

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0589**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On May 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 141859). The employer filed a timely request for hearing. On June 20, 2019, ALJ Seideman conducted a hearing, and on June 21, 2019 issued Order No. 19-UI-132122, concluding that claimant's discharge was for misconduct. On June 27, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) New Seasons Market LLC employed claimant as a freight clerk from June 13, 2018 until April 18, 2019.

(2) The employer had a point-based attendance policy. The policy provided that employees accrued points for reporting late to work, partially missing shifts, and completely missing shifts if those attendance events were not excused. The policy authorized the employer to discharge employees who accrued ten or more attendance points in a rolling six-month period.

(3) As of February 2019, claimant was working every Thursday, Friday and Saturday night from 10:00 p.m. until 8:00 a.m. On February 17, 2019, claimant completed a request to have off Thursday through Saturday, April 4, 5, and 6, 2019. Exhibit 16. On March 18, 2019, claimant's manager approved the request. Exhibit 17.

(4) Sometime around the end of March 2019, the employer issued a schedule for March 31 through April 19, 2019. Exhibit 5. The schedule showed claimant was off on April 4, 5, and 6. Exhibit 5. It showed that claimant was scheduled to work his usual shift of 10:00 p.m. to 8:00 a.m. on Thursday, Friday, and Saturday, April 11, 12, and 13, 2019. Exhibit 6. It also showed that claimant was scheduled to attend a mandatory all staff, all store, annual meeting on April 11 from 6:00 a.m. until 8:00 a.m. Exhibit 6. Sometime before April 4, 2019, claimant mentioned to his lead that the employer had scheduled its annual meeting. Exhibit 4.

(5) As planned, claimant was off work on vacation on April 4, 5, and 6, 2019. Claimant reported for his next regular shift after his vacation at 9:59 p.m. on Thursday, April 11, 2019, and for his regular shifts on Friday, April 12, 2019 and Saturday, April 13, 2019. Claimant missed the annual meeting on April 11, 2019, and did not call in to report that he would be absent or request to be excused from attendance.

(6) Sometime after April 11, 2019, the employer spoke to claimant to learn the reason that he had missed the annual meeting. Claimant told the employer that he was not aware of the meeting and that he thought he was still on vacation at the time of the meeting. The employer determined that the reasons claimant gave did not excuse his absence from the meeting and that, as a result, he accrued two attendance points for a partially missed shift. Adding those attendance points to eight points that claimant had already accrued, he had accrued total of ten attendance points in a rolling six month period, which was the threshold for discharge.

(7) On April 18, 2019, the employer discharged claimant for having violated its attendance policy and accruing ten attendance points.

(8) On June 20, 2019, a hearing was held in this matter. Claimant appeared at the hearing by phone when a staff member from the Office of Administrative Hearings (OAH) called the conference line to have him patched in. Audio at ~01:40. Without explanation, claimant was disconnected from the conference within a little more than a minute. Audio at ~02:52. Five more times, it appeared that someone tried to connect to the conference line during the hearing, but was almost immediately disconnected. Audio at ~4:29, ~4:31; ~7:16, ~7:21; ~9:54, ~9:59; ~13:28, ~13:50; ~17:20.

**CONCLUSIONS AND REASONS:** Order No. 19-UI-132122 is reversed, and this matter remanded for another hearing on whether the employer discharged claimant for misconduct.

After claimant was initially patched in to the conference hearing line and disconnected, it is inferred that claimant was the caller who unsuccessfully tried five more times to enter the conference line. Assuming it was claimant, there was every indication that claimant wanted to participate in the hearing, and no indication that he intended to waive his participation rights. As detailed below, information from claimant is required to determine on a complete record whether the employer discharged claimant for misconduct. Because it appears that claimant tried several times to participate in the hearing and give evidence on his own behalf, fairness requires that he be allowed an opportunity to give that evidence unencumbered by technical or other issues that likely were beyond his reasonable control.

Order No. 19-UI-132122 concluded that the employer discharged claimant for misconduct. The order reasoned that claimant's behavior in missing the April 11 meeting was wantonly negligent because he knew that the meeting was scheduled based on him allegedly having informed his lead of the meeting before he went on vacation. Order No. 19-UI-132122 at 3. The order further concluded that claimant missing the meeting was not excused from constituting misconduct as an isolated instance of poor judgment because "[t]here were various other attendance issues recently." Order No. 19-UI-132122 at 3. However, the record does not support those conclusions.

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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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)

At the outset, it is not relevant that the employer may have discharged claimant for exceeding the maximum points allowable under its attendance policy. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). To conclude that the employer’s discharge of claimant disqualifies him from benefits, it first must be found that claimant missed the April 11 meeting due to willful or wantonly negligent behavior.

Information from claimant is required to determine whether he missed the meeting as a result of conscious conduct or whether he never knew or forgot that the meeting had been scheduled for April 11. EAB has consistently found that a violation of the employer’s expectations that is the result of an inadvertent oversight, a mistake, forgetfulness or the like is generally not accompanied by the consciously aware mental state required for willful or wantonly negligent behavior. For instance, the record does not show if, from claimant’s perspective, he was ever aware of the meeting or if he forgot about the meeting due to being on vacation or other distractions. The record also does not show when or exactly what claimant told his lead when he mentioned the April 11 meeting to her sometime before he went on vacation. The record also does not show if claimant thought the vacation that the employer had approved beginning on April 4, 2019 would continue until his next regularly scheduled shift on April 11, which was many hours after the meeting.

Additionally, regardless of whether claimant’s failure to attend the April 11 meeting was willful or wantonly negligent, OAR 471-030-0038(3)(b) provides that isolated instances of poor judgment are not misconduct. The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

- (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
- (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
- (C) The act must involve poor judgment. A decision to willfully violate an employer’s reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer’s reasonable standard of

behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Additional information is needed to determine whether, if claimant missing the April 11 meeting was willful or wantonly negligent, it nevertheless is excused from constituting misconduct as an isolated instance of poor judgment. The record must be developed as to the facts underlying claimant's past attendance violations, and any other violation(s) of the employer's standards, whether they were due to willful or wantonly negligent behavior and not merely whether they caused him to accrue points that exceeded the maximum allowable. For instance, the record does not show if claimant's prior absences or other violations, if any, were caused by illness, exigent circumstances or factors beyond his reasonable control.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was discharged for misconduct, Hearing Order 19-UI-132122 is reversed, and this matter remanded for further development of the record.

**DECISION:** Order No. 19-UI-132122 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** August 1, 2019

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-132122 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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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