

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0584**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 16, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 115359). The employer filed a timely request for hearing. On June 19, 2019, ALJ Frank conducted a hearing at which claimant failed to appear, and on June 21, 2019, issued Order No. 19-UI-132074, affirming the Department's decision. On June 25, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's written argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's written argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Blue Moon Saloon Ungers Bay (dba The Boat) employed claimant from August 19, 2018 until May 14, 2019 as a server.

(2) The employer expected claimant to call the owner rather than text the owner if she was unable to report to work for her immediate shift. The employer's rule was contained in its handbook. The owner required a telephone call rather than a text message because she did not always receive text messages in time to arrange coverage for the shift.

(3) The owner warned claimant verbally that she must call, rather than text, if she was not going to report for an immediate shift. On September 30, October 22, December 23, and December 24, 2018, claimant notified the owner by text message that she would not report to work for her shift. The owner replied to each of those text messages, "Call me." Audio Record at 11:48 to 11:56. The owner sent claimant a photograph of the excerpt from the company handbook stating that claimant must call rather than text if she was going to miss work, and sent it to claimant by text message.

(4) On May 3, 2019, claimant sent the owner a text message stating, “I am heading into the doctor. My ankle is twice the size as normal and hurts. I won’t be able to come in today. I didn’t call because my phone is gonna die. I’m sorry. I will make it tomorrow.” Audio Record at 13:04 to 13:47. The owner called claimant, who did not respond. The owner sent claimant a text message stating, “I tried calling. So, please call me back.” Audio Record at 13:58 to 14:03.

(5) On May 4, 2019, the owner called claimant and discharged her for failing to notify the employer with a telephone call, rather than a text message, that she would be absent from work on May 3.

**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. “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).

The employer discharged claimant for failing to notify the employer on May 3, 2019 that she would be absent by calling rather than sending a text message. Absent exigent circumstances, the employer had a right to expect claimant to notify the employer of absences with a telephone call rather than a text message. Claimant had contacted the employer by text message multiple times before May 3, and received reminders and warnings not to do so. Despite claimant’s failure to follow the employer’s rule on multiple prior instances, claimant’s conduct on May 3 is the proper focus of the misconduct analysis because the employer did not decide to discharge claimant until after that incident had occurred.

Claimant’s text to the owner on May 3 shows that claimant informed the employer she could not work that day, was unable to call because her telephone was “gonna die,” and was seeking medical attention for her ankle immediately. The evidence therefore shows that claimant was not indifferent to the employer’s expectation that she make a voice call, but that she was unable to do so due to her failing telephone and an urgent medical situation. At hearing, the owner speculated that claimant would have had enough telephone power to call if she could text, or that she could have used her roommate’s telephone, or the telephone at the doctor’s office. Audio Record at 16:06 to 16:32. However, the record does not show, by a preponderance of the evidence, that those options were available to claimant, or that claimant was able to pursue those options while seeking medical attention for her ankle. Nor does the record show that claimant consciously engaged in conduct that would cause her telephone to fail, preventing her from complying with the employer’s rule. Accordingly, although claimant’s failure to call the employer on May 3, 2019 was a violation of the employer’s expectation that she call the employer rather than text the employer to report an absence, the conduct was not a willful or wantonly negligent violation. In the absence of evidence establishing that claimant’s violation was willful or wantonly negligent, misconduct has not been shown.

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

**DECISION:** Order No. 19-UI-132074 is affirmed.

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

**DATE of Service:** July 30, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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، می توانید 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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