

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1048**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 23, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective August 22, 2021 (decision # 85938). Claimant filed a timely request for hearing. On November 12, 2021, ALJ Janzen conducted a hearing, and on November 16, 2021 issued Order No. 21-UI-179710, affirming decision # 85938. On December 2, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Willamette Family Inc. employed claimant as a counselor from August 18, 2020 until August 26, 2021.

(2) The employer provided work email accounts to their employees, including claimant. Many of these email accounts had access to a distribution list called "Agency All." Transcript at 7. Using the Agency All distribution list to send an email resulted in the email being received by all of the employer's employees. Initially, claimant's work email account had access to the Agency All distribution list.

(3) The employer had an email use policy that provided "if you don't have access to [the Agency All distribution list], then you are not permitted and thus not allowed to send mass email communication[.] This permission is only available and limited to specific reasons and purposes." Audio Record at 20:08. The purposes for which the employer permitted the Agency All distribution list to be used was to convey human resources information or to make congratulatory announcements, such as those relating to promotions or new hires. Claimant was aware of and understood the email use policy because he received it and acknowledged understanding it when the employer hired him.

(4) On August 11, 2021, the employer's executive director sent an email to all employees advising of a state mandate that the employees receive the COVID-19 vaccine. That evening, at 8:23 p.m., claimant, via an anonymous private email account with the user name "truth365," sent an email in response to the executive director's email. Claimant sent the email using the Agency All distribution list. Claimant's

email stated, “So, we’re continuing to wear masks because they do not provide immunity, or stop the spread, but you’re still mandating the shots? Got it.” Transcript at 6. Claimant sent the email because he was “trying to assert” what he viewed as “the logical fallacies of a lot of the policies that were in place.” Transcript at 28.

(5) The employer did not know that claimant had sent the August 11, 2021 email. The employer was concerned that an anonymous external account had used the Agency All distribution list. After receiving claimant’s August 11, 2021 email, as a precaution, the employer removed access to the Agency All distribution list from several employees, including claimant.

(6) On August 20, 2021, the employer’s executive director sent another email to all employees advising of the potential availability of a religious exemption to the vaccine mandate. Claimant attempted to use the Agency All distribution list to reply to the executive director’s email but found his work email account did not allow him access to the list. Claimant was unaware that the employer had removed his permission to use the Agency All distribution list and thought his access to the list was denied due to a glitch. Claimant opened a reply email and manually populated the email addresses of approximately 200 other employees into the “To” line of the email. He then sent the email which stated, “If you need to navigate how to obtain a religious, moral, philosoph[ic]al, or medical exemption please let me know, we have plenty of doctors and lawyers on our side, you’re not alone.” Transcript at 8.

(7) After claimant sent the August 20, 2021 email, the employer conducted internet research, noticed that claimant had been using the truth365 user name online, and determined that claimant had sent the anonymous email on August 11, 2021.

(8) On August 26, 2021, the employer terminated claimant’s employment for violating their email use policy by sending the August 20, 2021 email.

**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) (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). Isolated instances of poor judgment and good faith errors are not misconduct. 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 record shows that claimant violated the employer's email use policy on August 20, 2021 when he sent a mass email communication without having access to the Agency All distribution list. Claimant knew or should have known that sending an email to approximately 200 other employees without access to the distribution list would probably result in a breach of the employer's policy because the record shows that claimant was aware of and understood the email use policy because he received it and acknowledged understanding it when the employer hired him. Although claimant thought his access to the distribution list was denied because of a glitch, when in fact it was because the employer had removed claimant's permission as a precaution, it is immaterial whether claimant knew the reason why he lacked access to the list. Here, the record indicates that claimant knew he lacked access to the distribution list but consciously sent a mass email communication anyway, thereby violating the policy. Accordingly, claimant violated the employer's email use policy with wanton negligence when he consciously sent a mass email communication without access to the Agency All distribution list.

Claimant's wantonly negligent conduct in violating the employer's email use policy cannot be excused as an isolated instance of poor judgment because his violation of the policy was a repeated act. The record shows that claimant also violated the employer's email use policy with wanton negligence on August 11, 2021. On that date, claimant used an anonymous private email account to send an email using the Agency All distribution list. Although claimant's private email account was allowed access to the distribution list, claimant's conduct in sending the anonymous email from a private email address was nevertheless a wantonly negligent violation of the email use policy. This is because the employer's email use policy specified that Agency All emails were to be limited to conveying human resources information or making congratulatory announcements, but the purpose of claimant's August 11, 2021 mass email was to criticize the vaccine mandate by asserting what claimant viewed as the logical fallacies of it. Claimant knew or should have known that sending an Agency All email for a purpose

other than conveying human resources information or making a congratulatory announcement would probably result in a breach of the employer's email use policy because, as discussed above, claimant was aware of and understood the policy. That claimant knew using the Agency All distribution list for the purpose of asserting what he viewed as the logical fallacies of the vaccine mandate would breach the policy is further bolstered by the fact that he sent the August 11, 2021 email from a private account without identifying himself. Had claimant thought the topic of his August 11, 2021 email was permissible under the employer's email use policy, he more likely than not would have sent it from his work account, which, as of August 11, 2021, could access the Agency All distribution list. Thus, claimant's wantonly negligent violation of the employer's email use policy was a repeated act and not an isolated instance of poor judgment.

Claimant's conduct also cannot be excused as a good faith error. The record does not establish that claimant reasonably believed the employer would approve of his conduct because claimant knew or should have known that sending a mass email communication on August 20, 2021 without access to the Agency All distribution list was prohibited given that claimant received and acknowledged understanding the employer's email use policy when the employer hired him.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective August 22, 2021.

**DECISION:** Order No. 21-UI-179710 is affirmed.

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

**DATE of Service: January 12, 2022**

**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](https://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 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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