

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0021**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133505). Claimant filed a timely request for hearing. On December 20, 2018, ALJ Janzen conducted a hearing, and on December 21, 2018, issued Order No. 18-UI-121659, concluding the employer discharged claimant, but not for misconduct. On January 3, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument and new information to EAB.<sup>1</sup> However, the employer failed to certify that it provided a copy of its argument and the new information to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer also failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the new information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Roseburg Forest Products employed claimant from December 6, 2003 until October 24, 2018 as a utility worker in its plant in Coquille, Oregon.

(2) The employer expected claimant to follow reasonable instructions from a supervisor and refrain from being insubordinate toward a supervisor. Claimant understood the employer's policy. The parties also had a union contract that specified employees should "work now and grieve later," meaning that employees should follow instructions when given and, if the employee disagreed, should file a grievance later. Transcript at 13. Claimant was not aware of that policy.

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<sup>1</sup> On January 4, 2019, the employer sent additional information to the Oregon Employment Department. The Department forwarded the information to the Office of Administrative Hearings, which sent the information to EAB.

(3) During the year preceding October 7, 2018, the employer had not warned claimant about any violations of employer policies or expectations.

(4) The employer had a shoe policy that required all employees who worked in the Coquille plant to wear shoes that were all-leather with a “defined heel.” Transcript at 8. Claimant had osteoarthritis and wore shoes that were all-leather, but did not have a “defined heel,” because such a heel aggravated her osteoarthritis. In 2015, claimant gave the employer a note from her surgeon regarding her inability to wear shoes with a defined heel. Claimant had been wearing shoes without defined heels while working since that time. Claimant assumed the doctor’s letter would remain valid indefinitely.

(5) On October 7, 2018, the employer conducted a “shoe audit” of the employees in claimant’s plant to ensure that all the employees were wearing footwear that was permissible under the employer’s footwear policy. Transcript at 6. Claimant’s supervisor audited claimant’s area near the end of claimant’s shift. The supervisor looked at claimant’s shoes while she was working and because her shoes did not look to be compliant, approached claimant and asked to look more closely at her shoes. Claimant allowed the supervisor to look at her shoes while she remained in the work area. The supervisor asked claimant if her shoes were in compliance. Claimant responded that they were in compliance because she had a “doctor’s note . . . in the office” permitting her to wear her shoes. Transcript at 36, 37. The supervisor told claimant that he had never seen a doctor’s note and that he would have to “look a little further into that,” and would return to speak with her later. Transcript at 23.

(6) The supervisor was not able to review claimant’s file before he returned to claimant’s work area. He remained in the work area until near the end of the shift, at about 4:20 a.m. The supervisor asked another nearby employee to accompany him and claimant “upstairs,” to the supervisors’ office. Transcript at 23. The other employee was a shop steward. The supervisor approached claimant and told her, “I need you to come upstairs with me [and the coworker] . . . regarding your shoes.” Transcript at 24. The supervisor observed that claimant appeared angry. Claimant responded, yelling, “[Y]ou mean over my shoes? . . . I’m not going to go upstairs to sign anything if it’s over my shoes because I haven’t done anything wrong. I already told you . . . I have a doctor’s note.” Transcript at 38. The supervisor responded that he had not seen the note. Claimant asked the supervisor if he could ask about the note in the morning when the office staff reported to work and he refused. Claimant took a step closer, and pointed her finger at the supervisor “in [his] face.” Transcript at 24. The supervisor told claimant that she needed to leave the plant because she was being inappropriate. Claimant retrieved her belongings and went to her locker.

(7) The supervisor accompanied claimant to her locker and continued to try to discuss claimant’s shoes. Claimant told the supervisor he was “harassing” her and stated that she had “complied” and told him she had a doctor’s note. Transcript at 45. Claimant told the supervisor the employer would have to pay her for the time she missed from work, and the supervisor responded, “[B]y all means if I’m wrong we will pay you for the time off.” Transcript at 24. Claimant asserted that she would file a harassment charge against the supervisor and the mill because he was “harassing someone with a medical illness,” and should accept her “word” that she had a doctor’s note or wait until someone checked her file for the note. Transcript at 25. The supervisor told claimant she would be paid for her time if he were wrong. Claimant left the workplace without further incident. Claimant did not use foul language toward the supervisor or threaten him during the October 7 incident.

(8) On October 8, 2018, the employer's human resources manager told claimant by telephone that the employer was suspending claimant while it investigated her conduct on October 7, 2018.

(9) During a subsequent discussion with the human resources manager, the manager told claimant that the employer did not have a note from her doctor regarding claimant's shoes and that such a letter would need to be updated every year. Claimant told the human resources manager that she would provide a new doctor's note regarding her shoes. Claimant requested a copy of the original letter from the surgeon who had prepared the letter in 2015, gave a copy to her new doctor, and asked him to redo the letter. The doctor wrote a new letter for claimant. Claimant mistakenly believed the doctor sent the letter to the employer before October 24, 2018.

(10) As a result of its investigation, the employer determined that claimant was insubordinate when she failed to follow her supervisor's instructions to go to the supervisors' office and leave work immediately when asked on October 7, 2018, and discharged claimant on October 24, 2018 for that reason.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for an isolated instance of poor judgment, and not misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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 is conscious of her conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471030-0038(3)(b).

The employer discharged claimant for insubordination toward her supervisor for failing to "go upstairs" to the supervisors' office and refusing to leave work immediately when asked. It is undisputed that claimant refused to go to the supervisors' office, and raised her voice and pointed at the supervisor while arguing about her shoes. Claimant did not deny that she was "speaking loudly" when she addressed the supervisor, but asserted at hearing that she spoke loudly because the machinery in her work area was "extremely loud." Transcript at 38-39. Claimant also asserted that she pointed at the supervisor because she "talk[ed] with [her] hands." Transcript at 38. Despite claimant's explanations for her demeanor, we are persuaded by the employer's evidence from three witnesses who described claimant as "yelling," "screaming" and "pointing" at the supervisor that claimant's conduct and demeanor toward the supervisor was hostile and angry. Transcript 9-10. The parties' testimony differed as to whether claimant initially refused the supervisor's direction to leave work. The supervisor testified that claimant did not comply until he had asked her three times to leave. Transcript at 24. Claimant testified that she agreed immediately to leave. Transcript at 45. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party that carries the burden to of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Although the preponderance of the evidence does not show that claimant refused to leave work immediately, claimant's conduct in refusing to go to the office and yelling and pointing at

the supervisor was a willful violation of the employer's policy against refusing to follow a supervisor's directions.

Although claimant's behavior on October 7 was a willful violation of the employer's expectations, it can be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). 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)(D).

Claimant's conduct on October 7 was isolated because it was a single occurrence. The issue is whether claimant's conduct was so serious that it exceeded mere poor judgment. The employer's human resources manager testified that the employer discharged claimant instead of disciplining her in some lesser way because of claimant's level of "hostility" and the "combative nature" and severity of the October 7 incident, and because the employer's policy was to discharge an employee who was insubordinate toward a supervisor. Transcript at 12. Whether an individual's conduct has caused an irreparable breach of trust, and is therefore inexcusable as an isolated instance of poor judgment, is not a subjective determination based only on the employer's opinion of claimant's conduct. It is an objective determination based on whether a reasonable employer under similar circumstances would also conclude that an irreparable breach of trust had occurred. *See accord Isayeva v. Employment Department*, 266 Or App 806, 340 P3d 82 (2014) (an irreparable breach is an objective determination); *see also Callaway v. Employment Department*, 225 Or App 650, 654, 202 P3d 196 (2009) ("an employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not do so").

Claimant's conduct was not unlawful or tantamount to unlawful conduct. Although claimant yelled and pointed her finger at the supervisor, the preponderance of the evidence at hearing does not show that claimant touched the supervisor, intended to threaten him by pointing at him, or that the supervisor felt the claimant might harm him. Nor does the record show that claimant's conduct caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Although claimant was insubordinate in refusing to go to the supervisors' office and overzealous in communicating her disagreement with how the supervisor assessed her shoes, claimant did not use foul language or threaten the supervisor, and she did ultimately leave the premises.

Moreover, claimant reasonably believed the employer had a letter regarding her shoes on file, felt frustrated that the supervisor would not allow time to confirm whether the letter existed, and apparently did not understand that the supervisor planned to go to the office merely to discuss the shoe policy with claimant, rather than discipline her regarding her shoes. Claimant also testified plausibly that she felt uncomfortable "going upstairs" with the supervisor and the shop steward because she had recently submitted a family medical leave request and filed a health and safety complaint against the employer, felt as though she "had a target on [her] back" due to the complaint, and associated "going upstairs" with a shop steward with "being in trouble" or "being questioned." Transcript at 40-42. On these mitigating facts, a reasonable employer in the same situation would not have concluded that an employee like claimant with no prior relevant disciplinary history had caused an irreparable breach of trust by arguing with the supervisor about her shoes and refusing to go to the office for what reasonably appeared to claimant at the time to be discipline over her shoes. We therefore conclude that, objectively considered,

claimant's behavior did not exceed mere poor judgment. Since claimant's behavior was isolated and did not exceed mere poor judgment, it is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Order No. 18-UI-121659 is affirmed.

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

**DATE of Service: February 8, 2019**

**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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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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