

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0528**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 19, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 130441). The employer filed a timely request for hearing. On May 23, 2019, ALJ Frank conducted a hearing, at which time claimant failed to appear, and on May 31, 2019 issued Order No. 19-UI-130902, affirming the Department's decision. On June 5, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Plaid Pantries, Inc. employed claimant as assistant manager from April 27, 2017 to January 11, 2019.

(2) The employer expected claimant to report to work when scheduled. The employer had a policy that required employees to provide at least eight hours' notice of any absences. The employer gave claimant the policies upon hire and required him to read them.

(3) In November 2018, claimant failed to provide the employer with the required amount of notice on two occasions. In approximately December 2018, claimant failed to cover a shift as assigned. The employer issued claimant a warning, and informed him that his employment was in jeopardy.

(4) On January 4, 2019, the employer scheduled claimant to work a swing shift. Claimant did not report to work or provide the employer with any notice of his absence.

(5) The employer subsequently sent claimant a text message directing him to report to work for a meeting to be suspended from work. Claimant did not report to the scheduled meeting.

(6) On January 11, 2019, the employer discharged claimant for his absences.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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). Isolated instances of poor judgment, good faith errors, and absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

There is no dispute on this record that claimant’s employment ended because the employer discharged him. The order under review concluded, however, that the discharge was not for misconduct. The order reasoned that while the employer had the right to expect claimant to report to work as scheduled or notify the employer if he was going to be absent, and “furnished evidence demonstrating that claimant failed to meet these expectations on various occasions . . . it has not been shown that the infractions leading to discharge resulted from misconduct” because the employer “could not identify reasons for claimant’s absence.” Order No. 19-UI-130902 at 4. The order stated that because “[i]t remains possible that” the absences were for “compelling” reasons or “beyond claimant’s reasonable control” the absences were not willful or wantonly negligent. *Id.* The record does not support that conclusion.

While it is certainly “possible” that claimant’s absences were for excusable reasons, the standard in an unemployment case is preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P.2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence). “Preponderance of the evidence” means that the employer only needs to prove that the absences were more likely than not the result of misconduct. The employer does not need to prove beyond all doubt that the absences were for misconduct. Therefore, the fact that it remains “possible” that claimant’s conduct was not misconduct does not mean that benefits should be allowed.

On this record, the idea that claimant’s absences might have been for “compelling” reasons or were “beyond claimant’s reasonable control” is speculative, because the record does not contain any evidence suggesting that they were. Decisions in unemployment insurance cases must be based upon facts in the hearing record, not conjecture about what the circumstances might have been. *See Kay v. Employment Department*, 292 Or. App. 700, 425 P.3d 502 (2018) (*Kay II*) (EAB inferred that the employer, who was not present at the hearing, had acted out of frustration; the Court found that EAB’s inference was based upon “mere speculation” because there was no evidence in the record about how the employer was feeling); *see also Reynolds v. Employment Dep’t.*, 243 Or. App. 88, 259 P.3d 50 (2011) (EAB inferred that, because no one told claimant her discharge would be immediate if she did not quit and the employer had a progressive discipline policy, continuing work was available to claimant; the Court found that there was no evidence that claimant could have remained employed under the progressive discipline policy or that there would be any delay in discharge had claimant not quit); *Gonzales v. Employment Dep’t.*, 200 Or. App. 547, 115 P.3d 976 (2005) (there must be evidence to support a finding about claimant’s actual experience or qualification). In this case, no party presented evidence suggesting that claimant’s absences were for excusable reasons, like illness or disability, a mistake or misunderstanding, or circumstances beyond his control.

Considering only the evidence in this hearing record, the employer reasonably expected claimant to report to work for his scheduled shifts or notify the employer in advance if he could not. It is more likely than not on this record that claimant knew he was expected to report to work for the suspension meeting and a scheduled swing shift. It is also more likely than not that he knew or should have known that by failing to report to work at those times he was probably violating the standards of behavior the employer had the right to expect of him. Claimant's absences without notice between January 4, 2019 and January 11, 2019 therefore amounted to two wantonly negligent acts.

The evidence does not show it was more likely than not that claimant was unaware he was expected to report to work on those occasions. Nor is there evidence establishing it is more likely than not that he sincerely believed, or had a factual basis for believing, that he did not need to report to work or notify the employer of his absences on those two occasions. Nor is there evidence that claimant sincerely believed, or had a factual basis for believing, that the employer would condone his failures to do so. Claimant's conduct was therefore not excusable as a good faith error.

The record also does not establish it was more likely than not that, claimant's conduct was excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior" that involves poor judgment. OAR 471-030-0038(1)(d). Claimant's conduct involved repeated wantonly negligent exercises of poor judgment because he failed to report for the suspension meeting, failed to notify the employer of that absence, failed to report to work for a scheduled swing shift, failed to notify the employer of that absence, failed to cover a shift in approximately December 2018, and failed to provide the employer with the amount of notice required on two occasions in November 2018. His conduct therefore was not isolated, and cannot be excused.

For those reasons, the preponderance of the evidence in the record developed at the hearing shows that the employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits.

**DECISION:** Order No. 19-UI-130902 is set aside, as outlined above.

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

**DATE of Service: July 2, 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 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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