

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0791**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150933). Claimant filed a timely request for hearing. On May 16, 2019, ALJ Snyder conducted a hearing, and on May 24, 2019 issued Order No. 19-UI-130587, affirming the Department's decision. On June 3, 2019, claimant filed an application for review with the Employment Appeals Board (EAB). On July 8, 2019, EAB issued Appeals Board Decision 2019-EAB-0505, concluding that claimant's absences from work on March 21 and 22, 2018 were due to willful or wantonly negligent behavior, but remanding the matter to determine if that willful or wantonly negligent behavior was excused as an isolated instance of poor judgment. On July 23, 2019, ALJ Snyder conducted a hearing, and on July 31, 2019 issued Order No. 19-UI-134308, re-affirming decision # 150933. On August 20, 2019, claimant filed an application for review with EAB.

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Living Opportunities Inc. employed claimant as a support living specialist from May 24, 2018 until March 22, 2019. The employer provided services that supported intellectually and developmentally disabled clients residing in private homes.

(2) The employer expected that claimant would report for work when scheduled unless she was not reasonably able. The employer expected that claimant would not make errors when she administered medicines. Claimant understood the employer's expectations.

(3) On July 11, 12, and 30, 2018, December 27, 28, 29, 30, and 31, 2018, January 1 and 26, 2019 and March 5, 2019 claimant accrued unscheduled and unexcused absences. In total, claimant accrued eleven unscheduled absences. Claimant brought physicians' notes justifying her absences on some of those days.

(4) On November 15, 2018, January 10, 2019, February 1 and 7, 2019, and March 2 and 13, 2019, claimant made medication errors. Because of claimant's many medication errors, the employer gave claimant additional training, supervision and written instructions, and tested her in the correct administration of medicines. The employer advised claimant to read and follow the medication administration competency sheet each time she administered medicine. On February 7 and March 2, claimant failed to administer a daily thyroid medicine to a particular client. The client did not like to take the medicine. The employer notified claimant that the client was not given thyroid medicine on those two occasions. The employer told claimant not to conclude that the client had taken the thyroid medicine and that she did not need to administer it to the client unless claimant saw the client take the medicine and verified that the thyroid medicine for that day was no longer in the client's medication organizer.

(5) On March 13, claimant did not administer the thyroid medicine to the client because claimant believed the client had already taken the thyroid medicine earlier that day. Claimant did not check the client's medication organizer to verify that the client had actually taken the medication. The person who came on duty after claimant observed that the thyroid medicine was still in the client's medication organizer and reported claimant's medication error to the employer.

(6) On March 19, 2019, claimant received a disciplinary action, two-day suspension and last chance agreement for eleven unscheduled absences. The last chance portion of the warning stated that claimant would be discharged if she incurred any additional absences without approval in the next 90 day period. That same day<sup>1</sup>, claimant also received a second disciplinary action, two-day suspension, and last chance agreement for having made five medication errors in a 90 day period. The last chance portion of this warning stated that claimant would be discharged if she made any further medication errors in a 90-day period. The warning further stated that claimant's suspension would end when she returned to work for her next scheduled shift on March 21. Also on that day, Claimant received a third disciplinary action, two-day suspension, and last chance agreement for failing to follow a client's support plan and specific protocols set out in it. The warning detailed several other ways in which claimant's work performance was deemed inadequate. The last chance portion of the warning stated that claimant would be discharged for further violations of the employer's policies.

(7) Claimant was scheduled to work March 21 and 22, 2019. On March 20, 2019, claimant sent a text message to the director of supported services informing her that she was not able to report for work as scheduled on March 21 because a tire on her car was punctured and the car was not safe to drive. Claimant attached a picture of the punctured tire to the text. The director told claimant to contact her or the human resources manager the next day.

(8) On the morning of March 21, 2019, the human resources manager called claimant and left a voicemail message stating that, in line with the March 19 attendance warning and last chance agreement, the employer expected her to return to work for her 2:00 p.m. shift that day and if she did not she would be discharged. The manager asked claimant to contact her. The manager then emailed claimant at 9:53 a.m., notifying claimant that the employer expected her to report to work at 2:00 p.m. that day. At around 2:45 p.m., claimant called the human resources manager. The manager told claimant that she could be discharged if she did not report for work, and asked claimant if she was going to attend work.

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<sup>1</sup> Note incorrect date Exhibit 1, p. 17.

Claimant told the manager that she was not sure when she could report for work because she did not know when the punctured tire would be repaired. The human resources manager then asked claimant if claimant could take public transportation to work or could arrange for someone else to drive her. When claimant rejected those options, the manager asked claimant if claimant would allow her or another of the employer's managers to pick claimant up and drive claimant to work. Claimant told the manager that she was not comfortable riding to work with her or another manager and turned down the offered transportation. The human resources manager told claimant that if claimant did not contact her about when claimant would return to work on March 22, 2019, claimant would be discharged.

(9) Claimant did not contact the employer about returning to work on March 22, 2019. On March 22, 2019, claimant did not report for work. On March 22, 2019, the employer discharged claimant for failing to report for work on March 21 and 22, 2019.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for behavior on March 21 and 22, 2019 that is not excused from constituting misconduct as an isolated instance of poor judgment. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

*Appeals Board Decision* 2019-EAB-0505 (July 8, 2019) concluded that claimant's absences from work on March 21 and 22, 2019 were due to willful or wantonly negligent behavior in violation of the employer's standards. The record supports that conclusion. The employer had a right to expect claimant to report for work as scheduled unless she was unable to do so. Claimant could not drive to work because a tire on her car was punctured and the car was not safe to drive. However, claimant rejected the options of taking public transportation to work or arranging for someone else to drive her to work. She also refused the employer's offer to have a manager pick claimant up and drive to work. In doing so, claimant demonstrated indifference to the consequences of her actions by consciously engaging in conduct she knew or should have known would probably result in her failing to report for work on March 21 and 22. Claimant's failure to report for work therefore was wantonly negligent.

The issue on remand was limited to determining whether claimant's willful or wantonly negligent behavior was excused from constituting misconduct as an isolated instance of poor judgment and did not disqualify her from receiving benefits.

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).

On two occasions before March 13, claimant failed to administer thyroid medicine to the same client that she allegedly failed to administer it to on March 13. Claimant contended that she watched the client put the thyroid medicine in her mouth on March 13, and that it was a "surprise" to her when the thyroid medicine for March 13 was later discovered in the medication organizer. Transcript of May 16, 2019 hearing at 25; Transcript of July 23, 2019 hearing at 16. It is notable that claimant did not contend that the thyroid medicine for March 13 was not in the organizer when the person who relieved claimant came on duty on March 13, after claimant allegedly saw the client take the medicine. Claimant was unable to account for the presence of the thyroid medicine in the organizer for March 13 other than to contend during the first hearing that someone must have tried to "sabotage" her by replacing the thyroid medicine in the medication organizer slot for March 13. Transcript of May 16, 2019 hearing at 25. Claimant's contention of sabotage was undercut, however, when she did not identify the supposed saboteur, or supply a motive for the sabotage.

The credibility of claimant's explanation for how the thyroid medicine came to be in the medicine organizer was also undercut by the sheer number of times claimant failed to administer the thyroid medicine to the same client. The most logical explanation for the presence of the thyroid medicine in the medical organizer was that the employee who relieved claimant discovered on March 13 is that claimant did not observe the client while the client took the medicine or did not check the medication organizer to verify that the thyroid medicine had been taken. More likely than not, claimant demonstrated indifference to the consequences of her actions by consciously engaging in conduct she knew or should have known would probably result in her failure to administer the thyroid medication to the client. Claimant's failure to administer the medication to the client therefore was wantonly negligent.

Accordingly, claimant's exercise of poor judgment on March 21 and 22 was part of a pattern of wantonly negligent behavior, and not a single or infrequent occurrence. As such, claimant's behavior on March 21 and 22 is not excused from constituting misconduct as an isolated instance of poor judgment.

Additionally, claimant's willful or wantonly negligent absence from work on March 21 and 22, 2019 not excused as a good faith error under OAR 471-030-0038(3)(b). It is not plausible that claimant did not report for work on March 21 or 22 due to misunderstanding the employer's expectations.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-134308 is affirmed.

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

**DATE of Service:** September 25, 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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**

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 الاستئناف 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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