

State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0633**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 29, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 65919). Claimant filed a timely request for hearing. On June 25, 2019, ALJ Janzen conducted a hearing, and on June 26, 2019 issued Order No. 19-UI-132309, affirming the Department's decision. On July 8, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Waterfront Depot Restaurant & Bar employed claimant as a chef from February 11, 2019, when the employer purchased it, until May 7, 2019. Claimant had worked for the employer's predecessor in interest from 2003 until the employer acquired the business.

(2) The employer expected that claimant would not make threats against the employer, the owner, the manager, and other employees. Claimant understood the employer's expectations.

(3) Claimant became romantically involved with a female coworker, coworker 1. Coworker 1 was also romantically involved with another male coworker, coworker 2. Claimant understood that coworker 1 had a husband who lived in Indiana because he was hiding from law enforcement. Claimant thought the husband was capable of physical violence and dangerous. Claimant loaned a shotgun to coworker 1 so she could protect herself.

(4) Sometime before May 2019, claimant told the owner that he wanted to leave work. The owner convinced claimant to remain working through September 2019.

(5) On May 6, 2019, coworker 1 told the owner that she was quitting work to move across country to join her husband. Coworker 1 told the owner that she was willing to work the shift scheduled for her on May 7, 2019. Soon after, claimant learned that coworker 1 was quitting as of May 7. Also on May 6, claimant and coworker 2 had a verbal disagreement in the workplace. Sometime later, the owner and the manager decided that they did not want coworker 1 to report for a final shift at which claimant and coworker 2 might be present. The owner was concerned that there might be conflict between them. The

owner called coworker 1 and told her the employer would cover her shift on May 7. Coworker 1 agreed that May 6 was her final day.

(6) After he learned that coworker 1 was leaving work, claimant contacted several customers and coworkers inviting them to the workplace during what he thought would be coworker 1's final shift on May 7. Claimant hoped that those invited would leave a significant sum in tips for coworker 1 to help her finance her cross-country trip.

(7) Early in the day on May 7, claimant sent a text message to the owner stating that he was planning a celebration for coworker 1's final shift later that day, and had invited many people to attend. The owner replied to the text stating that he, the manager and coworker 1 had agreed that coworker 1's shift on May 6 had been her last shift. Claimant responded that he had invited too many people to retract all the invitations and told the owner that the owner could not call off the celebration. Claimant also told the owner that it appeared the owner cared only about money. The owner then placed a voice call to claimant. However, when the owner reached claimant, claimant almost immediately disconnected because he had an incoming call. Claimant told the owner he would call him back.

(8) Approximately 1 ½ hours later on May 7, a customer forwarded the owner a screen shot of a message that the customer had received from claimant. The message stated, "I am going to fuck up [the owner, the former owner and the manager] for what they did to [coworker 1]. Invite everyone you know to [coworker 1's] last night [at work]. They will have to explain why she's not there to 100s hopefully. Should be fun. [The owner] has less than two hours to call me back, invite everyone." Transcript at 8.

(9) Shortly after on May 7, coworker 1 called the owner. Coworker 1 told the owner that, although she did not know what was going on, claimant had just been at her house and he seemed to be angry with the owner. Coworker 1 reported that claimant had told her that he was "gonna blow up" the restaurant and that "[y]ou're gonna see what I did on the news tomorrow." Transcript at 11. Coworker 1 also reported that, after she had tried to persuade claimant to calm down, claimant had commented to her, "You know, everybody has to die somehow." Transcript at 11. Coworker 1 also stated that she wanted to give the owner a "head's up," and told the owner that she had just given claimant back a gun that she had borrowed from him. Transcript at 11.

(10) Shortly after speaking with coworker 1, the owner sent a text message to claimant stating that he wanted claimant to come to the restaurant to talk with him. The owner and the manager had decided that the employer would discharge claimant when he came in for the threats he had made in the text to the customer and in the conversation with coworker 1. Soon after, claimant arrived at the restaurant and met with the owner and the manager. A discussion developed between the manager and claimant about claimant's priorities. In the course of the discussion, the manager discharged claimant for making threats.

**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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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 owner was definite as to what the screenshot forwarded to him said, and appeared to read the screenshot verbatim during his hearing testimony. Transcript at 7-8. The owner appeared equally certain about what coworker 1 told him about her conversation with claimant on May 7. Transcript at 10-11. Claimant did not dispute the contents of the screen shot, but contended that his intention was not to threaten physical violence. Claimant stated that his reference to “fucking up” the owner, former owner and manager was meant to convey that he was going to quit work in retaliation for not being able to hold the celebration for coworker 1 and that his leaving would harm all of them. Transcript at 22. However, neither the screen shot nor its context alludes to claimant leaving work and nothing about it remotely suggests that it is about claimant quitting work. It also is not clear why claimant would mention harming the former owner and the manager if he actually intended to refer to harming the restaurant’s business and finances.

Claimant also did not dispute that he had a conversation with coworker 1 on May 7, and initially testified that he did not remember the exchange he had with her. Transcript at 20. Later, claimant contradicted his first statement and testified that coworker 1 must have misinterpreted several of his references in the conversation, suggesting that he had a recollection of the conversation with coworker 1. Rather than meaning to convey to her that he intended to actually “blow up” the restaurant, claimant stated that he told coworker 1 that it would “wreck” the restaurant, meaning that the restaurant would be harmed, if he quit work. Transcript at 23-24. Claimant further explained that he told coworker 1 that his departure from the restaurant would appear on his Facebook newsfeed, which he stated that she must have confused with a reference to appearing on the television news. Transcript at 25. Claimant also explained that coworker 1’s reference to him making comments about death was a misinterpretation of concerns he had expressed that day over the possible consequences of her husband’s propensity for physical violence. Transcript at 25-26. It is unlikely that claimant would have been as vague as he suggested he was in his conversation with coworker 1 if his intended meanings were as he contended. Had claimant’s references actually been to him leaving work, he would have been expected to make at least some reference to leaving or quitting, which he did not do in his account. Given the conflict in claimant’s testimony about whether he recalled the communications and the unlikelihood of his later explanations, claimant’s testimony about the communications with the customer and coworker 1 is not reliable. The testimony of the owner is accepted on the contents of the text that claimant sent to the customer on May 7 and the conversation he had with coworker 1 that day.

The preponderance of the evidence shows that claimant made communications on May 7, 2019 that were reasonably construed by their intended recipients, the customer and coworker 1, as threats to harm the owner, the former owner, the manager and the workplace. Given the language that claimant used in

the communication, claimant knew or should have known how these communications would be reasonably interpreted by their intended recipients and, if disclosed, by the employer. By the content of the communications, claimant violated the employer's expectations with at least wanton negligence.

However, claimant's wantonly negligent behavior is not 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). The evidence did not establish that claimant willfully or with wanton negligence violated the employer's standards before May 7, 2019. The issue is whether claimant's behavior on that day exceeded mere poor judgment by causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. Claimant's communications on May 7, reasonably interpreted, stated an intention to inflict pain, injury, damage, or some other hostile and destructive consequence on the current and past owners, the manager, and the workplace. While claimant contended that he did not intend to harm anyone or anything, the graphic language that he chose to use reasonably suggests that was precisely what he wanted to communicate, whether or not he actually intended to follow through. As a matter of common sense, a reasonable employer would not assume the risk that claimant would not act in accordance with the plain meaning of his communications. A reasonable employer would not expose the owner(s), the manager, and the workplace premises to that level of danger. Given the clarity of his communications, a reasonable employer would conclude that by his threatening communications on May 7, 2019, claimant caused an irreparable breach of trust in the employment relationship. Accordingly, claimant's behavior on that day may not be excused as an isolated instance of poor judgment.

Nor is claimant's wantonly negligent behavior on May 7, 2019 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). The evidence does not show that claimant's communications that day arose from a misunderstanding of the employer's standards, or that claimant mistakenly thought that the employer would condone their contents. Claimant's behavior on May 7, 2019 is 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-132309 is affirmed.

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

**DATE of Service:** August 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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

## 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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، 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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