

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0220**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154708). Claimant filed a timely request for hearing. On January 31, 2019, ALJ S. Lee conducted a hearing, and on February 8, 2019 issued Order No. 19-UI-124361, concluding that claimant's discharge was not for misconduct. On February 27, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information that was not part of the hearing record. The employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For that reason, EAB did not consider the new information that was included in the employer's written argument. However, EAB considered information received into evidence at the hearing and the parts of the employer's argument that relied on such information when reaching this decision.

**FINDINGS OF FACT:** (1) McPartland Medical LLC employed claimant as a receptionist and technician from January 16, 2018 until November 16, 2018. The employer was small, with a staff of only three employees in addition to the optometrist. Claimant's usual shift was 8:30 a.m. until 5:00 p.m.

(2) The employer had a written policy that prohibited staff from using cell phones and communicating by text message during office hours. Claimant knew of the written policy. Despite the policy, the owner, who was an optometrist, allowed one staff member to communicate with him during office hours by text message if he was out of the office and a patient matter arose. The employer also expected claimant to refrain from insubordination and to follow the instructions of supervisors. Claimant understood this expectation as a matter of common sense.

(3) Sometime during the workweek of November 5 through 9, 2018, claimant had a disagreement with one of her coworkers about patient scheduling. Patients were in the office at the time of the disagreement. To avoid having patients overhear claimant and the first coworker, the second coworker

told claimant and the first coworker to leave the office and continue the discussion outside. The employer did not discipline claimant for this incident or issue a warning.

(4) Before November 16, 2018, the employer had not issued any disciplinary warnings to claimant or taken any disciplinary measures.

(5) On November 16, 2018 at 8:13 a.m., before her shift began, claimant sent a text message to the optometrist telling him she was still waiting for a \$50 check that she understood would be paid to her as reimbursement for her expenses in attending an off-site mobile care charity event. Claimant asked the optometrist to provide her the check that day. At 8:23 a.m., the owner replied telling claimant that the employer only gave one \$50 reimbursement check per year unless the employee incurred more than \$50 in costs in the year, and claimant had already received her check for the current year. At 8:25 a.m., claimant responded that she thought the optometrist had told her she would be given a \$50 check each month. At 8:26 a.m., the optometrist replied, "\$50 a month?!!!" At 8:27 a.m., claimant replied that she remembered the optometrist telling her she would receive \$50 per month. Exhibit 2 at 22-23. At 8:28 a.m., the optometrist texted claimant that he "would recommend" that she discuss her understanding of the employer's \$50 reimbursement policy with her two coworkers. At 8:29 a.m., claimant replied, "They are not my boss." Exhibit 2 at 23.

(6) The text message exchange continued after claimant's shift began at 8:30 a.m., with claimant repeating her understanding of how the optometrist had explained the employer's reimbursement policy. At 8:37 a.m., claimant texted the optometrist that, "This needs to be resolved between you and I [] so that everyone understands." Exhibit 2 at 23. The optometrist replied at 8:38 a.m. that he thought claimant might be confused about federal and state mileage deductions, and asked claimant to "please review" the reimbursement policy and federal and state deductions with her coworkers. Exhibit 2 at 24. At 8:45 a.m., claimant responded, "Not going to discuss this with [the two coworkers], they are not my boss," and at 8:46 a.m., claimant continued, "Guess we will need to sit down and chat." Exhibit 2 at 25. The optometrist did not respond to claimant or send another text message until 10:15 a.m.

(7) On November 16, 2018 at 10:15 a.m., the optometrist sent claimant a text message stating, "I'm letting you go; effective immediately," and telling her to drop off all items the employer had issued to her during employment. Exhibit 2 at 25. The employer discharged claimant for communicating with the optometrist by text message on November 16 in violation of the employer's policy, and for alleged insubordination by refusing to discuss the employer's \$50 reimbursement policy with her coworkers as the optometrist had instructed.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has 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).

With respect to claimant communicating with the employer by text message on November 16, the text message string began before claimant started work, and the terms of the employer's policy were not technically violated until claimant continued sending text messages after 8:30 a.m., when she was on-shift and during office hours. However, the optometrist, who presumably was in charge of the employer's operations and supervised all staff, continued to participate in the exchange of text messages after the start of claimant's shift at 8:30 a.m. and did not inform claimant that her continued sending of texts after 8:30 a.m. would be considered a violation of the employer's policy. By not telling claimant that continued texting was unwelcome after 8:30 a.m., and continuing to participate in the string of messaging by sending texts of his own to claimant, the optometrist led claimant into reasonably believing that employer would condone continuing the text message conversation into office hours. While claimant's belief may have been mistaken, it likely was sincere and held in good faith. Good faith errors are not misconduct under OAR 471-030-0038(3)(b).

With respect to claimant declining to discuss the employer's \$50 reimbursement policy with her two coworkers after the optometrist suggested that she do so, we assume for purposes of this decision that it was a willful or wantonly negligent violation of the employer's policy against insubordination. However, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may qualify as an isolated instance of poor judgment if it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, to be considered an isolated instance of poor judgment, a claimant's behavior also must not have exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer's owner testified that before November 16, 2018, the employer had not disciplined claimant for any violations of the employer's policies. Transcript at 13. With respect to any incidents for which claimant was not disciplined but that may have violated the employer's standards, the owner identified "some sort of disagreement" that claimant had with a coworker during the week of November 5 through 9, 2018. Transcript at 12. The optometrist contended that claimant's voice was "raised" during the disagreement and that another coworker asked her to lower her voice or go outside. Transcript at 12. However, the optometrist did not witness that disagreement or identify the policy that claimant allegedly violated. The optometrist did not contend that claimant failed to lower her voice in compliance with the coworker's request, or that the disagreement between claimant and the coworker continued outside. Notably, the optometrist apparently did not consider the incident sufficiently significant to take disciplinary steps, and did not issue a warning to claimant.

For her part, claimant admitted she had a disagreement with one of the coworkers, that a second coworker asked both of them to go outside, and that the matter was "resolved." Transcript at 23. Although the optometrist told the ALJ that he had both coworkers available to testify at hearing, but the ALJ did not call them, it is not apparent what they would have added to the optometrist's testimony, since he appeared to recount what they had told him about the incident. On this record, the evidence was insufficient to show that claimant's behavior during this alleged disagreement with one of her coworkers likely constituted a willful or wantonly negligent violation of the employer's standards of behavior.

Accordingly, claimant's allegedly willful or wantonly negligent behavior on November 16 was single or infrequent occurrence. As such, it meets the first prong of the test to be excused as an isolated instance of poor judgment.

Nor did claimant's behavior on November 16 exceed mere poor judgment. The instructions of the optometrist that claimant failed to follow were susceptible of being interpreted as recommendations, requests or advisements, rather than orders. That claimant wanted discuss the \$50 reimbursement policy with the owner rather than the coworkers likely was not an attempt to defy or flout the authority of the optometrist, but merely was an statement about the most efficient way to resolve their disagreement as to what the optometrist had told claimant about the reimbursement policy. Based on claimant's text messages expressing that she wanted to discuss the reimbursement policy with the optometrist and not her coworkers, a reasonable employer would not have objectively concluded that it could not trust claimant in the future to comply with its standards. Nor would a reasonable employer have concluded that claimant's behavior caused an irreparable breach of trust in the employment relationship, or that it made a continued employment relationship impossible. Accordingly, claimant's behavior on November 16 meets the second prong of the test to be excused as an isolated instance of poor judgment. Having met both prongs, claimant's allegedly insubordinate behavior on November 16 is excused as, at worst, an isolated instance of poor judgment.

The employer did not show that claimant was discharged for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-124361 is affirmed.

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

**DATE of Service:** April 2, 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 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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