

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0394**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 142557). The employer filed a timely request for hearing. On April 10, 2019, ALJ Frank conducted a hearing, and on April 18 2019 issued Order No. 19-UI-128442, affirming the Department's decision. On April 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Freyes Lumber employed claimant in its mill performing utility work from February 20, 2019 until February 25, 2019. Claimant worked day shifts, from 7:00 a.m. until 3:30 p.m. During his shift, the employer allowed claimant to take two ten-minute rest breaks and one meal break.

(2) The employer expected claimant to remain on the workplace premises during work hours unless he was authorized to leave the premises or was on a break. Claimant understood the employer's expectations as a matter of common sense.

(3) On February 25, 2019, at approximately 8:00 a.m., claimant was being trained on feeding veneer into the drier by loading veneer trays. The process of feeding veneer was stalled because the machine kept getting jammed. A graveyard supervisor was leaving the mill and observed claimant at work. Claimant and the supervisor did not know each other. The supervisor went up to claimant and told him that he "will need to find another gear" for feeding the veneer trays and he should "pick up the pace." Audio at ~10:39. Claimant was offended that he was being given instructions by someone he did not know and who was so abrupt with him. Claimant responded to the supervisor's comments about his work speed by saying it was "impossible" to increase it. Audio at ~10:52. Claimant was referring to the fact that because the machine kept getting jammed, he could not load the trays any faster. The supervisor's approach and comments upset claimant.

(4) Immediately after responding to the supervisor, claimant walked out of his work area. Claimant left the mill and went to his vehicle intending to take a short break from work because he was upset about

the interaction that had just concluded with the supervisor. It was not the scheduled time for claimant to have a break. Claimant did not tell the supervisor what he was going to do. Claimant drove away from the mill, and then returned between 5 and 15 minutes later. Claimant went to his work area in the mill, but shortly thereafter the supervisor and a member of management asked claimant to come with them to the lunchroom.

(5) During the conversation in the lunchroom, the member of management asked the supervisor if claimant had “walked away.” Audio at ~27:17. The supervisor responded that claimant had. The member of management then looked at claimant and stated, “Well, you’re done here then.” Audio at ~27:25. The management member then told claimant to pick up his check. Claimant assumed he was discharged, left the workplace and did not return.

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

The employer contended that claimant quit work by driving away from the workplace premises for a short period on February 25, 2019 before returning to the workplace. Audio at ~8:04. Claimant’s position was that he was discharged on February 25, 2019 because he walked away after an earlier interaction with his supervisor. Audio at ~23:40, ~30:40. Given this disagreement, the first issue this matter presents is the nature of the 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) (December 23, 2018). 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).

Neither party testified that claimant stated he was quitting before he briefly left the workplace on February 25 or explained what he was intending to do by driving away. Claimant returned to the workplace very shortly after he left, and the employer’s witness agreed that claimant appeared to be willing to resume his work duties upon his return. Audio at ~16:40. Under the circumstances, claimant’s intention as to the work relationship was ambiguous when he drove away from the workplace and his behavior after he returned strongly suggested that he had not intended to quit work. The first objective manifestation of a clear intention to sever the work relationship occurred when the member of management told claimant in the lunchroom after he returned to the workplace that he was “done,” which claimant reasonably interpreted as indicating that he was discharged. Because the employer was the first party to express unequivocally an unwillingness to continue the work relationship, claimant’s work separation was a discharge on February 25, 2019.

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) 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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant may have been upset at the supervisor's approach and treatment of him on February 25, he knew or should have known as a matter of common sense that the employer did not allow employees to leave without permission during the workday unless on an authorized break. By driving away from the workplace without permission, before the scheduled time for his break, claimant violated the employer's expectations with at least wanton negligence.

Claimant's wantonly negligent violation of the employer's expectations on February 25 may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if, among other things, it 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). However, even if the behavior at issue was single or infrequent, it may not be considered an isolated instance of poor judgment if it exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). Here, although the employer's witness described the employer's process for correcting behavior in violation of the employer's standards, he did not refer to any incidents during claimant's five days of employment in which claimant may have willfully or with wanton negligence violated the employer's expectations other than on February 25. Audio at ~12:00. The evidence in the record is insufficient to show that claimant's behavior on February 25 was more than a single or infrequent wantonly negligent violation of the employer's standards. Claimant's behavior was therefore isolated.

The second issue to be considered in determining whether claimant's conduct may be excused is whether claimant's behavior on February 25 exceeded mere poor judgment. Claimant left the workplace without authorization while not on a designated break. However, claimant was off premises only for a very few minutes before returning to the workplace. In further mitigation of claimant's behavior, although he was upset with the supervisor, claimant did not challenge the supervisor's authority, did not yell at or insult him, and did not engage in a tirade or an outburst in response to the supervisor's perceived treatment of him. The evidence in the record does not show, more likely than not, that any employer would have objectively concluded based on claimant's February 25 behavior that it could not trust claimant to comply with its standards in the future or that claimant's behavior made a continued employment relationship impossible. Claimant's February 25 behavior therefore did not exceed mere poor judgment. Because claimant's wantonly negligent behavior on February 25 was isolated and did not exceed mere poor judgment, it was an isolated instance of poor judgment, and isolated instances of poor judgment are not misconduct.

The employer discharged claimant for behavior that did not constitute misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-128442 is affirmed.

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

**DATE of Service: May 24, 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 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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