

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0817**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92731). Claimant filed a timely request for hearing. On August 9, 2019, ALJ Wyatt conducted a hearing, and on August 16, 2019, issued Order No. 19-UI-134139, concluding the employer discharged claimant not for misconduct. On August 26, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer included written argument on its application for review to EAB. EAB did not consider the employer'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) Jerry's Place Bar and Grill employed claimant from March 2017 until the employer discharged claimant on June 14, 2019.

(2) The employer's owner was concerned that claimant was "over-serving and over-pouring" customers. Audio Record at 7:36. To address the problem, the employer began using a new point-of-sale (POS) system to help track inventory and specific sales records. The employer expected claimant to use the POS system after she had "mastered" it. Audio Record at 8:02. The employer also expected claimant to refrain from making disparaging remarks about the employer that might affect the employer's sales. Claimant understood the employer's expectations.

(3) During her shift on June 3, 2019, claimant began learning how to use the POS system. The owner's wife helped and guided claimant with using the POS. June 8, 2019 was the second shift claimant worked using the POS system. The owner believed that claimant had "mastered" the POS system by the end of that shift. Audio Record at 10:19 to 10:26. However, claimant was "struggling" with the POS system, was not able to "keep up with it," and had to resort to using handwritten sales tickets during her June 8 shift. Audio Record at 19:52, 19:30.

(4) On June 9, 2019, the owner and his wife left town for several hours during claimant's shift. During that time, claimant did not use the POS system and completed all the records of her transactions by hand. Claimant did not believe she had to use the POS system on June 9 because the owner had told her it was a "learning process," there were still items on the menu that were not on the POS system, and claimant was not yet able to use the system on her own. Audio Record at 20:04.

(5) On June 10, 2019, the owner met with claimant to discuss her failure to use the POS system on June 9. Based on statements the owner made to claimant during the conversation, claimant asked the owner if he was "calling her a thief," and the owner responded that he was calling claimant a thief. Audio Record at 21:16 to 20:20. Claimant and the owner argued. The owner suspended claimant from work and asked claimant for her key to the restaurant. Claimant believed that the owner had discharged her at that time.

(6) On June 11 and 12, 2019, the owner heard "rumors" that claimant had told local residents that he had discharged claimant for stealing and that some of claimant's friends and "regulars" were boycotting the employer's business. Audio Record at 15:44, 16:03.

(7) On June 14, 2019, the owner met with claimant at a local library and discharged her because she did not use the POS system on June 9, 2019, and had allegedly told customers the employer had discharged her for stealing.

**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). 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).

To the extent the employer discharged claimant because she did not use the POS system on June 9, 2019, the employer did not discharge claimant for misconduct. Claimant understood that the employer expected her to use the POS system once she had "mastered" it. However, as of June 9, claimant felt as though she was "struggling" with the POS system. The record does not show that claimant had explicit instructions from the employer to use the POS system on June 9, or that she knew or should have known the employer expected her to use the POS system that day despite not being fully trained to do so. Claimant did not therefore disregard a known employer expectation, and her failure to use the POS system on June 9 was not misconduct.

To the extent the employer discharged claimant because she allegedly told the employer's customers that she had been discharged for stealing, allegedly prompting a boycott of the employer's business, the employer did not discharge claimant for misconduct. First, the record does not establish by a

preponderance of the evidence that claimant told others that the employer discharged her for stealing, or that claimant encouraged anyone not to patronize the employer's business. The employer's evidence was based on "rumors." Second, even if claimant had told others that the employer discharged her for theft, the record shows that claimant reasonably believed that to be true. Telling people the reason for her work separation cannot be attributable to claimant as misconduct where she believed that the employer had already discharged her, and that her statements were true.

Because the employer discharged claimant not for misconduct, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 19-UI-135139 is affirmed.

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

**DATE of Service:** September 30, 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 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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