

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-1016**

*Reversed*  
*Not Disqualified*

**PROCEDURAL HISTORY:** On September 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and claimant was disqualified from benefits effective August 4, 2019 (decision # 110845). On September 17, 2019, claimant filed a timely request for hearing. On October 3, 2019, ALJ R. Frank conducted a hearing, and on October 4, 2019 issued Order No. 19-UI-137586, affirming the Department's decision. On October 22, 2019, claimant filed a timely application for review of that order 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) Portland Nursery Company employed claimant from March 19, 2013 to August 6, 2019.

(2) The employer had a policy that required employees to interact with others in a respectful manner. Claimant understood the expectation.

(3) Between April 2015 and March 2019, the employer received complaints about claimant or observed claimant engage in conduct that affected the morale of the workplace or made the workplace toxic. In March 2019, the employer issued a warning to claimant about her behavior and instructed her, among other things, to stop commenting on others' work performance or work ethic, speaking negatively about peers, or making them feel uncomfortable. The warning stated that reoccurrences of the issues identified in the warning may result in termination of her employment. Claimant understood the warning, and said she would try harder. Claimant knew after receiving the warning that she was on probation.

(4) On approximately August 1, 2019, claimant received an instruction to set up a sale table in a particular area. When she started to do so, an assistant supervisor told her that they weren't going to put the table in that location this year. Claimant asked why, and the assistant supervisor told claimant the

supervisor did not want it there that year. Claimant folded up the table and left to put the table away. Claimant then told her regular supervisor she was unable to complete the task, then resumed working. The assistant supervisor thought claimant had used foul language and stormed away.

(5) The assistant supervisor approached claimant later to say that she was frustrated claimant had stormed off and wanted to know why she had. Claimant explained that she had just been trying to do what she was told, and apologized for storming off. Claimant told the supervisor she felt frustrated at the time because she did not feel like people were doing their part to set up for the sale. Claimant felt after she spoke with the assistant supervisor that their relationship was okay.

(6) The assistant supervisor later complained to the employer about claimant's conduct. The employer investigated, and, on August 6, 2019, discharged claimant.

**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).

The order under review concluded that claimant's discharge was for misconduct because she more likely than not said "fuck it" to an assistant supervisor in the final incident, and, even if she had not, she was still discharged for misconduct because she was noticeably angry and stormed off in the final incident. Order No. 19-UI-137586 at 4. The record does not support the conclusion that claimant's discharge was for misconduct.

The employer alleged that claimant said "fuck it" in the final incident. In support of the allegation, the employer presented hearsay evidence that the assistant supervisor involved in the final incident said claimant used that phrase. Transcript at 5, 23-24. The employer also presented double-hearsay, through the same assistant supervisor, that claimant had sent a text message to a different assistant supervisor admitting she had used the phrase. *See* Transcript at 11-12. Claimant, who was the only firsthand witness to testify at the hearing, denied having said "fuck it," and denied having sent a text message to her assistant supervisor admitting she had done so. Transcript at 16, 17-18.

The employer alleged that claimant was given the opportunity to deny that she had used foul language during the final incident and did not deny having used it. Transcript at 11, 25. The employer also testified, though, that they "didn't have the opportunity to really nail down the facts about the incident" at the time they discharged claimant. Transcript at 25. Claimant testified that she was not told at the time she was discharged that the employer was alleging she used foul language. Transcript at 16, 20, 26. The record fails to show exactly what occurred at claimant's discharge meeting, and it is just as likely as not

that the employer told claimant she was being discharged for using foul language as it is that they did not, or that they did and claimant did not hear, or that they did and claimant did not comprehend. It is not reasonable under the circumstances to construe claimant's failure to deny having used foul language in the final incident as a tacit admission that she had.

The employer has the burden to prove misconduct in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must present evidence establishing that it is more likely than not that claimant engaged in willful or wantonly negligent misconduct. In this case, the evidence is no better than equally balanced about what occurred at the time of the final incident. Absent a reason to disbelieve claimant, or find that she was generally not a credible witness, her testimony has at least as much weight as, or more weight than, the employer's hearsay and double-hearsay about what claimant said at the time of the final incident, and as much weight as the employer's evidence about whether or not claimant was given the opportunity to refute the allegation that she said "fuck it" at the time the employer discharged her. The preponderance of the evidence therefore fails to establish that claimant said "fuck it."

With regard to whether claimant's other conduct at the time of the final incident should be construed as misconduct, the record is, again, inconclusive. Claimant folding up the table and leaving the area, after being told not to set up the table there, is more akin to a reflexive response to being told not to set up the table rather than a conscious or willful decision to be disrespectful to the assistant supervisor. Nor is it clear how claimant's conduct in folding up a table and leaving the area violated the employer's expectation that she treat others with respect.

On this record, the preponderance of the evidence shows that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Order No. 19-UI-137586 is set aside, as outlined above.

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

**DATE of Service:** November 26, 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**

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