

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0721**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 24, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 112652). The employer filed a timely request for hearing. On July 22, 2019, ALJ Seideman conducted a hearing, and on July 23, 2019, issued Order No. 19-UI-133788, concluding the employer discharged claimant for misconduct. On August 1, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Opportunity Foundation of Central Oregon employed claimant from January 1, 2019 until April 19, 2019 as a direct support professional (DSP) in one of its residential group homes for adults with intellectual and developmental disabilities.

(2) The employer expected each DSP to refrain from using "profane" or "abusive" language at work. Exhibit 6, Work Rules, at 1. The employer's medication administration policy prohibited each DPS from using cell phones while administering medication and removing a "hold" from a medication unless it was pursuant to a doctor's orders. Claimant understood these expectations. The employer also expected each DPS to refrain from using the employer's computers for personal use during work.

(3) Prior to March 28, 2019, claimant occasionally used foul language while at work. On March 28, 2019, the employer gave claimant a warning and instructed her not to use foul language while working. Claimant refrained from doing so after March 28.

(4) On April 12, 2019, claimant reported to work and saw that she was no longer assigned to perform medication-related duties on April 13. Her name had been crossed off the schedule. Claimant asked a coworker if she knew who crossed her name off the list and why, but the coworker did not answer

claimant's questions. Claimant became "upset" with the coworker because claimant had been taken off the medication schedule. The coworker left. Claimant called the human resources director and told her that she had become "upset" with a coworker. Transcript at 7. The human resources director told claimant that she had been taken off the medication schedule because she had made medication errors, and that she would investigate the incident with the coworker. The house manager called the human resources director after claimant and told the human resources director that claimant had yelled at the coworker that the coworker was "the manager's little pet." Transcript at 8.

(5) The evening of April 12, 2019, a medication that had been "on hold" and not available to a resident was marked as being off hold, but there was no doctor's order to remove the hold from the medication. Transcript at 5. Claimant was distributing medication that evening. Claimant did not know how to remove a medication off hold status, and if she removed the medication, she did so inadvertently.

(6) On April 14, 2019, in response to the human resource director's investigation about claimant's April 12 conduct at the group home, the human resources director received several signed statements from claimant's coworkers stating that claimant used foul language while at work, in front of residents, and had called her coworkers "bitches and hoes." Transcript at 8. Coworkers also reported that claimant used her cell phone while distributing medication, and that she used the employer's computer for personal use while she was on duty. The human resources director had the employer's technology supervisor retrieve a record of claimant's computer use for April 14. The results showed that on April 14, 2019, claimant had used the employer's computer to complete job applications to other employers for a "period of time" between "about noon and 4:00 p.m." Transcript at 9.

(7) On April 16, 2019, the employer put claimant on leave until it completed its investigation regarding claimant's conduct.

(8) On April 19, 2019, the employer discharged claimant for allegedly using foul language while working, using her cell phone while distributing medication, taking a medication off hold without doctor's orders, and using the employer's computer for personal business during work time.

**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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for allegedly violating its policies prohibiting employees from using foul or abusive language at work, using her cell phone to distract her while distributing medication, and releasing a medication from hold without a doctor's authorization. Claimant knew or should have known

these expectations from training or from common sense. The employer also discharged claimant for misusing the employer's computer during work to complete job applications for other employers. Order No. 19-UI-133788 concluded that claimant's comments and attitude were "bad" and "not good" with her coworkers and clients, and that her poor attitude and comments amounted to misconduct that could not be excused as isolated because "there were many" comments and instances of poor attitude.<sup>1</sup> The employer has the burden to prove misconduct in a discharge case, and on this record, the employer did not meet its burden to show that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence.)

With respect to claimant's use of foul, profane or abusive language at work, the employer's witness testified that it received signed witness statements that claimant used foul language at work. Transcript at 8. The employer did not offer the statements as evidence. Claimant provided the only firsthand testimony regarding her use of foul language at work. Claimant testified that she had used foul language before she received a warning on March 28, 2019, but that after receiving that warning, she refrained from using "cuss words" at work, including when she became upset with a coworker on April 12, 2019. Transcript at 22. Claimant's firsthand testimony about the April 12 incident was that she was "upset . . . [b]ut . . . didn't cuss at [her coworker] or anything." Transcript at 22. The employer presented hearsay evidence that claimant called her coworker "the manager's little pet," but the employer's evidence does not outweigh claimant's firsthand testimony that she "wasn't being rude." Moreover, both parties testified about discord between claimant and the coworkers who presumably provided the signed witness statements about claimant's alleged policy violations, which may make the statements unreliable. The human resources manager testified that claimant said she "hated" the coworker who did not answer her questions about the medication schedule on April 12, and claimant testified that her coworkers "didn't like me right off the bat." Transcript at 8, 21. Claimant did not have the opportunity to testify about the details of the statements or cross-examine the coworkers who provided the statements. To the extent the employer discharged claimant for using foul language at work, the employer did not discharge claimant for misconduct.

Nor does the record show by a preponderance of the evidence that claimant took a medication off hold status on April 14 without a doctor's permission, let alone that claimant did so willfully or with wanton negligence. The employer's witness alleged that claimant took the medication off hold during her shift on April 14. Transcript at 5-6. Claimant testified that she did not take a medication off hold, and that she did not even know how to take a medication off hold. Transcript at 14. The employer did not persuasively show otherwise. To the extent the employer discharged claimant for removing the hold from a medication in violation of the employer's medication administration policy, the employer did not discharge claimant for misconduct.

Similarly, the employer's evidence that claimant used her cell phone while administering medication to clients was based entirely on hearsay statements that were not submitted as evidence at hearing. Claimant denied having ever used her cell phone while administering medication. Transcript at 19. Because the record does not show by a preponderance of the evidence that claimant ever used her cell

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<sup>1</sup> Order No. 19-UI-133788 at 3.

phone while administering medication, the employer's discharge for that reason was not shown to be for misconduct.

Finally, the record shows that claimant used the employer's computer for personal use, as alleged by the employer. Claimant used the employer's computer for a "period of time" to complete job applications on April 14, 2019. Although the employer's policy prohibited the use of its computers for personal use during work time, the record shows that claimant had a good faith belief that the employer permitted such use during "down time" when claimant was on break and not engaged in work activities. Transcript at 23. A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's expectation, and some factual basis for believing that to be the case. *See Goin v. Employment Dep't.*, 203 Or. App. 758 (2006) (Claimant's failure to provide her doctor with documentation of her need for additional medical leave was a good faith error where she mistakenly believed that her employer would obtain the information directly from her doctor). Claimant testified that she saw other employees using the employer's work computer for "all kinds of stuff," including social media, during breaks, and believed it was "okay" to use the computer for personal purposes during "down time." Transcript at 23. The employer's evidence does not show that claimant used the computer while not on a break. Although claimant violated the employer's expectations by using its computer to complete job applications, claimant's conduct was a good faith error, and therefore not misconduct. OAR 471-030-0038(3)(b). Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 19-UI-133788 is set aside, as outlined above.

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

**DATE of Service: September 6, 2019**

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week 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 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 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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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