

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0402**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 133100). Claimant filed a timely request for hearing. On March 28, 2019, ALJ Seideman conducted a hearing, and on April 4, 2019 issued Order No. 19-UI-127610, affirming the Department's decision. On April 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained new information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information at the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing, and claimant's argument only to the extent it was based on such information.

**FINDINGS OF FACT:** (1) Chinook Winds Casino employed claimant as a table games dealer from August 17, 2017 to February 13, 2019.

(2) The employer expected employees to return from their breaks on time but generally allowed them a 4-minute grace period. Prior to September 15, 2018, however, the employer eliminated the grace period for table games dealers, who took a 20-minute break after each hour worked.

(3) Claimant understood that as a table game dealer, she was expected to return from her breaks on time, with no grace period. However, claimant occasionally failed to return from her break on time, which she attributed to the fact that she suffered from attention deficit hyperactivity disorder (ADHD), and therefore had "trouble judging the passage of time," which affected her "time management and timeliness." Transcript at 17.

(4) On September 15, 2018, claimant unknowingly returned from one of her breaks late. On September 21, 2018, claimant returned from two of her breaks less than one minute late, after which the employer coached her about returning from breaks on time. On September 22, 2018, claimant returned from one of her breaks less than one minute late, after which the employer gave her a verbal warning.

(5) Claimant did not return late from a break again until October 11, 2018, when she unknowingly returned from one of her breaks 20 minutes late. Claimant did not return late from a break again until November 23, 2018, when returned from two of her breaks less than one minute late, after which the employer gave her another verbal warning. On November 25, 2018, claimant returned from one of her breaks less than one minute late, after which the employer gave her written warning.

(6) Claimant did not return late from a break again until February 1, 2019, when she returned from one of her breaks 3 minutes late. On February 5, 2019, the employer gave claimant a final written warning and one-day suspension.

(7) From September 15, 2018 through February 5, 2019, claimant repeatedly informed her direct supervisors, her manager, and the employer's human resources director that she had difficulty returning from her breaks on time due to her ADHD. Claimant made "multiple efforts" to prevent further tardiness, including requesting that the employer to provide her with a timer to assist her in returning from breaks on time. Exhibit 1. The employer did not provide claimant with a timer.

(8) On February 6, 2019, claimant unknowingly returned from one of her breaks 6 seconds late, for which the employer discharged her.

**CONCLUSIONS AND REASONS:** The employer failed to establish 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and absences due to mental disabilities are not misconduct. OAR 471-030-0038(3)(b) (January 11, 2018).

Order No. 19-UI-127610 found that from September 15, 2018 to February 6, 2019, claimant returned from 10 breaks 3 to 20 minutes late, and that although claimant "contends that she has ADHD and can't keep track of time," she "hasn't tried to get a timer" or "asked others to help her."<sup>1</sup> Based on those

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<sup>1</sup> Order No. 19-UI-127610 at 2.

findings, Order No. 19-UI-127610 concluded that claimant's failure to adhere to the employer's break policy was wantonly negligent, and could not be considered an isolated instance of poor judgment because there were similar instances and she had received several warnings.<sup>2</sup>

At hearing, however, claimant testified that for 8 of the 10 breaks at issue, she returned less than one minute late, and that she returned from the break on February 6, 2019 only 6 seconds late, which was corroborated by the testimony of her former supervisor.<sup>3</sup> Although the employer's director of human resources testified that he was "reading off a spreadsheet here that they use in the pit" showing that claimant returned from all 10 breaks at least three minutes late, the spreadsheet was not offered into evidence.<sup>4</sup> Absent a basis for concluding that claimant was not a credible witness, her first hand testimony regarding the breaks, corroborated by the testimony of her former supervisor, outweighs the employer's hearsay evidence to the contrary.

The record therefore shows that for 8 of the 10 breaks at issue, claimant returned less than one minute late, and that she returned from her break on February 6<sup>th</sup> only 6 seconds late. And contrary to Order No. 19-UI-127610's findings that claimant "hasn't tried to get a timer" or "asked others to help her," the record shows that claimant repeatedly informed employer that she had difficulty returning from her breaks on time due to her ADHD, and made multiple efforts to prevent further tardiness, including asking the employer to provide her with a timer, which the employer failed to do.

In determining whether the employer discharged claimant for misconduct, Order No. 19-UI-127610 first should have focused on the final incident resulting in the discharge, claimant returning 6 seconds late from one of her breaks on February 6<sup>th</sup>. To the extent claimant returned late due to her ADHD, she was absent from work for 6 seconds due to a mental disability which, under OAR 471-030-0038(3)(b), is not misconduct. Alternatively, the record fails to show claimant knew she was returning late, that she consciously engaged in conduct on February 6<sup>th</sup> that she knew or should have known would probably result in her returning late, or that she was indifferent to the consequences of her actions that day. Absent such a showing, the record fails to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Order No. 19-UI-127610 is set aside, as outlined above.

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

**DATE of Service:** May 28, 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,

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<sup>2</sup> Order No. 19-UI-127610 at 3.

<sup>3</sup> Transcript at 15, 17-18, 28.

<sup>4</sup> Transcript at 8-9.

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 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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