he return to work willfully or with wanton negligence, and that his failure to return to work was not a good faith error.

Even assuming claimant's failure to return to work was wantonly negligent, it would be an isolated instance of poor judgment, and not misconduct. An "isolated instance of poor judgment" is behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The record does not show that claimant had engaged in prior acts of willful or wantonly negligent behavior. There was evidence that claimant had made "unprofessional" comments at work, but claimant rebutted that testimony, and the evidence regarding whether those incidents were willful or wantonly negligent is at best equally balanced. Transcript at 12, 40. Claimant failed to attend an appointment with a customer the morning of January 31. However, that incident was not willful or wantonly negligent because claimant did not consciously fail to attend the appointment. He did not know about the appointment because he did not read the email the morning of January 31 because he was focused on completing a sale with the "tough customer" from the prior day.

Thus, for claimant's failure to return to work to be disqualifying, it must have exceeded "mere poor judgment" by creating an irreparable breach of trust in the employment relationship or otherwise making a continued relationship impossible. OAR 471-030-0038(1)(d)(D). Under the aforementioned circumstances, leaving work for two hours without explicit permission did not, when viewed objectively, create an irreparable breach of trust in the employment relationship or otherwise make a continued relationship impossible. The employer therefore discharged claimant for, at worst, an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation from the employer.

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<sup>2</sup> Order No. 19-UI-127253 at 3.

**DECISION:** Order No. 19-UI -127253 is set aside, as outlined above.

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

**DATE of Service:** May 16, 2019

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately one week for the Department to complete.

**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 Tý 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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