

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0049**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 19, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140423). Claimant filed a timely request for hearing. On December 28, 2018, ALJ Wyatt conducted a hearing, and on January 4, 2019, issued Order No. 19-UI-122133, affirming the Department's decision. On January 9, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wildhorse Resort & Casino employed claimant from November 14, 2005 until September 5, 2018 as a "VIP host." Transcript at 12.

(2) The employer had a computer resource use policy that allowed employees to use computer resources to assist them in performing their job functions. Claimant signed the policy in 2011.

(3) Prior to 2018, claimant's coworker told her he had seen a letter for claimant from claimant's former manager to the Department of Motor Vehicles. He told claimant he saw it in the shared "marketing file," which VIP hosts were able to access. Transcript at 25. Claimant understood that VIP hosts and the club lead had permission to access information in the employer's computer files to enable them to assist new management.

(4) During 2018, claimant searched employee personnel files for information about employee commissions to see when the employer provided commissions and what guests the commissions came from. Claimant also searched for information about upcoming changes in employees' job duties and future workplace events. Some of the files generated by claimant's searches contained employee performance evaluations, counseling, and termination letters. Claimant did not view all the files generated by her searches. The employer never told claimant that it did not permit her to search or view the employee personnel information.

(5) On June 15, 2018, a customer complained that they were not able to contact claimant while claimant was working on June 8, 2018, and that claimant had not returned the customer's call. The complaint prompted the employer to review claimant's computer records. The review showed that claimant had accessed more than 3,000 files on the employer's network during 2018.

(6) On August 22, 2018, the employer suspended claimant while it investigated her computer activities. The employer's investigation showed that on some days, claimant had accessed few files. Other days, such as on June 8, 2018, claimant had accessed as many as 455 files. Claimant had accessed some of the files when she completed data entry necessary for her job. However, the employer determined that many of the files claimant accessed included personnel information and actions. Claimant's supervisor did not know VIP hosts were able to access the file containing the personnel information. Claimant's supervisor put information intended for VIP hosts in a different file that did not contain the personnel-related information. The employer was dissatisfied that claimant reviewed the files containing personnel information because it did not consider VIP hosts to have the authority to access them, and because claimant spent time reviewing the files that the employer preferred she spend assisting customers.

(7) On September 5, 2018, the employer discharged claimant for violating its computer resource use policy.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant, 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. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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 her conduct and knew or should have known that her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

In Order No. 19-UI-122133, the ALJ found as fact that claimant accessed over 3,000 computer files that contained confidential personnel information and were unrelated to claimant's job duties.<sup>1</sup> The ALJ also found that claimant knew or should have known as a matter of common sense that the personnel records were "off limits," and based on those findings and claimant's repeated act of accessing the files, concluded that claimant engaged in misconduct by violating the employer's computer use policy.<sup>2</sup> In so concluding, the ALJ did not give equal weight to claimant's testimony, much of which was uncontested. In a discharge case, the employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). We disagree that the employer's evidence showed by a preponderance of the evidence that claimant viewed all the files she found, that all of the files she viewed were unrelated to her job duties, or that claimant willfully or wantonly violated a known expectation that she refrain from accessing personnel files.

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<sup>1</sup> Order No. 19-UI-122133 at 1.

<sup>2</sup> Order No. 19-UI-122133 at 3.

The employer did not instruct claimant to refrain from accessing computer files that contained personnel information, and its computer use policy was sufficiently vague that it was plausible claimant did not understand the employer expected her to refrain from looking at personnel files. Nor do we agree claimant should have known as a matter of common sense that personnel files were confidential. It was undisputed that the personnel files were accessible to VIP hosts and club leads, VIP hosts sometimes needed access to information to assist management, and claimant knew a coworker had seen claimant's personnel record in the marketing file. Additionally, the record does not show how many of the 3,000 files claimant actually viewed, or how many of the 3,000 files were unrelated to claimant's job functions and used instead by claimant to understand the employer's commission structure and employment decisions. The record does not show by a preponderance of the evidence that claimant disregarded a known employer expectation. Therefore, to the extent the employer discharged claimant for violating its computer use resource policy, the record does not show that the employer discharged claimant for misconduct.

The employer implied that it also discharged claimant because of poor performance because she spent time reviewing computer files that she should have spent assisting customers. The record does not show the employer's expectations regarding making and returning telephone calls as opposed to completing other job duties, or that claimant violated those expectations willfully or with wanton negligence.

For the foregoing reasons, we conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Order No. 19-UI-122133 is set aside, as outlined above.

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

**DATE of Service:** February 12, 2019

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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**

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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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