

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0475**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 121419). The employer filed a timely request for hearing. On April 30, 2019, ALJ Seideman conducted a hearing, and on May 6, 2019 issued Order No. 19-UI-129403, concluding that claimant's discharge was for misconduct. On May 17, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** Order No. 19-UI-129403 stated that Exhibits 1 through 21 were admitted into the record. However, there was no Exhibit 20 or 21 among the documents actually marked and admitted. It appears that the employer's intended Exhibits 20 and 21, two written statements from two employees, were not received by the ALJ before the hearing and, due to logistical constraints, could not be delivered to the ALJ on the day of the hearing even if faxed or sent electronically. Audio Record at 1:50 to 6:58; Transcript at 13-14. As a result, those statements were not received into the hearing record. However, both statements were read into the record during the hearing. Transcript at 13-14. A third statement from a witness, dated February 19, 2019, was received before the hearing and was marked and admitted into the record as Exhibit 19. EAB considered the entire hearing record, including Exhibits 1 through 19, when reaching this decision.

**FINDINGS OF FACT:** (1) Lakeview Senior Living employed claimant as a cook from September 27, 2017 until February 18, 2019.

(2) The employer expected that claimant would not take any food, including food intended for employee meals, from the kitchen unless he had permission to do so. Claimant was not aware of this prohibition until February 10, 2019.

(3) During his employment, the employer issued several warnings to claimant. None of those warnings was for removing food from the kitchen without permission.

(4) On February 5, 2019, the culinary director posted a memorandum stating that employees were prohibited from removing food from the kitchen without permission. Claimant did not see the memorandum or know about it.

(5) On February 10, 2019, claimant made a tuna sandwich and intended to take it home with him because he was not able to eat an employee meal at work. Two coworkers observed claimant preparing the sandwich. The coworkers told claimant that if he took the sandwich home they would report him to the culinary director and he would be fired. Claimant called the culinary director and asked the director if he could take the sandwich home. The culinary director told claimant he could do so. Before the interaction with his coworkers, claimant did not know that he was not allowed to take from the kitchen without permission.

(6) After February 10, 2019, claimant did not take any food home from the kitchen. However, some of claimant's coworkers reported that he had.

(7) On February 18, 2019, the employer discharged claimant for allegedly taking food from the kitchen without permission.

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

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means 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." OAR 471-030-0038(1)(c). The employer has the burden to show, more likely than not, that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence).

Order No. 19-UI-129403 concluded that the employer established it discharged claimant for misconduct. The order found, without setting out the basis for its finding, that claimant "made two hamburgers on two different days and took them home without even inquiring." Order No. 19-UI-129403 at 3. However, the record fails to show that claimant engage in misconduct.

At hearing, claimant contended that he did not take food from the kitchen without permission on February 10, and that he did not attempt to do so after February 10. Transcript at 28-29. However, the employer alleged that claimant took food without permission on February 10, 11 and 12. Transcript at 11. The employer's witness at hearing did not have personal knowledge of claimant's behavior on those days, but was relying on reports from three of claimant's coworkers. Transcript at 11, 13. However, the hearsay reports that the employer offered were not persuasive.

One coworker's hearsay statement reported stated that the coworker had seen claimant take hamburgers home from the kitchen without permission, but did not indicate the dates of those observations or how

the coworker knew claimant did not have permission. Transcript at 14. Second and third coworkers' hearsay statements reported that they had seen claimant take home food several times from the kitchen, but also did not indicate the dates on which they made their observations or whether claimant had permission to remove the food. Transcript at 14; Exhibit 19. The statements are deficient in at least two respects. First, the coworkers might have seen claimant remove food before the culinary director implemented the prohibition against doing so, or before claimant learned of it on February 10. Second, claimant might have had permission to remove food, so was not violating the employer's standards by the behaviors that the coworkers allegedly observed.

Given the vagueness of the reports on which the employer relied and the evidentiary principle that hearsay testimony is entitled to less weight than sworn testimony that, like claimant's, is based on first hand observations, claimant's account of his behavior is accepted. Accordingly, the employer did not meet its burden to show, more likely than not, that claimant removed food from the kitchen without permission after the employer prohibited it, let alone after he knew that the employer had prohibited it. Absent such a showing, the employer failed to establish that claimant violated its expectation that he not take food from the kitchen without permission, much less that he did so willfully or with wanton negligence.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-129403 is set aside, as outlined above.

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

**DATE of Service: June 20, 2019**

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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