

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0124**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113354). Claimant filed a timely request for hearing. On January 15, 2019, ALJ Griffin conducted a hearing, and on January 16, 2019, issued Order No. 19-UI-122898, affirming the Department's decision. On February 5, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted written argument. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument, to the extent it was based thereon, when reaching this decision.

**EVIDENTIARY MATTER:** Claimant offered several exhibits into evidence at the outset hearing but the ALJ did not admit them because he did not consider them relevant. However, both claimant and the employer testified about portions of the exhibits at hearing. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. Several of the documents submitted by claimant are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, these documents, marked as EAB Exhibits 1-6 are admitted into the record. Copies of the documents are being mailed to the parties with this decision. Any party that objects to the admission of EAB Exhibits 1-6 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibits will remain in the record.

**FINDINGS OF FACT:** (1) EBM Foods, Inc. dba Jack in the Box employed claimant as a team member at one of its restaurants from May 30, 2018 to November 15, 2018. Claimant worked the graveyard shift which ended at 6:00 a.m.

(2) On or about September 6, 2018, claimant wrote a letter to the employer requesting that the employer reimburse him for wages earned but unpaid and a machine part he paid for out of his own pocket. He also asked the employer to address a complaint of his against his assistant manager for what he believed was a retaliatory reduction in his work hours.

(3) On September 20, 2018, the employer's director of human resources (DW), district manager (LV) and claimant's assistant manager (RR) met with claimant in response to his letter "in the middle of the restaurant, in front of everybody." Transcript at 24. During the meeting management employees told claimant that with regard to the hours he claimed he had not been paid for, he had not worked them because their records showed he had not been clocked in. They also criticized him for his lack of professionalism, attitude, and demeanor at work, stating that coworkers had complained about it. Finally, they criticized him for sending text messages to DW and RR outside of normal business hours, sometimes in the middle of the night, and asked him to do so only during normal office business hours. Claimant, who suffered from a "generalized anxiety disorder," perceived that during the meeting the management employees essentially "attacked [him]...and called [him] a liar." Transcript at 10, 34. Shortly after the meeting, claimant suffered a mental breakdown and was hospitalized for a day on September 22, 2018. (EAB Exhibit 1). Claimant did not recall the employer's admonition to communicate with management only during office business hours.

(4) On September 24, 2018 at 3:40 a.m., claimant sent DW a text message requesting her to review video to verify he had worked during time he had been denied wages for on a paycheck and to authorize sick time for a day he had called in sick. Later that morning, DW sent claimant an email stating, "Please ensure, unless it is a true emergency, that you text/call me during office hours and not at 3:40 in the morning. That is not professional. Additionally I previous [*sic*] explained that text is not a correct form of communication for employment issues, including call-ins. Please call or email." Transcript at 8. That same day, DW sent claimant a letter summarizing the September 20 meeting and including a check for hours claimant had worked but had not been paid for, which she had verified by review of restaurant video. In her summary of the meeting, DW encouraged claimant to contact her by phone during office hours or by email if he wished to discuss other matters with her but she did not forbid claimant from sending text messages. Exhibit 2. Finally, that same day, DW sent claimant necessary paperwork for requesting protected leave from work for claimant to complete and return. EAB Exhibit 5.

(5) Claimant did not review the September 24 email. Previously, he had made DW aware that because he did not have computer, he was only able to review emails from a library computer or another person's computer when alerted one had been sent, which had not occurred.

(6) Claimant sent DW text messages at 9:01 p.m. on September 29, 2018, at 7:23 p.m. on October 12, 2018. The text messages were related to employment but not emergencies.

(7) On October 28, 2018, claimant had an anxiety attack and mental breakdown and missed his scheduled shift for that reason. EAB Exhibit 2. Claimant reported that information to the employer.

(8) On November 1, 2018, claimant was evaluated at a mental health clinic and referred to a mental health therapist for ongoing treatment. EAB Exhibit 3. He reported that information to the employer. Later that day, DW notified claimant that although he did not qualify for protected leave due to his failure to meet length of employment and hours requirements, she was authorizing a medical leave of absence for him beginning October 28, 2018 and ending November 12, 2013. EAB Exhibit 4.

(9) Claimant sent DW text messages at 8:29 p.m. on November 2, 2018, at 8:32 p.m. on November 6, 2018, and at 2:11 a.m. on November 7, 2018. The text messages were related to claimant's mental health therapy or forms relating to his leave the employer wanted claimant to have completed.

(10) On November 13, 2018, at 11:16 p.m. claimant sent DW a text message that contained a photograph of a doctor's note releasing him to return to work. EAB Exhibit 6. Shortly thereafter, he sent a second message requesting a return to work. DW texted claimant a response, "We can discuss this tomorrow" and also told him he had woken her up. She added, "please text me during normal business hours." Transcript at 7. Claimant then sent two additional messages of an apologetic nature, the first stating, "Okay my phone sucks. Sorry it's late just wanted to offer to work." *Id.* The second was, "Good night and thank you." *Id.* Claimant did not send any text messages to DW after November 13, 2018.

(11) On November 15, 2018, the employer discharged claimant for violating its expectation that claimant refrain from texting management employees outside of normal business hours on November 13, 2018.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude the employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended 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 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant on November 15, 2018, following the "final incident" which the employer's witness asserted occurred on November 13, 2018, when claimant sent DW a text message after 11:00 p.m. Transcript at 5. Because the employer did not decide to discharge claimant until after that incident, claimant's conduct on November 13 is the focus of the misconduct analysis.

In Order No. 19-UI-122898, after finding that claimant sent the November 13 text messages to DW after business hours, following which the employer discharged claimant, the ALJ concluded that the employer discharged claimant for misconduct, reasoning:

Here, claimant was told repeatedly to refrain from sending nonemergency employment related communications to employer management:

- Via text message and
- During non-business hours.

After being given this direction in a face-to-face meeting, in a letter, in an email, and...via text message he continued to send employment related text messages via prohibited means and at prohibited hours. \* \* \*

Order No. 19-UI-122898 at 3-4. The ALJ concluded that claimant's conduct was repeated and willful. *Id.* at 4. We disagree and conclude the employer failed to meet its burden to establish misconduct. Although there was no dispute that claimant sent the November 13 after hours text messages to DW, or any other text messages for that matter, the record fails to show that claimant's conduct in doing so was willful or demonstrated conscious indifference to an employer prohibition against doing so.

Although DW asserted that at the September 20 meeting, claimant was directed to not text management and communicate only during business hours, claimant denied that the matter was ever discussed. Transcript at 25-26. Regardless, there was no dispute that claimant was going through a mental health crisis at the time, corroborated by his hospital admission on September 22, 2018. EAB Exhibit 1. Accordingly, even if the employer forbade claimant from future texting or after-business-hours communications at that meeting, it is likely that claimant simply did not understand the employer's admonition at the time, or even if he did, that he did not later remember it. Nor did DW's September 24 letter summarizing the meeting did not include a prohibition against sending her any other management employee text messages in the future. Exhibit 2.

The employer's witness did not assert or show that the employer outright prohibited texting in any written policy. It did not establish that claimant understood its expectation or should have known because of the face-to-face meeting on September 20<sup>th</sup> or its email and letter dated September 24, 2018 that he was required from texting or after-hours texting to management. The employer did not dispute claimant's testimony that he received after-hours text messages from his manager, during his graveyard shift, and responded accordingly when he did. With the exception of the November 13 text messages, when claimant was still on a medical leave of absence for a mental health issue, claimant's after hours text messages all occurred during his scheduled work shifts and were work-related.

Although DW asserted that she sent claimant an email on September 24 that expressly discouraged him from texting outside of normal business hours or even texting at all, claimant never reviewed it. Again, claimant was going through a mental health crisis at the time and did not have regular access to a computer, which he had previously told DW. That email did not put claimant on notice that after-hours text messaging to management was prohibited. Although claimant sent five after-hours text messages to DW between September 24 and November 13, 2018, the record fails to show that he was ever told that those texts violated the employer's expectations. That condition did not change until November 13 2018, when DW responded to claimant's after-hours text message by stating "please text me during normal business hours." Notably, between that date and his termination on November 15, 2018, claimant did not send management any after-hours text message.

For all these reasons, the employer failed to meet its burden to establish that claimant knew or necessarily should have known that he was violating the employer's expectations, or was indifferent to the consequences of his conduct, when he sent the text messages to DW on November 13, 2018. Accordingly, the employer discharged claimant but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 19-UI-122898 is set aside, as outlined above.

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

**DATE of Service: March 15, 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.

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