

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0397**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 12, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective December 12, 2021 (decision # 120043). Claimant filed a timely request for hearing. On March 1, 2022, ALJ Mott conducted a hearing, and on March 2, 2022 issued Order No. 22-UI-187631, reversing decision # 120043 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 21, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) ABC Medical Transport Plus LLC employed claimant as an office employee and driver from November 2020 until December 20, 2021. The employer operated a non-emergency medical transportation service.

(2) On December 17, 2020, claimant sent a text message to her coworkers, not including the owner of the business, informing them that the owner decided to resume transporting a former client who had an unpleasant odor. Claimant felt that the client's odor was the "most awful thing in the world that literally can make you throw up," and that the odor lingered in the employer's vehicles for days. Transcript at 43. Claimant told her coworkers that if they declined to transport the client, then the owner would have to do it herself. Claimant also told her coworkers that she did not think that the owner supported them, and referred to her coworkers as "underpaid minions." Transcript at 57. One of claimant's coworkers shared claimant's message with the owner.

(3) The owner wished to continue providing services for the client because she provided “regular income” for the employer, and the employer was “struggling as it is.” Transcript at 59. Claimant had previously attempted to dissuade the employer from continuing to provide services for the malodorous client. However, the owner’s husband (who co-owned the company) responded by laughing at claimant’s concerns and “making jokes about it.” Transcript at 44.

(4) On December 19, 2021, claimant went to work and performed weekend work tasks. On December 20, 2021, claimant went to work and text messaged with the owner. During those texts, the owner instructed claimant to go home, and told her that the owner would handle dispatching duties (answering calls and telling drivers where to go) for the day. Later that day, the owner’s husband discharged claimant by texting her that he needed her work key, and that she was not allowed at the office. The employer discharged claimant due to claimant’s December 17, 2021 message to coworkers, as well as other previous matters that the employer was concerned about, such as some of claimant’s work habits. Had the employer not discharged claimant that day, claimant would have been willing to continue working for the employer.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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) (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 employer discharged claimant due to several different concerns that the employer had about claimant’s work habits. However, the record shows that the final incident which led the employer to discharge claimant on December 20, 2021 was claimant’s text message to her coworkers on December 17, 2021. Therefore, despite the fact that the employer had other, unrelated concerns regarding claimant’s work habits, the determination of whether claimant was discharged for misconduct must be premised on this final incident.<sup>1</sup>

In order to support a conclusion that claimant was discharged for misconduct, the record must show that claimant willfully, or with wanton negligence, either violated the standards of behavior that the employer had the right to expect of her or disregarded the employer’s interest. There is no dispute in the record that claimant intended to send the text message in which she expressed to her coworkers that she did not wish to drive a particular client, and suggested that they refuse to do so as well on December 17,

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<sup>1</sup> See e.g. *Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

2021. Therefore, claimant's conduct was willful. However, the record does not show that claimant's willful behavior violated any standards of behavior that the employer had the right to expect of claimant. Generally, it is not reasonable for an employer to expect an employee to endure work circumstances such as those here, which made the claimant nauseated, without complaint or an attempt to improve them. To the extent this was the employer's expectation in this case, their expectation was unreasonable. *See* OAR 471-030-0038(1)(d)(C) ("A conscious decision not to comply with an unreasonable employer policy is not misconduct."). Notwithstanding, claimant's text message to her coworkers was, more likely than not, an attempt to improve those conditions. Thus, although claimant willfully sent the December 17, 2021 text message, the record does not support the conclusion that, by so doing, she violated any standards of behavior that the employer had the right to expect.

Similarly, the employer has not met their burden to show that claimant's text messages constituted a willful disregard of the employer's interest. The record does not show that claimant's actions either caused or were likely to cause the employer to lose income because even if claimant and the other employees refused to drive the client in question the owner could have driven the client herself. Further, it can be reasonably inferred that claimant's attempt to improve working conditions for herself and coworkers was at least an attempt to act in service to, rather than in disregard of, the employer's interests, as other employees might have ultimately decided to quit rather than be forced to endure those conditions or other clients may have used a different transport service if they had to ride in a car that had a lingering unpleasant odor. Therefore, the record does not show that claimant's actions were a willful disregard of the employer's interests.

For the above reasons, the record shows that claimant's actions did not constitute misconduct. Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

**DECISION:** Order No. 22-UI-187631 is affirmed.

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

**DATE of Service:** June 3, 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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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 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 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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