EO: 200
BYE: 202218

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

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2022-EAB-0456

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On May 26, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective May 9, 2021 (decision # 144923). On June 15, 2021, decision # 144923 became final without claimant having filed a request for hearing. On June 29, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on July 27, 2021 issued Order No. 21-UI-171110, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by August 10, 2021. On July 29, 2021, claimant filed a timely response to the appellant questionnaire. On October 6, 2021, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 21-UI-171110 was vacated and that a new hearing would be scheduled to determine if claimant's late request for hearing should be allowed and, if so, the merits of decision # 144923. On December 16, 2021, ALJ Frank conducted a hearing, and on December 17, 2021 issued Order No. 21-UI-182132, allowing claimant's late request for hearing and affirming decision # 144923. On January 4, 2022, claimant filed an application for review of Order No. 21-UI-182132 with the Employment Appeals Board (EAB). On February 15, 2022, EAB issued 2022-EAB-0048, affirming the portion of Order No. 21-UI-182132 allowing claimant's late request for hearing and otherwise reversing and remanding the matter for further development of the record. On March 21, 2022, ALJ Frank conducted a hearing, and on March 29, 2022, issued Order No. 22-UI-189932, affirming decision # 144923. On April 8, 2022, claimant filed an application for review with 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) Western Mercantile Agency, Inc. employed claimant as a collections floor supervisor from March 2015 until May 13, 2021. The employer operated a collections agency that collected debts owed to their clients by their clients' consumers. As part of their collections duties,

employees would use their personal Facebook accounts at work to track down debtors who were particularly hard to find.

(2) The employer expected claimant to attend meetings with the employer's owner, absent an emergency. Claimant was aware of and understood that expectation. The employer also expected claimant to refrain from using her work computer to use social media unless the social media use was during scheduled break times or approved by the employer's owner. Claimant was aware of and understood that expectation. The employer's employee handbook, which claimant signed, also stated, "[g]ossiping about your fellow workers is not appropriate at any time[.]" Exhibit 5 at 43. The employee handbook called for progressive discipline of employees, and the handbook only specifically called for automatically discharging an employee in a limited number of circumstances, none of which included missing a meeting. Exhibit 5 at 46-47.

(3) Claimant had a personal friendship with one of her coworkers and used Facebook's messenger feature to have private chats with the coworker. On April 12, 2021, claimant used her Facebook messenger to chat with the coworker during work hours. Some of these chats featured foul language and spoke harshly of an assistant manager with whom claimant and the coworker worked. Sending chats featuring foul language and harsh talk about other workers was commonplace in the employer's office.

(4) On April 14, 2021, claimant used Facebook messenger to chat with the coworker during non-work hours. On April 16, 2021, claimant used Facebook messenger to chat with the coworker during work hours. However, these chats related to the coworker contemplating quitting work for the employer. The employer's owner approved of claimant chatting with the coworker about that topic during work hours.

(5) On May 5, 2021, the coworker quit working for the employer. The employer reviewed the coworker's computer and discovered that the coworker had not logged off Facebook, which meant that her profile was viewable without entering the coworker's log-in credentials. With access to the coworker's profile, the employer checked the coworker's Facebook messenger and discovered the chats between the coworker and claimant.

(6) On May 6, 2021, the owner placed claimant on a three-day suspension pending review of her computer by a third-party auditor. On May 10, 2021, the owner extended the suspension two more days because the audit was not complete. On the evening of May 12, 2021, the owner texted claimant to come to a meeting the next day in the owner's office at 9:00 a.m. "to discuss [claimant's] options." Exhibit 5 at 15. The owner intended to discuss three options at the meeting: either retaining claimant as an employee, claimant voluntarily leaving work, or the employer discharging claimant.

(7) Claimant did not go to the May 13, 2021 meeting because she felt that having a meeting at 9:00 a.m. in the owner's office after everyone in the office began working would be humiliating, as the owner's office had "windows everywhere and people can hear in there." March 21, 2022 Transcript at 23. Claimant was willing to continue working for the employer but preferred to meet with the owner under different circumstances perhaps after work hours.

(8) On May 13, 2021, at 9:07 a.m., the owner texted claimant to ask her if she was coming to the meeting. Claimant responded that she did not intend to do so. The owner texted back, stating "that's unfortunate," to which claimant sent a text stating that she agreed. Exhibit 5 at 15. A few hours later, the

owner sent claimant a text stating, "Your stuff is upfront. Ask for Tina, she has your check." Exhibit 5 at 15. Claimant did not work for the employer again.

(9) Over the course of claimant's employment for the employer, the employer was pleased with claimant's work performance, and had never disciplined claimant. Prior to claimant's discharge, the owner was "grooming" claimant to take over the business. March 21, 2022 Transcript at 13.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

**Nature of the Work Separation.** If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The order under review concluded that the nature of claimant's work separation was a voluntary quit and, further, that claimant quit without good cause. Order No. 22-UI-189932 at 4-5. The record does not support these conclusions.

The preponderance of evidence demonstrates that the employer discharged claimant on May 13, 2021. On that day, claimant, who had been serving a 5-day suspension from work previously imposed by the employer, was scheduled to meet with the owner to discuss her employment options. The record shows that prior to the meeting, the employer was willing to continue employing claimant because retaining claimant as an employee was one of three options the owner was considering. The record also shows that claimant was willing to continue working for the employer but did not go to the May 13, 2021 meeting because she felt that having a meeting at 9:00 a.m. in the owner's office after everyone in the office began working would be humiliating. However, after claimant missed the meeting and informed the owner that she did not plan to attend, the owner stated that that was "unfortunate" and then, a few hours later, sent claimant a text stating, "Your stuff is upfront. Ask for Tina, she has your check." Exhibit 5 at 15. By mentioning that claimant's paycheck was available for her and that her belongings were placed in a particular location, the owner's text shows that she was unwilling to allow claimant to work for the employer for an additional period of time. Therefore, the work separation was a discharge that occurred on May 13, 2021.

**Discharge.** 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). "'[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 because claimant failed to attend the May 13, 2021 meeting. Although the catalyst for the meeting was the employer's discovery of the Facebook messenger chats between claimant and the coworker, given that the employer decided to discharge claimant only after she missed the meeting, the proximate cause of the discharge was claimant's failure to attend the May 13, 2021 meeting. *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).

The record shows that claimant's failure to attend the May 13, 2021 meeting was a willful violation of the standards of behavior the employer had the right to expect of her, as an employer has the right to expect that an employee, absent an emergency, will attend a meeting to discuss options relating to their continued employment. Here, claimant was aware of and understood the employer's expectation that she attend the meeting, and there was no emergency preventing claimant's attendance. Even so, she intentionally missed the meeting. Thus, claimant's conduct was a willful violation of the employer's expectation.

However, claimant's failure to attend the May 13, 2021 meeting was not misconduct because it was an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct.. 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 willful violation of the employer's expectation on May 13, 2021 was isolated. Claimant had a personal friendship with one of her coworkers and, on April 12, 2021, used her work computer to use Facebook messenger to chat with the coworker during work hours. As this social media use did not occur during scheduled break times and was not approved by the employer's owner, claimant's Facebook chatting on April 12, 2021 violated the employer's social media use expectation with at least wanton negligence.

However, the April 12, 2021 violation did not amount to a repeated act or pattern of wantonly negligent behavior. This is because the other instances of claimant's Facebook chatting contained in the record did not violate the employer's expectations, either because they occurred during non-work hours, as was the case with claimant's April 14, 2021 chats, or because it was approved by the owner, as was the case with claimant's April 16, 2021 chats. Accordingly, because the expectation claimant violated on May 13, 2021 was distinct from the expectation that governed claimant's April 12, 2021 social media use violation, the two violations were not repeated acts. Further, as the April 12, 2021 social media use violation occurred on that date only, it did not amount to a pattern of other willful or wantonly negligent behavior. Therefore, claimant's willful violation of the employer's expectation that claimant attend the May 13, 2021 meeting remained a single or infrequent occurrence despite her prior violation of the employer's social media use expectation on April 12, 2021.

Nor did the employer meet their burden to show that claimant violated the employer's prohibition against gossiping about fellow workers willfully or with wanton negligence such that it may be concluded that claimant's willfully missing the May 13, 2021 meeting was not isolated. While the record shows that the employer's employee handbook, which claimant signed, stated, "[g]ossiping about your fellow workers is not appropriate at any time," the handbook did not define what constituted gossiping. Exhibit 5 at 43. Moreover, while the record shows that some of claimant's April 12, 2021 chats featured foul language and spoke harshly of an assistant manager, claimant produced unrebutted evidence indicating that such conduct was commonplace in the employer's office and that the assistant manager herself used Facebook messenger to send claimant chats that spoke harshly of others. *See* Exhibit 6 at 7-15. The record therefore shows, more likely than not, that claimant did not know and understand that sending chats that featured foul language and spoke harshly of other workers would violate the employer's prohibition on gossiping. Thus, the employer did not meet their burden to show that claimant's chats that featured foul language and spoke harshly of other workers was a willful or wantonly negligent violation of the employer's expectations. Accordingly, claimant's willful violation of the employer's expectation that claimant attend the May 13, 2021 meeting remained a single or infrequent occurrence despite the fact that claimant sent chats that featured foul language and spoke harshly of other workers.

Finally, the record shows that claimant's failure to attend the meeting did not exceed mere poor judgment because it did not violate the law nor was it tantamount to unlawful conduct. The record also reflects that missing the meeting did not amount to an irreparable breach of trust because it did not involve an act of dishonesty, theft, or the like. Nor did claimant's failure to attend otherwise make a continued employment relationship impossible. The record shows that the employer was pleased with claimant's work performance, had never disciplined claimant, and prior to claimant's discharge was "grooming" claimant to take over the business. March 21, 2022 Transcript at 13. Further, the employer's employee handbook called for progressive discipline of employees, and the handbook only specifically

called for automatically discharging an employee in a limited number of circumstances, none of which included missing a meeting. Exhibit 5 at 46-47.

For these reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 22-UI-189932 is set aside, as outlined above.

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

**DATE of Service: June 23, 2022**

**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. 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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