

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0334**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 13, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 63350). Claimant filed a timely request for hearing. On March 11, 2019, ALJ Wymer conducted a hearing, and on March 12, 2019 issued Order No. 19-UI-126185, affirming the Department's decision. On April 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Both claimant and the employer submitted written arguments to EAB that contained information not in the hearing record. Neither party showed that factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, neither party's new information was considered when reaching this decision.

**FINDINGS OF FACT:** (1) PNW Metal Recycling Inc. employed claimant as an equipment operator from September 4, 2018 until January 27, 2019.

(2) The employer expected claimant to refrain from threatening, insubordinate or disrespectful behavior. Claimant understood that he was expected to refrain from such behavior.

(3) On January 11, 2019, claimant was involved in an accident while at work. The employer administered a post-accident drug test to claimant that same day. On January 22, 2019, the employer was notified by the testing facility that claimant's test was positive for methamphetamines. As a result, the employer placed claimant on an unpaid suspension.

(4) Around and after January 22, 2019, claimant contacted the testing facility, the employer's human resources representative, and various managers to dispute the accuracy of the drug test and to try have a second test administered. Representatives of the testing facility informed claimant it was unlikely the test result was inaccurate, but that he could submit a list of medicines he was taking and other information to the medical review officer (MRO) to try to account for the positive result. Claimant

thought the facility representatives were rude to him. Claimant also thought that, in their conversations, the human resources representative had not appreciated how devastating the test result was to him and was not trying to help him disprove its accuracy.

(5) On January 27, 2019, the employer's human resources representative contacted claimant to follow up on whether he had submitted the list of medicines to the MRO. During this conversation, claimant offered to fax to the representative the medication list and other information that he had gathered to send to the MRO. The human resources representative told claimant not to fax the information to her. Claimant did not like what he perceived as the representative's attitude. Claimant thought the representative was rude to him and did not believe that the positive test could have been inaccurate. Claimant felt frustrated and helpless.

(6) Very shortly after ending the conversation with the human resources representative, claimant tried to reach a manager, but was unable to do so and left a voice message. The message stated in part:

It's [claimant]. I'm trying to stay calm through all this but I didn't use any drug[s] and I ain't using any drugs and that woman [the human resources representative] is a fucking bitch. I don't care if they fire me now. \*\*\*\*I am one mad son of a bitch. \*\*\*\*Yeah you know I'm sorry I'm trying to stay in control but I'm not using. I didn't use. This is not going the way I ever expected it to and I'm being railroaded and I am pissed off. If you can give me a call, I'd sure appreciate it.

Exhibit 1 at 22.

(7) After leaving the voice message, claimant tried to reach another manager, but was unable to do so. Claimant left a voice message for the second manager, stating in part:

[H]ow ya doing bud. If you ever get my message give me a call. I'm probably just done. \*\*\*\* [The human resources representative] is a fucking bitch. I'm sorry, that's the way I feel. I don't have no chance in hell of being able to prove myself on this \*\*\*\*I don't know what I'm supposed to do. I wasn't using and I'll tell you what, I'm really, really angry. \*\*\*\* Right now my whole fucking world just went to shit over a test that's bullshit and I'm trying to stay calm but those days are getting real limited.\*\*\*\* I'm getting fucking pissed at [the employer's] bullshit right now and I'm the last person on the fucking planet they want to mess with. I'll get a fucking attorney and I will fight for this. God damn it brother that bitch I just got off the phone with her is a lying, fucking two-faced backstabbing bitch \*\*\*\* Any way I better let you go. I'm sorry. I just had to have someone to vent to.

Exhibit 1 at 22.

(8) On January 27, 2019, sometime after the voice messages were left, claimant's wife used her cell phone to send the human resources representative a text message. Claimant had not composed the text message, had not seen it or known of it before his wife sent it to the representative, and had not authorized his wife to send it to the representative. The text stated in part:

When you have the fate of a person's life in your hands, you should stop and think of

putting yourself in the position of the other person and ask yourself how would you feel if a person wasn't listening understanding or considering all of the factors and not set or focused on [one] thing. Because the decision you make for the future of a life for a person can affect you personally. Besides if you make the wrong decision you have to face God one day and still have to look at yourself in the mirror afterwards. Also making the wrong decision could leave you looking over your shoulder for a long time. You never know what people can do when their life is in your hands and you make a decision that effects [sic] them in a bad way it might piss that person off and [in] some cases people retaliate. Think about it.

Exhibit 1 at 19-20. The human resources representative received the message but did not know who had sent it since she was unfamiliar with the number from which it originated.

(9) Later on January 27, 2019, the human resources representative discussed the text message with her manager, who determined that the text message was from claimant's wife's phone. When the human resources manager discussed the text message with the two managers claimant had called, the managers reported having received the voice messages from claimant. At 9:43 p.m., the employer notified claimant by email that he was discharged effective immediately because the two voice messages and the text message from earlier that day were verbally aggressive and threatening. Exhibit 1 at 24.

(10) On January 28, 2019, claimant called the employer and, while stating that he had been angry about the lack of help he received from the human resources representative, denied having threatened anyone. Exhibit 1 at 26. Claimant also sent an email to the employer that day stating that he had not threatened anyone and asking, "When or who did I threaten?" Exhibit 1 at 25. On February 10, 2019, claimant sent another email to the employer seeking clarification as to what he had done that was perceived as threatening or abusive. Exhibit 1 at 27.

**CONCLUSIONS REASONS:** The employer discharged claimant for an isolated instance of poor judgment, and not 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. The employer carries 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).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). A judgment is an evaluation resulting from discernment and comparison, a conscious decision to take an action in the context of an employment relationship. OAR 471-030-0038(3)(b)(B). Poor judgment includes a conscious decision to take action that results in a wantonly negligent violation of an employer's

reasonable standard of behavior. OAR 471-030-0038(3)(b)(C). An instance of poor judgment is isolated if it is 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, isolated acts that violate the law, that are tantamount to unlawful conduct, and that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

Order No. 19-UI-126815 concluded that because the employer failed to show that claimant was responsible for the allegedly threatening text message sent to the human resources representative on January 27, a finding of misconduct could not be based on it. Order No. 19-UI-126815 at 4-5. With respect to the two voice messages claimant left with the managers, however, the Order concluded that claimant knew or should have known that “referring to [the human resources manager] with profanity would probably violate a standard of behavior the employer had a right to expect of him” and, as a result, claimant’s conduct in leaving those messages was wantonly negligent. Order No. 19-UI-126815 at 5. The Order further concluded that claimant’s conduct was not an isolated instance of poor judgment because, in calling two managers and leaving the two voice messages, he exercised poor judgment on two separate occasions. Order No. 19-UI-126815 at 5.

The record supports the Order’s conclusion regarding the allegedly threatening text message. At hearing, claimant testified that he did not compose it, send it, authorize its sending or even know about it before the employer discharged him. The employer did not challenge claimant’s testimony. Although the employer presented evidence that on one occasion two months before the events at issue, claimant’s wife had communicated with the employer by text from her phone, it did not present evidence that claimant ever communicated with anyone using his wife’s phone. Transcript at 12; Exhibit 1 at 21. Nor did the employer show that claimant even had access to his wife’s phone on January 27. Indeed, the human resources representative candidly testified at hearing that she did not know if it was claimant or his wife who sent the text message to her. Transcript at 13. Because the employer did not show that claimant was responsible for the text message from his wife, the employer did not show that claimant engaged in misconduct regarding the content of that text.

The record also supports a conclusion that claimant knew or should have known the language he used in the voice messages he left for the managers probably violated the employers’ reasonable expectations, and that his conduct in leaving those messages was wantonly negligent. However, the record does not support the conclusion that claimant’s conduct amounted to two separate incidents of poor judgment. In *Waters v. Employment Division*, 125 Or App. 61 65, 865 P.2d 368 (1993), the Oregon Court of Appeals stated that where an employee upset at being called in to work on short notice repeatedly telephoned the employee who called him in and left her several angry voice messages containing foul language, the calls were a single occurrence in the employment relationship that was properly treated as an isolated instance. In *Perez v. Employment Department*, 164 Or App 356, 367, 992 P.2d 460 (1999), the Court cited to *Waters* with approval, reiterating that the employee’s several distinct acts of misconduct over the course of an evening were nonetheless one “isolated instance of poor judgment” in the context of the employment relationship. Thus, under *Waters* and *Perez*, claimant’s calls to the managers are properly treated as an isolated instance of wantonly negligent behavior in the context of the employment relationship.

The remaining issue is whether claimant's conduct in leaving the voice messages exceeded mere poor judgment. The record fails to show the voice messages violated the law or were tantamount to unlawful conduct. At hearing, the employer's witness was not clear as to what the employer found objectionable about the voice messages other than that the employer believed they were threatening and verbally abusive. Transcript at 10, 11. However, claimant made no threats of harm to anyone in the voice messages other than stating in one that he might retain the services of a lawyer to help him challenge the positive drug test result. With respect verbal abuse, claimant referred to the human resources representative in both voice messages as a "fucking bitch" and in one as a "two-faced backstabbing bitch," but the references were not made to her or in her presence, and not made publicly or to anyone other than the recipients of the messages. Under the circumstances and in light of claimant's frustration and obvious distress, the record fails to show that the voice messages created an irreparable breach of trust in the employment relationship, or otherwise make a continued employment relationship impossible. Claimant's conduct therefore did not exceed mere poor judgment.

We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on his discharge by the employer.

**DECISION:** Order No. 19-UI-126185 is set aside.

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

**DATE of Service:** May 7, 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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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