

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0154**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 154916). The employer filed a timely request for hearing. On January 29, 2019, ALJ Seideman conducted a hearing, and on February 8, 2019, issued Order No. 19-UI-124266, affirming the Department's decision. On February 11, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Jackson County employed claimant from August 24, 2015 until October 5, 2018 as a developmental disabilities case manager.

(2) The employer's conflict of interest policy prohibited any employee from engaging in any activity that conflicted with, potentially conflicted with, or gave the appearance of conflicting with the interest of the employer, its customers, or suppliers. Exhibits 9-11. The employer's written policy explained that a conflict of interest arose when an employee took action that could "reasonably have a financial impact on that employee," and specifically prohibited employees from receiving gifts that were intended to influence the employee in performing their official duties. Exhibits 9-11. The employer's outside employment policy and equipment use policy prohibited employees from using work time or the employer's resources for outside employment. Exhibits 22-23. Claimant reviewed the employer's policies annually.

(3) One of claimant's job duties was to supervise disability service providers in her area to ensure that they were properly managing developmentally disabled clients' finances, medications, and health and safety plans. Exhibit 1. Claimant was responsible for reporting if providers failed to perform their duties properly. The employer expected employees to refrain from having conflicts of interest with providers.

(4) Prior to February 1, 2018, claimant provided meditation services for free at a meditation studio to earn professional credit to qualify to open her own meditation studio. On one occasion, while at a conference, claimant provided meditation services to a coworker, and did not charge the coworker for

the service. On February 1, 2018, claimant opened a meditation studio business through which she provided meditation therapy for clients of that business, which was open to the public. After she opened her business, claimant provided meditation services to a coworker. Claimant did not charge the coworker, but the coworker gave claimant a \$50 tip after the service.

(5) Claimant also provided three meditation sessions for a person who was a service provider for the employer. Claimant did not charge for the sessions, but did receive a tip of \$20 on each occasion.

(6) On August 6, 2018, claimant completed a conflict of interest disclaimer for the employer stating that she did not accept pay for any “professional related practice,” and did not have any other outside business interest or activity that the public might consider a conflict of interest. Exhibit 25.

(7) On August 7, 2018, claimant made a telephone call to a provider she had known for many years about a work-related matter. The provider knew claimant had started her own business, and at the end of the call, asked claimant questions about it. Claimant told the provider about her business, how many people were necessary for a group session, and how much a group session would cost per person. Exhibit 5.

(8) In August 2018, one of claimant’s coworkers informed the employer that claimant might have violated its policies while conducting her personal meditation business. The employer conducted an investigation regarding potential policy violations and claimant’s meditation practice. During an investigatory meeting on August 28, 2018, claimant told the employer that she often told people that she was not permitted to discuss her meditation business while she was working. When the employer asked claimant about the conversation she had with a foster care provider on August 7, claimant stated that she had responded to questions from the foster care provider regarding the number of participants needed for a meditation session and the cost.

(9) Also during the investigatory meeting on August 28, claimant told the employer that she had not received any money from a coworker or a disability services provider for meditation services. However, later during the meeting, claimant stated that she had provided three meditation sessions to one coworker, and although she did not charge the coworker for the services, the coworker gave her a tip of \$50 for one of the sessions. Claimant told the employer that she had provided meditation services to one service provider, and had not received payment, but did receive three \$20 tips. Claimant later recalled that she had provided meditation services to another coworker while at a conference, and informed the employer about that incident as well.

(9) On October 5, 2018, the employer discharged claimant for receiving tips from a coworker and a service provider in violation of its conflict of interest policy, providing incorrect information on the employer’s conflict of interest disclaimer, discussing her personal business with a services provider during work time, and for allegedly giving the employer misleading information during the investigation regarding the violations of employer policy.

**CONCLUSIONS AND REASONS:** We agree 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 claimant for misconduct. 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant because she accepted tips for meditation services from one coworker and one service provider, the employer did not discharge claimant for misconduct. Although the employer had the right to expect claimant to refrain from creating conflicts of interest, the record fails to show that claimant knew or should have known from the employer's written policy, or from experience or prior warnings, that accepting tips from a coworker or a service provider would or was likely to constitute a conflict of interest. Claimant's firsthand testimony that the \$50 she received from a coworker was a tip and not a charge for services (Transcript at 22) outweighed the employer's hearsay testimony that the coworker had alleged the \$50 was a negotiated price rather than a tip (Transcript at 12, 29). Likewise, the service provider gave claimant tips, and not payments for services. The employer's policy prohibits employees from activities that could "reasonably have a financial impact on that employee," and specifically prohibited employees from receiving gifts intended to influence the performance of their official duties. However, the policy does not, on its face, prohibit payment for services unless such payment would "impact" the employee or "influence" the employee's work. Although the policy does not clearly prohibit payments for services, claimant understood from the employer's policy and conflict disclaimer that she was not permitted to accept payment for services, but asserted that she did not understand she was prohibited from receiving tips, because tips were voluntary, and not a charge or payment she required for services. Transcript at 18, 24, 30. We are persuaded by claimant's testimony because the policy does not state in unambiguous terms that an employee may not accept tips or even gifts that were not meant to influence her work. Nor does the record show that claimant should have understood from experience or prior warnings that the employer's policy prohibited claimant from accepting tips from coworkers or providers.

The record therefore does not show claimant willfully or wantonly violated the employer's policies when she accepted four tips totaling \$110, or that claimant was dishonest in completing the conflict of interest disclaimer on August 6, stating that she did not accept pay for any professional related practice, and did not have any other outside business interest or activity that the public might consider a conflict of interest. Nor does the record show that claimant intentionally provided incorrect information on the form, because she did not consider the tips to be payment for services.

The employer discharged claimant, in part, because it perceived claimant's responses to its questions during the employer's investigation as intentionally "misleading." Transcript at 11. The employer's witness testified that claimant denied receiving payment from anyone connected to the employer, and stated that she told people "all the time" that she could not discuss her personal business on work time.

Transcript at 11-12. However, when asked directly about the occasion when claimant discussed her business with a provider on August 7, claimant did not “mislead” the employer. She admitted that she had discussed her meditation business with the provider. Transcript at 12. Regarding the tips she did not immediately disclose during the meeting, the employer failed to show by a preponderance of the evidence that claimant was untruthful during the investigation, because she did not consider the tips to be payment for services and did not identify them as such when initially asked about payments. Therefore, to the extent the employer discharged claimant for being “misleading” during the investigation into the allegations that she was violating the employer’s policies, the employer did not discharge claimant for misconduct.

It is undisputed that claimant discussed her personal business with a foster care provider on August 7, 2018, and that she knew such behavior violated the employer’s standards. Transcript at 18, 24. By discussing her personal business with a provider on work time using the employer’s telephone, claimant violated the employer’s expectations with wanton negligence. However, claimant’s conduct will not be considered misconduct if it is excused as an isolated instance of poor judgment under OAR 471-0300038(3)(b). Behavior may be excused as an isolated instance of poor judgment if it was a single or infrequent act in willful or wantonly negligent violation of the employer’s standards, and if it was not the type of behavior that caused an irreparable breach of trust in the employment relationship or otherwise exceeded mere poor judgment. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(C). Since there was no demonstrated willful or wantonly negligent violation by claimant other than discussing her business during work time on August 7, that behavior was a single willful or wantonly negligent act in violation of the employer’s standards. Claimant’s behavior on August 7, 2018 meets the first prong of the test to be excused as an isolated instance of poor judgment.

Claimant’s behavior on August 7 also was not the type of behavior that would cause an irreparable breach of trust in the employment relationship or otherwise exceeded mere poor judgment. That claimant responded to questions about her business during a work-related telephone call with a person she had known for years was a relatively insignificant violation of the employer’s standards. There was no evidence to show that claimant initiated the call for the purpose of promoting her meditation business, or that the call disrupted claimant’s work or used significant employer resources. On these facts, a reasonable employer would not have concluded that claimant’s behavior on August 7 was of a type that caused an irreparable breach of trust in the employment relationship. Having met both prongs of the test, claimant’s willful or wantonly negligent behavior on August 7, 2018 is excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-124266 is affirmed.

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

**DATE of Service:** March 19, 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

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