

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0226**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 105611). Claimant filed a timely request for hearing. On February 15, 2019, ALJ Frank conducted a hearing, and on February 22, 2019 issued Order No. 19-UI-125129, affirming the Department's decision. On March 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant did not show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information when reaching this decision.

**FINDINGS OF FACT:** (1) Loyal Order of Moose, a fraternal organization, employed claimant as a part-time bartender from around May 2017 until November 15, 2018. Claimant worked only on Sunday afternoons.

(2) The employer considered claimant and other employees to be members of the employer's organization due to their employment. The employer's rules prohibited members from engaging in conduct that was unbecoming of a member, which the employer interpreted as precluding yelling at and making insulting references to other members and using foul language. Claimant understood the employer's expectations.

(3) On November 11, 2018, shortly after claimant reported for work, a new employee who was in training (A) arrived at the workplace. At that time, the employee whom claimant was relieving (L) and another employee (T) were also in the workplace. Upon claimant's arrival, claimant asked T why A was there. T told claimant that A was going to be training with claimant that day. T also told claimant that claimant had to split the tips she received that day with A. T then left the workplace and went outside. Claimant was very angry that A was going to be working with her. Claimant yelled at A, "Fuck [T], there is not enough work," "[T] is nothing but a fucking stripper slut," said that T was sleeping with the

employer's administrator, and "[T] is a whore." Audio at ~16:23. Around that time, A left the workplace and went outside to join T. When A and T re-entered the workplace, claimant shouted foul language at them. Claimant did not work that day, but went home citing illness due to T telling her that she had to split tips with a person being trained, with no notice from the administrator. Very shortly after claimant departed from the workplace, the administrator arrived. A and T reported claimant's behavior to him. A stated that claimant had seemed so angry about working with her that she thought claimant was going to hit and hurt her.

(4) On approximately November 14, claimant sent a letter to the administrator, giving her account of the events on November 11, and mostly blaming the administrator and T for what had transpired. Exhibit 1 at 8-11. On November 15, 2018, the employer discharged claimant for her behavior on November 11.

**CONCLUSIONS AND REASON:** The employer discharged claimant 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 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. 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).

Although claimant testified that she did not know if her behavior on November 11 was "unbecoming to member" or if the employer prohibited her from using the foul language and making insulting the references that the administrator testified she had, common sense dictates otherwise. Audio at ~31:16, ~31:30. Claimant's demeanor and the language that she chose, as described by the administrator, was not merely the "discussion with somebody" that claimant suggested in her testimony that she had with A and T on November 11. Audio at ~31:48. Claimant knew or should have known that using foul language and making degrading, derogatory references about a coworker, even if the coworker was not a manager or supervisor, violated the employer's reasonable standards.

The administrator's testimony about claimant's demeanor November 11 and what she actually said was exact and detailed. He appeared to have been reading from notes based on conversations with A and T. Audio at ~16:23. In rebuttal, claimant agreed that she had a "kerfuffle" with A and T on November 11, but testified that she did not recall whether she had made the statements that the administrator alleged. Audio at ~22:07, ~26:50, ~29:52. It does not make sense, and is not plausible, that claimant would be unable to recall whether or not she had made the graphic comments recounted by the administrator, particularly when she mentioned in other parts of her testimony that she was a "little hard" on A on November 11 and "I'm not gonna say I wasn't mad," and in the November 14 letter "that [the discussion with T] really got me going!" Audio at ~30:06, ~30:44, Exhibit 1 at 8; *see also* Exhibit 1 at 7, 8. The preponderance of the evidence shows that on November 11 claimant made the statements that the

administrator alleged. By making those statements, claimant willfully violated the employer's expectations.

Claimant's behavior on November 11 will be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an isolated instance of poor judgment, the behavior at issue must not, among other things, have exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. Here, claimant yelled at a coworker and used foul language, referred to another coworker as a "fucking stripper slut," said that the coworker was sleeping with the employer's administrator, and referred to her as a "whore." After having time to calm down, claimant again yelled and shouted foul language at both coworkers, then abandoned her shift, citing illness, but blaming it on the administrator and one of the coworkers. Three days later, claimant continued to mostly blame the administrator and the coworker for what had transpired.

The egregious nature of claimant's conduct, including its continuation after she had time to calm down, the abandonment of her shift, and her continued blaming of others for what had transpired, were sufficient to create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Claimant's conduct therefore cannot be excused as an isolated instance of mere poor judgment.

Nor was claimant's behavior excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not suggest or show that she behaved as she did on November 11 because she misunderstood the employer's standards or she thought the employer would condone her behavior. Moreover, such a contention would be implausible under the circumstances. Claimant's behavior was not excused from constituting misconduct as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-125129 is affirmed.

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

**DATE of Service:** April 5, 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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