

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0292**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 80318). The employer filed a timely request for hearing. On February 21, 2019, ALJ Shoemake conducted a hearing, and on February 28, 2019 issued Order No. 19-UI-125518, reversing the Department's decision. On March 20, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB copies of emails and text messages that she sent to her supervisor after November 10, 2018 to rebut the supervisor's testimony at hearing that the employer did not hear from her after November 10, 2018. Although claimant did not offer these documents into evidence during the hearing, OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not presented at the hearing if it is relevant to the issues before EAB and the party offering it on review shows that factors or circumstances beyond the party's reasonable control prevented it from offering it during the hearing. Claimant reasonably could not have foreseen that the supervisor would deny at hearing that she contacted him by email and text after November 10, which was a circumstance beyond claimant's reasonable control that prevented her from having those emails and texts available and offering them into evidence during the hearing. Because claimant and the supervisor's testimony was irreconcilable on the issue of whether claimant contacted the supervisor about her absences after November 10, and the texts and emails appear to directly impeach the supervisor's testimony, they are highly relevant on the matter of the parties' credibility. Claimant has made the required showing under OAR 471-041-0090(2), and the texts and emails that she submitted are admitted into the record as EAB Exhibit 1.

A copy of EAB Exhibit 1 accompanies the decision. Any party who objects to the admission of EAB Exhibit 1 must submit any such objections to this office in writing, setting forth the basis for the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received and sustained, EAB Exhibit 1 will remain a part of the record.

**FINDINGS OF FACT:** (1) Conduent Commercial Solutions LLC employed claimant as a customer service representative from January 2, 2018 until December 7, 2018.

(2) The employer expected claimant to call in before a scheduled shift began if she was unable to report for that shift. Claimant understood the employer's expectation.

(3) On January 22, 2018, claimant's former boyfriend physically attacked her and held her captive in a motel room. Claimant escaped, and the boyfriend was ultimately arrested. Afterward, the boyfriend was either incarcerated or hospitalized for purposes of receiving mental health treatment. Later, claimant obtained a restraining order against the boyfriend and gave a copy of it to the employer.

(4) On November 11, 2018, claimant was raped by a stranger. As a consequence, claimant was admitted to a hospital. On November 13, 2018, claimant sent an email to her supervisor telling the supervisor that she was involved in an emergency and she was going to miss work. EAB Exhibit 1 at 8-9. Claimant also asked the supervisor for information as to whether she could take a leave of absence from work to handle the situation or if she had personal time that she could take off. The supervisor responded that claimant was not eligible for leave. On November 14, 2018, claimant sent another email to her supervisor informing him that she still was not able to report for work. EAB Exhibit 1 at 8. Claimant did not report for work on November 15, 16, 17, 20, 21 and 22, 2018.

(5) The former boyfriend's trial on charges arising from the January 22, 2018 incident was scheduled for December 7, 2018. Claimant needed to attend the trial. Sometime before December 7, claimant made an online request to have December 7 off from work. Claimant also informed her supervisor that she needed to take December 7 off from work to attend the trial of her former boyfriend on charges arising from the January 22 incident. In response, claimant's supervisor sent a text to claimant telling her that if she did not report for work on December 7, the employer was going to discharge her. EAB Exhibit 1 at 7. Claimant was not able to and did not report for work on December 7.

(6) On December 7, the employer discharged claimant for not reporting for work that day and allegedly failing to notify the employer that she was not reporting for work.

**CONCLUSIONS AND REASONS:** 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 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. 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).

Order No. 19-UI-125518 concluded that the employer discharged claimant for misconduct. The order reasoned that claimant missed several days of work, presumably beginning around November 15, 2018, and failed to notify the employer of those absences, which was a wantonly negligent violation of the employer's standards. Order No. 19-UI-125518 at 3. The order noted that the testimony of claimant and the employer's witness, claimant's supervisor, was in conflict about whether claimant did or did not

notify the employer that she was going to be absent, and implicitly accepted as accurate the supervisor's testimony that she had not. Order No. 19-UI-125518 at 3. However, in light of the contents of EAB Exhibit 1, Order No. 19-UI-125518 was incorrect in finding that the supervisor's testimony on the issue of notification was more credible than that of claimant, and that the employer discharged claimant for misconduct.

At the outset, while the supervisor testified that claimant missed several days of work in November 2018, it is undisputed that claimant was not discharged until she failed to report for work on December 7, 2018 and allegedly failed to give notice of that absence. The final incident of alleged misconduct occurring before claimant's discharge is customarily the focus of the misconduct analysis because if, like here, the employer was aware of the prior incidents around the time they occurred and did not discharge claimant, the employer presumably did not consider them sufficiently serious to warrant discharge. On this record, the alleged absence on December 7 was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

At hearing, the supervisor testified without qualification that he had no contact with and did not hear from claimant after November 10, while claimant testified that she sent the supervisor emails and texts after that date. Audio at ~9:54, ~10:50, ~11:22, ~13:35, ~13:56, ~14:16, ~15:35, ~20:24, ~20:55, ~21:10, ~21:30~25:48, . The supervisor specifically and unconditionally denied that claimant sent him emails or texts around November 12 and December 7 regarding absences from work. Audio at ~11:22, ~26:25, ~26:40, ~27:30, ~28:26, ~28:50. The emails and text messages in EAB Exhibit 1, between claimant and the supervisor, wholly undermine the accuracy of the supervisor's testimony, and corroborate claimant's testimony. EAB Exhibit 1 at 7, 8, 9. On this record, more likely than not, claimant notified the employer in advance that she was going to be absent from work on December 7. As such, the employer did not meet its burden to show that claimant failed to give notice of her absence from work on December 7, and that she violated the employer's standards with wanton negligence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-125518 is set aside, as outlined above.

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

**DATE of Service:** April 23, 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**

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 محكمة 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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