

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0526**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 84742). The employer filed a timely request for hearing. On May 14, 2019, ALJ Frank conducted a hearing, and on May 22, 2019, issued Order No. 19-UI-130384, affirming the Department's decision. On June 2, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090. We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) TWGW Inc. employed claimant as a sales manager from January 1, 2014 to November 30, 2018.

(2) On October 26, 2018, the employer informed claimant that it was removing him from his position as a sales manager for poor performance but that continuing work would be available for him as a salesperson on a commission basis. Claimant expressed his intent to resign, but did not give the employer a date on which that would occur. The employer's vice president asked claimant to consider accepting the sales position and then asked him to continue as sales manager until December 31, 2018, which claimant agreed to do.

(3) Over the next several weeks, the vice president and claimant engaged in negotiations over a commission structure for the sales position that would be mutually agreeable to both parties, as of November 30, 2018 they had not reach such an agreement.

(4) On November 28 and 29, 2018, the employer's vice president received information that claimant had been discussing his replacement in the position of sales manager in a negative manner with two customers and some coworkers. The vice president discussed the matter with others and concluded claimant's conduct was unacceptable. On November 29, 2018, the vice president directed claimant to discontinue making negative comments about his replacement.

(5) On November 30, 2018, the vice president met with claimant and presented him with a letter dated that day that requested claimant to submit his "official resignation" to its human resources department and that it considered his previous verbal resignation from October "effective" that day. Exhibit 1. Claimant then left the meeting without agreeing to submit a resignation. As he was leaving, the vice president directed claimant to immediately return any company property in his possession. Exhibit 2.

(6) On November 30, 2018, the employer discharged claimant for previously making negative comments to two customers and some coworkers about his replacement.

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

**Work Separation.** At hearing, the employer asserted that claimant quit and claimant asserted that he was discharged. Audio Record ~ 8:00 to 8:30; 26:30 to 27:00. 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).

Claimant explained that on November 30, 2018, the vice president met with him, presented him with the November 30, 2018 letter and then told him that it was his "last day." Audio Record ~ 24:30 to 27:00. The employer also presented evidence that the vice president told claimant to return his company property before he left the premises. Exhibit 2. Claimant asserted that he was willing to continue working for the employer on and after November 30, 2018, but was not given that option. Audio Record ~ 24:30 to 25:30. Because claimant was willing to continue to work for the employer for an additional period of time but was not allowed 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 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976)

Viewing the record as a whole, the employer discharged claimant for previously making negative comments to two customers and some coworkers about his replacement. However, claimant denied ever

doing so. Audio Record ~ 24:30 to 25:30. The employer presented only hearsay evidence that claimant did and its evidence lacked any detail about exactly what claimant supposedly said and when he said it. Accordingly, the employer failed to meet its burden to establish, by a preponderance of the evidence, that claimant consciously, i.e. willfully or with wanton negligence, violated a known and reasonable employer expectation for which he was discharged.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is therefore not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 19-UI-130384 is affirmed.

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

**DATE of Service:** July 5, 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**

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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.

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