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

323
DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2019-EAB-0728

*Affirmed*
*Disqualification*

**PROCEDURAL HISTORY:** On June 5, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131729). On June 24, 2019, claimant filed a timely request for hearing.[1] On July 9, 2019, ALJ Murray-Roberts conducted a hearing, and on July 15, 2019, issued Order No. 19-UI-133295, concluding the employer discharged claimant for misconduct. On August 3, 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) Multnomah County School District employed claimant in the human resources department from October 10, 2014 until May 1, 2019.

(2) The employer expected claimant to refrain from sexually harassing coworkers. The employer defined sexual harassment to include unwelcome sexual advances or requests for sexual favors, or other

[1] With his request for hearing and along with his argument to EAB, claimant indicated that another administrative decision also issued on June 5, 2019, which was decision # 63622, allowed him benefits based on the same June 2, 2019 work separation for which he was denied benefits in decision # 131729. The difference in outcome appears due to the employer providing information about the separation to the Department after decision # 63622 was issued. It is within the Department's discretion to issue an administrative decision superseding a previously issued administrative decision so long as the Department is not equitably estopped from doing so or claimant is not deprived of due process rights, including a reasonable opportunity to challenge an adverse decision. Here, estoppel does not apply because the Department made no false representation to claimant and claimant likely did not reasonably rely to his detriment on the decision that allowed him benefits since it was superseded on the very day it was issued. As well, claimant filed a timely request for hearing on decision # 131729, showing that he was not deprived of a reasonable opportunity to challenge the adverse decision. This matter is before EAB pursuant to claimant's timely request for hearing and application for review of the denial of benefits based upon his separation from the employer.

unwelcome behaviors of a sexual nature that created a hostile or offensive working environment. The employer also defined sexual harassment to include sexual innuendos, suggestive comments, jokes of a sexual nature, and sexual propositions. Claimant understood the employer's expectations.

(3) Beginning in November 2018, claimant sent unwelcome texts and made unwelcome voice calls to a female coworker. Those communications sometimes included sexual or suggestive content and innuendo.

(4) On November 22, 2019, claimant sent multiple texts to the female coworker. The first text included claimant stating, "Tell me do u get or not. I am no hater jus feel a certain way. Take a pool [sic] with your fam and[] [l]et me no. Care for u deeply[,] always be safe[.]" Exhibit 1 at 18. A second text claimant sent two minutes later to the coworker stated, "Hopefully u will respond[.] Thanks[.]," to which the coworker replied with a smile emoji. Exhibit 1 at 18. Around five hours later, Claimant sent a second series of texts to the coworker, which included, "U really need to let me take care of u financially sometimes. No sex attached. I just care for u bae[2] Lol[.]" Exhibit 1 at 19. Although the coworker did not respond, claimant sent another text stating, "We never touched that is why I no why u r a special women [sic]. And i[t] would be to[o] much any way. U no that. Be safe ok. Much love[,] more importantly respect[.] Exhibit 1 at 19.

(5) With still no response from the coworker, claimant began another series of texts that day stating, "Say ok. Nice n slow[.] Say yes. Nice n slow[.] Exhibit 1 at 19. The coworker did not respond. Claimant sent a new series of texts, which began with "Will u at least think about us[.] Exhibit 1 at 20. Claimant then sent a text stating, "Would love to help u out win [sic] needed. U r da one all natural and down for da count. Am [I] right," followed by, "Do not mean any disrespect. Just care for u," and "Still wondering why. Cannot figure it out. Daaaaaaaaa@m[.]" Exhibit 1 at 20.

(6) The coworker still had not responded, but claimant sent another series of texts that day, beginning with, "Just no that you are always on my mind. Will not bother u anymore. Take care bae much respect and more importantly luv still chasing da answer. Never felt this way about nan[3] female. No kissing or sexial [sic] activity. Wow only can [i]magine [sic]." Exhibit 1 at 20. When the coworker did not respond, claimant continued with, "I no you take care of your man. You want to act square. U nasty though." Exhibit 1 at 21. With no response, claimant followed up with another text, "Tell me u aint. Dont like[.] Don't lie[.] B safe. Exhibit 1 at 21.

(7) With still no reply from the coworker on November 22, 2018, claimant started another text series that day with, "Don't mean any disrespect to your man. Can only tell u how [I] been feeling. Since [I] met u. Real talk. Thanks for listening and happy holidays." Exhibit 1 at 21. The texts on that day ended. Sometime later in November, the coworker told a second coworker about the texts that claimant was sending. The first coworker asked the second coworker not to notify others of claimant's behavior because the first coworker thought claimant's unwelcome communications might stop if she did respond to them.

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[2] Bae is an acronym for "before anyone else" and often is used as a synonym for baby or sweetie or to refer to a girlfriend or boyfriend. https://www.urbandictionary.com/define.php?term=B%C3%A6.

[3] Nan means a strong and beautiful woman, a survivor. https://www.urbandictionary.com/define.php?term=Nan

(8) On March 21, 2019, claimant called the coworker at 4:15 a.m. and asked her "if she was still able to have kids because he would have put six kids in her by now." Transcript at 18-19.

(9) On March 29, 2019, claimant's ex-fiancé sent a text message to the coworker claimant had been texting and calling. The coworker considered the message threatening, and she notified a supervisor of that message as well as the phone calls and text messages that claimant had been making since November 2018. The coworker told the supervisor that the communications from claimant of a sexual or romantic nature were unwelcome. The coworker showed the texts from claimant that were on her phone to the employer. The employer initiated an investigation.

(10) On April 4, 10 and 29, 2019, the employer's counsel met with claimant to discuss the coworker's allegations. Claimant admitted sending non-work related text messages to claimant, including on November 22 and December 1. However, claimant stated that he and the coworker were good friends and he did not know the texts were not welcome because the coworker had responded positively to them and had not told him to stop. Claimant told counsel that the coworker had deleted her responses to claimant's texts before showing her phone to the employer. When the counsel asked claimant to produce the coworker's responses on his phone, claimant stated that he had deleted them and his phone carrier only kept deleted texts for two weeks. Claimant also told counsel that the coworker often phoned him outside of work, but denied making voice calls in which he made sexual reference or comments to the coworker. The employer's counsel asked claimant several times to bring in his phone records to corroborate what he was saying about the coworker initiating contact with him outside of work, but claimant did not and did not provide a reason for failing to do so. Claimant also told the employer's counsel that he thought the coworker and his ex-fiancé had colluded to bring the sexual harassment allegations against him.

(11) On May 1, 2019, the employer discharged claimant for violating its sexual harassment policy by his text and phone communications with the coworker.

**CONCUSIONS 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 and good faith errors 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 plain language claimant used in the texts he sent to the coworker on November 22, absent explanation, is reasonably interpreted as containing sexual innuendos and sexually suggestive comments. At hearing, claimant contended that he did not violate the employer's sexual harassment

policy by the communications because he thought the coworker welcomed them, or, at a minimum, did not consider them offensive.

To corroborate his contention, claimant first stated that the coworker had responded positively to the texts he sent, but had deleted her responses from her phone before showing his texts to the employer. However, claimant stated that he was unable to produce the coworker's alleged responses to his texts because had deleted them from his phone and his phone carrier had not retained copies of them. Claimant's contention is significantly undercut by the failure of his texts to directly or indirectly respond or refer to any intervening responses from the coworker, as would be expected if the coworker had actually responded. For this reason, it is not likely that the coworker responded to positively to claimant's texts other than for the one smile emoji she sent to claimant on November 22, which was sent before he began making sexually suggestive comments.

To corroborate his contention, claimant also stated that the coworker had continued to speak with him frequently on the phone outside of work between November 2018 and March 2019, suggesting that the texts had not offended her. Claimant agreed that phone records showing his call history were readily available and that the employer had asked him on several occasions to produce those records. Regarding his failure to produce those phone records, claimant agreed that he did not have a particular reason for failing to provide the phone records. Transcript at 38, 39. Had claimant's call history actually showed repeated contacts with the coworker during the relevant timeframe of November 2018 through March 2019, he likely would have produced it for the employer. For this reason, it is not likely that the coworker continued to contact claimant, nor is it likely that claimant received contacts by the coworkers from which he reasonably could have concluded that she condoned his sexually suggestive communications to her.

To corroborate his contention that he did not initiate unwelcome sexually suggestive topics, claimant further stated that some of the sexually suggestive content of the November 22 texts was due to him responding to a post that claimant had placed on Facebook. The coworker's Facebook post allegedly asked "[W]hat would I say to my man" or "something to that effect." Transcript at 37. However, responding to that post does not explain why claimant referred to taking care of the coworker, doing things "nice n slow," asking the coworker to think about "us," stating that the coworker was always on his mind, and characterizing the coworker as "nasty." Exhibit 1 at 18-21. It is not plausible that claimant's sexually suggestive texts on November 22 were invited by the coworker's alleged Facebook post or were actually in response to it.

Claimant finally asserted that his disgruntled ex-fiancé and the coworker had worked together to bring sexual harassment allegations against him. Transcript at 23, 26. However, claimant did not supply a reason for why they would collude together against him, or why the coworker would cooperate with the ex-fiancé, particularly after the coworker received an email from the ex- fiancé the coworker construed as threatening in nature. It is unlikely on this record that the coworker and the ex-fiancé colluded to bring sexual harassment allegation against claimant.

Because claimant's justification for the language that he allegedly used in the texts and phone calls was not supported by available evidence, it is not reliable. For the same reason, claimant's assertion that he did not call the coworker on March 21, as the employer contended, also is not reliable. If phone records corroborated that claimant had not made a call to the coworker on March 21, it is implausible that he

would not have supplied those records. Transcript at 43. Given the reasonable interpretations of the language that claimant used in communications that he initiated with the coworker on November 22 and March 21, and the absence of reliable evidence showing the coworker condoned those communications, claimant violated the employer's expectations with at least wanton negligence.

Claimant's violations of the employer's standards with wanton negligence by the sexual innuendos and sexually suggestive communication he had with the coworker may be considered misconduct if the conduct was not excusable as 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). Here, claimant's behavior was not a single or infrequent occurrence, but a repeated act or pattern of other willful or wantonly negligent behavior. Claimant sent a series of sexually suggestive separate texts to the coworker on November 22,and made a sexually suggestive comment in a telephone call to the coworker on March 21. Claimant's behavior was not isolated.

As well, claimant's sexual innuendo or sexually suggestive comments resulted from claimant's conscious decision to communicate, and thus were judgments for purposes of OAR 471-030-0038(3). Claimant's behavior in communicating sexual innuendo or sexually suggestive comments to the coworker involved decisions to take actions in wantonly negligent violation of the employer's reasonable standards and thus involved poor judgment.

Finally, claimant's behavior in consciously communicating sexual innuendos and sexually suggestive comments to his coworker created an irreparable breach of trust in the employment relationship. At hearing, claimant insisted that the coworker condoned the communications at issue, and did not admit of the possibility that the communications could reasonably have been perceived as sexually harassing. Given the absence of self-reflection, any reasonable employer would objectively conclude that claimant could not be trusted in the future trust to comply with the employer's standards against sexually harassing communications or other standards. Claimant's behavior may not be excused as an isolated instance of poor judgment.

Nor may the communications at issue be excused as a good faith error under OAR 471-003-0038(3)(b). Claimant stated that he understood the employer's prohibition against sexual harassment, and did not contend that his communications with the coworker were due to misunderstanding the employer's standards. Nor did claimant establish that he reasonably or sincerely believed that his communications with the coworker were not harassing in nature. Accordingly, claimant's behavior in violation of the employer's sexual harassment policy is not subject to excuse as a good faith error.

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

**DECISION:** Order No. 19-UI-133295 is affirmed.

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

**DATE of Service: September 10, 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. 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف 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 دستورالعمل 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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