

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0923**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 14, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective August 22, 2021 (decision # 105715). Claimant filed a timely request for hearing. On October 20, 2021, ALJ Janzen conducted a hearing, and on October 21, 2021 issued Order No. 21-UI-177716, affirming decision # 105715. On November 3, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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 claimant's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Clinic for Dermatology & Wellness employed claimant as a front office manager from November 13, 2017 until August 24, 2021.

(2) The employer had a computer use policy, which required claimant to refrain from using her work computer for personal purposes except during breaks and lunches. Claimant was allowed to use her work computer to text family members in an emergency. The employer's computer use policy was contained in the employer's employee handbook, which was provided to claimant prior to her first day of work. Claimant was aware of and understood the employer's computer use policy.

(3) The employer also had an insubordination policy, which prohibited claimant from failing or refusing to obey the instructions of a supervisor. The employer's insubordination policy was contained in the employer's employee handbook, which was provided to claimant prior to her first day of work. Claimant knew and understood the employer's insubordination policy.

(4) In early August 2020, two of the employer's owners went to Florida for vacation. On August 13, 2021, while on the vacation, one of the owners sent a message to claimant requesting that claimant convey to other employees that COVID-19 was worsening where the employer's clinic was located and that employees should "make good choices over the weekend," and avoid interacting with people who are not wearing masks or social distancing. Transcript at 12.

(5) After receiving the owner's message, claimant approached the other employees and stated to them that the owner had sent the message and "[w]anted everyone to be careful and not go anywhere, um, because with COVID rising." Transcript at 26. One of the employees stated that the message seemed hypocritical because the owners were on vacation. Claimant agreed that the message was hypocritical and said, "yes[,] they sent that from Florida." Transcript at 26.

(6) Shortly thereafter, the employer learned about the comment claimant made after she conveyed the owner's message. The employer viewed claimant's comment as insubordinate. On August 20, 2021, the employer held a meeting with claimant and reprimanded her for making the comment.

(7) Later on August 20, 2021, claimant was at her desk working when she received a text message on her work computer from her friend. In the text, the friend informed claimant of a potential job with the friend's employer and urged claimant to pursue the job. Claimant used her work computer to send a response text asking where the job would be located. Claimant was not on break or at lunch when she used her work computer to text with her friend.

(8) On August 22, 2021, the employer discovered the texts between claimant and her friend on claimant's work computer. On August 24, 2021, the employer discharged claimant for violating the computer use policy by using her work computer for personal purposes to text with her friend on August 20, 2021.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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) (September 22, 2020). "[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 order under review concluded that claimant acted with wanton negligence and committed misconduct when she knowingly violated the employer's computer use policy by using her work computer for personal reasons to text with her friend. Order No. 21-UI-177716 at 3. The order under review further reasoned that claimant's conduct was not an isolated instance of poor judgment because it was part of a pattern of other willful or wantonly negligent behavior. Order No. 21-UI-177716 at 3-4.

The order concluded that claimant had acted with wanton negligence previously by breaching the employer's insubordination policy via the comment she made after she conveyed the owner's message on August 13, 2021. Order No. 21-UI-177716 at 4. The record supports the order under review's conclusion that claimant acted with wanton negligence when she violated the employer's computer use policy. However, the record does not support the order under review's conclusion that claimant's conduct was not an isolated instance of poor judgment.

Claimant violated the employer's computer use policy with at least wanton negligence when she used her work computer to text with her friend on August 20, 2021. The record shows that on that date, while neither on break or at lunch, nor in the context of an emergency, claimant used her work computer to text with her friend about a job opportunity the friend wished for claimant to pursue, which included claimant sending a text asking where the job would be located. This evidence is sufficient to conclude that claimant consciously used her work computer for personal purposes. Claimant knew or should have known this would probably result in violation of the employer's computer use policy because claimant acknowledged being aware of the employer's computer use policy at hearing. Transcript at 19. As such, claimant's conduct on August 20, 2021 constituted a wantonly negligent violation of the standards of behavior the employer had a right to expect.

However, under OAR 471-030-0038(3)(b), claimant's wantonly negligent conduct did not constitute misconduct if it was an isolated instance of poor judgment. 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).

Applying these standards, the record shows that claimant's violation of the employer's computer use policy was an isolated instance of poor judgment and therefore not misconduct. Claimant's conduct was

an isolated act. Other than the one instance on August 20, 2021, the record is devoid of evidence that claimant had previously violated the employer's computer use policy or otherwise engaged in any willful or wantonly negligent violation of a known employer policy or expectation.

In particular, although the record shows that the employer viewed the comment claimant made on August 13, 2021 after she conveyed the owner's message about COVID-19 to be insubordinate, the record does not support that claimant's conduct on that occasion actually violated the employer's insubordination policy. That policy prohibited claimant from failing or refusing to obey the instructions of a supervisor. However, the record shows that on that day, the owner asked claimant to tell the employees "to make good choices over the weekend" and avoid interacting with people who are not wearing masks or social distancing. Transcript at 12. Claimant, in turn, advised the employees that the owner had sent the message and "[w]anted everyone to be careful and not go anywhere, um, because with COVID rising." Transcript at 26. Therefore, while there was some variation in the choice of words, the record shows that claimant complied with the instructions she received from the owner on August 13, 2021 to deliver the owner's message to the employees. After doing so, claimant made a comment relating to the owner's message being hypocritical. However, this comment did not constitute a breach of the employer's insubordination policy because at the time claimant made the comment, she had already complied with the owner's instructions. Thus, the record does not show that claimant's conduct on August 13, 2021 violated the employer's insubordination policy or otherwise amounted to a willful or wantonly negligent violation of a known employer expectation.

Moreover, even if the comment claimant made on August 13, 2021 had been a willful or wantonly negligent breach of the employer's expectations, it would not be sufficient to establish a pattern of willful or wantonly negligent behavior under OAR 471-030-0038(1)(d)(A). The record shows that claimant worked for the employer for nearly four years, during which she breached the computer use policy with wanton negligence one time. If, for sake of argument, the comment claimant made on August 13, 2021 was willful or wantonly negligent, two unrelated incidents, constituting violations of two distinct employer expectations over a period of nearly four years, do not give rise to a pattern of willful or wantonly negligent behavior. Claimant's violation of the employer's computer use policy therefore was an isolated act, even if the comment claimant made on August 13, 2021 had been willful or wantonly negligent.

Application of the remaining criteria to the record evidence also supports the conclusion that claimant's violation of the computer use policy was an isolated instance of poor judgment. Claimant's use of her work computer to text with her friend was an act of poor judgment in that claimant's conduct was a conscious decision that resulted in a violation of the employer's standard of behavior. Claimant's conduct did not exceed mere poor judgment because it did not violate the law or constitute an act tantamount to unlawful conduct. Further, although claimant's conduct on August 20, 2021 involved engaging in a text conversation about a potential job with a different employer, the employer did not show that the content of claimant's text messages constituted an irreparable breach of trust or made a continued employment relationship impossible. This is because claimant's friend, who wished for claimant to pursue the job, instigated the text exchange and, as far as the record shows, was the principal driver of the discussion, while claimant's inquiries about the job amounted only to where the potential job would be located. Therefore, viewed objectively, the employer did not show that the content of claimant's contribution to the text exchange rose to the level of an irreparable breach of trust or constituted a circumstance that made a continued employment relationship impossible.

Accordingly, the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. For that reason, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 21-UI-177716 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;  
S. Alba, not participating.

**DATE of Service: December 10, 2021**

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 desisyong ito.

## 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

**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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.