

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0530**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 23, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145145). Claimant filed a timely request for hearing. On May 16, 2019, ALJ Janzen conducted a hearing, and on May 22, 2019 issued Order No. 19-UI-130334, affirming the Department's decision. On June 7, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Answer Live LLC employed claimant as a customer service representative from July 12, 2017 until April 3, 2019.

(2) The employer expected claimant to refrain from communications with coworkers that were offensive, harassing, threatening, or obscene. Claimant understood the employer's expectations as a matter of common sense.

(3) On April 1, 2019, one of claimant's coworkers hung up on claimant during a work-related phone call. Afterward, claimant sent a series of instant messages<sup>1</sup> to the coworker. In the first message, claimant stated, "LOL. Nice working with you. Bye-bye. You[r] rude fucking ass just got you fired. Happy now, Ms. Misery?" Transcript at 6-7. The coworker responded, "What did I do to you?" Transcript at 7. Claimant replied, "You will see I am not the only one you have disgusted[,] rude ass bitch. Have fun. Better clear out your box." Transcript at 7. The coworker responded, "I'm just verifying you are typing to me. I've never done anything rude to you. Help explain, please." Transcript at 7.

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<sup>1</sup> The instant messages were read into the record during the hearing and the text of those messages was not reproduced in any documentary exhibit. During the reading, the actual text of the messages was sometimes first read only partly and then corrected, was sometimes interrupted as the employer's witness identified the sender of the message or confirmed that the ALJ had followed that text, or other extraneous comments were made by witness or the ALJ during the reading of the text of the message. Transcript at 6-8. For purposes of clarity, those incomplete readings, interjections, and comments have been intentionally omitted from the quotations set out in the findings as to the content of the messages.

(4) Claimant continued the conversation by instant message and replied, "Last check." Transcript at 7. The coworker responded, "I really don't have a clue what you are talking about. If you want to talk to me do it face-to-face[,] not over the computer. If you are playing April fool's[,] this is not a joke at all." Transcript at 7. Claimant answered the coworker, "You are a joke. Bye, Felicia." Transcript at 8. The coworker responded, "That's sick. Not right." Transcript at 8. Claimant replied, "You really need to learn customer service. You are so rude. We are all not going to tolerate your abuse anymore." Transcript at 8. The coworker did not respond, and claimant did not send further messages.

(5) Sometime later on April 1, 2019, a supervisor contacted the general manager and told the general manager that the coworker with whom claimant had been exchanging instant messages seemed to be out of sorts. To prepare to speak with the coworker, the general manager reviewed the coworker's recent communications and discovered the chain of instant messages between claimant and the coworker. The general manager found no other instant messages or communications between claimant and the coworker.

(6) Still later on April 1, 2019, the general manager spoke with claimant. The general manager told claimant to stop sending instant messages and that the general would handle any situation between claimant and the coworker. At the end of her shift, claimant went home.

(7) The employer did not consider claimant to have failed to comply with its standards before April 1, 2019.

(8) On April 3, 2019, the employer called claimant at home and told claimant that she was discharged. The employer discharged claimant for the content of the instant messages she sent to the coworker on April 1, 2019.

**CONCLUSIONS AND REASONS:** 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. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (December 23, 2018). "[W]antonly negligent' means 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." OAR 471-030-0038(1)(c). 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)

At hearing, claimant explained that she sent the series of instant messages to her coworker because the coworker had hung up on her earlier that day and the coworker was generally rude and bullied her. By their language and tone, the repeated messages that claimant sent to the coworker could reasonably be interpreted only as intimidating, hurtful, malicious, and abusive. The coworker's responses to claimant's communications were not, nor could they reasonably be construed as provocation for claimant's messages. Even if the coworker had recently hung up on claimant during a business-related phone call,

that reasonably would not justify the content of claimant's messages. As a matter of common sense, claimant knew or should have known that the content of the messages she sent to the coworker on April 1 violated the employer's standards against harassing, threatening, or offensive communications. Claimant's behavior in sending those messages was at least wantonly negligent.

Even though claimant violated the employer's standards with wanton negligent, it will not be considered misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

- (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
- (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
- (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
- (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts 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).

To be excused as an isolated instance of poor judgment, the issue in this case is whether claimant's behavior on April 1, 2019 meets the requirements set out in subparts (A) and (D), above. With respect to subpart (A), the evidence did not show that claimant had ever before April 1, 2019 failed to comply with the employer's standards. Accordingly, claimant's behavior on April 1, 2019 was a single or infrequent occurrence of wantonly negligent behavior in violation of the employer's standards. It meets the first requirement to qualify as an isolated instance of poor judgment.

However, claimant's behavior on April 1, 2019 may not be excused as an isolated instance of poor judgment because it exceeded mere poor judgment and thus did not meet the requirement set out in subpart (D). Claimant's attitude at hearing was unapologetic about the substance of the instant messages, and she suggested that she was justified in sending vicious and abusive messages to the coworker. Transcript at 18. Claimant's attitude further suggested that, despite the employer's prohibitions against harassing, threatening, and offensive communications, she would in the future send similar messages if she felt that she needed to "stand up" for herself, as she said she did on April 1, 2019. Transcript at 26. It appears that any employer would reasonably conclude that claimant's behavior in sending such messages was not correctable by disciplinary actions short of discharge. A reasonable employer would conclude, on these facts, that claimant's behavior on April 1, 2019 caused an irreparable breach of trust in the employment relationship. Accordingly, claimant's wantonly negligent behavior on April 1, 2019 was not excusable.

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

**DECISION:** Order No. 19-UI-130334 is affirmed.

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

**DATE of Service:** July 12, 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**

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**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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