

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0235**

*Modified*  
*Request to Reopen Allowed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84357). Claimant filed a timely request for hearing. On January 10, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 24, 2019, at which time claimant failed to appear. On January 24, 2019, ALJ Murdock issued Order No. 19-UI-123339, dismissing claimant's hearing request for failure to appear. On January 26, 2019, claimant filed a request to reopen the January 24<sup>th</sup> hearing. On February 6, 2019, OAH mailed notice of a hearing scheduled for February 20, 2019. On February 20, 2019, ALJ Murdock conducted a hearing, and on February 25, 2019 issued Order No. 19-UI-125266, allowing claimant's request to reopen and concluding that claimant's discharge was not for misconduct. On March 6, 2019, the employer filed an application for review of Order No. 19-UI-125266 with the Employment Appeals Board (EAB).

The employer failed to certify that they provided a copy of their argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the findings and analysis in Order No. 19-UI-125266 with respect to the conclusion that claimant's request to reopen should be allowed are **adopted**. The remainder of this decision will therefore focus exclusively upon the discharge issue.

**FINDINGS OF FACT:** (1) Precision Rail of Oregon, LLC employed claimant as a carpenter on three occasions, last from May 30, 2017 to November 26, 2018.

(2) The employer had a policy that prohibited employees from violence or intimidation in the workplace, and prohibited employees from using foul language or being aggressive with one another. The employer gave claimant copies of the policy on two occasions and claimant signed an acknowledgment that he

read and accepted the policy. Claimant also understood that the employer prohibited fighting, and that using foul language was offensive to some of his coworkers.

(3) Sometime around August 21, 2018, claimant had a disagreement with an employee whom he thought was being “overly demanding” by assigning him work when he felt it was too late in the day and too hot to perform that sort of work. Transcript at 45. He called a supervisor to complain about the employee and stated during the call that the employee was a “fat cow.” Transcript at 15, 21, 33. The supervisor also noted that during the call claimant had described the employee as a “cunt,” used the word “fuck,” and referred to the employee as a “fat bitch” and “stupid bitch.” Transcript at 14-15, 53-54. The employee about whom claimant was speaking was sitting next to the supervisor during the call and clearly heard everything claimant said about her. On August 21, 2018, the employer gave claimant a written warning for his behavior toward the coworker.

(4) On November 20, 2018, claimant and a different employee had a verbal disagreement. After the disagreement, claimant picked up a piece of wood and angrily threw it against a wall in an area that was sometimes occupied by other workers. Claimant thought the work area was empty at the time and threw the wood out of frustration and to get “a little bit of relief, just a physical relief just to chuck a piece of wood.” Transcript at 37. The employee had entered the area just before claimant threw the wood into it. The employee began yelling at claimant. Claimant did not know what the employee was yelling and “didn’t care,” and went back to work. Transcript at 37. The employee reported that he thought claimant had thrown the wood at him.

(5) On November 26, 2018, the employer discharged claimant for engaging in a violent act at work by throwing the piece of wood into a work area.

**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. 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 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.

The order under review states that although claimant “should have known, at least as a matter of common sense, to refrain from throwing a piece of wood at the wall out of anger or frustration,” claimant’s conduct was excusable as an isolated instance of poor judgment because “[i]t was a single episode of such behavior and was not so severe as to render a continued employment relationship impossible.” Order No. 19-UI-125266 at 5. The record suggests that claimant was or should have been conscious that his conduct in the final incident would violate the employer’s expectations. Claimant’s conduct in the final incident was therefore wantonly negligent.

However, the order under review neglects any mention of the August 2018 incident the employer alleged was a prior instance of willful or wantonly negligent conduct, and fails to explain why claimant's conduct in the final incident did not exceed mere poor judgment. The evidence developed at the hearing suggests it is more likely than not that claimant's conduct was not excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d) defines an isolated instance of poor judgment as an act of "poor judgment" that is a "single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior." "Poor judgment" includes "a conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior." OAR 471-030-0038(1)(d)(C).

Claimant's exercise of poor judgment in the final incident was not a single or infrequent occurrence of poor judgment. Just three months earlier, around mid-August, claimant called another employee a "fat cow" and probably an array of other names that included the use of foul language, such as "fat bitch" and "stupid bitch."<sup>1</sup> Regardless whether or not claimant was subjectively aware at the time that the employee about whom he was speaking could hear him, claimant intentionally said those terms when he described the employee. Claimant knew that using foul language at work had a tendency to offend some of his coworkers. He had also received two copies of the employer's policy that, in part, prohibited use of foul language, and he had acknowledged receiving the policy on both occasions. Claimant knew or should have known that calling his coworker "fat cow," "fat bitch," and "stupid bitch" would probably violate the employer's expectations. His conduct in that incident therefore was wantonly negligent.

Claimant therefore engaged in two wantonly negligent violations of the employer's policies within a three-month period, both of which involved claimant behaving inappropriately towards a coworker or negative and inappropriate interactions with his coworkers. His exercise of poor judgment in the final incident was not a "single or infrequent occurrence," it was, rather, a repeated wantonly negligent act. Claimant's conduct therefore was not "isolated," and it was not excusable as an isolated instance of poor judgment.

Even if claimant's behavior in the final incident had been isolated, the record would still support a denial of benefits in this case because claimant's conduct exceeded mere poor judgment. OAR 471-030-0038(1)(d)(D) states, "acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment" and cannot be excused as an isolated instance of poor judgment. Claimant's conduct – picking up a piece of wood and throwing it into a work area because he was angry and frustrated after a negative interaction with his coworker – involved an act of workplace violence. He did not know that an individual had just entered the area into which he threw the wood because he did not check to make sure that the area was empty before he threw the wood. He also threw the piece of wood at a wall, apparently without regard to whether doing so damaged the wood and/or the wall, both of which were ostensibly the employer's property. Because of claimant's history in venting verbally or through acts of violence when upset by workplace altercations, and his actions in the final incident involved a violent act done without regard to the safety of other employees or the employer's property, any reasonable employer would have

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<sup>1</sup> The employer also alleged claimant called the employee a "cunt." However, claimant specifically denied having used that word, and his possible use of that word is not material to the outcome of this case so we need not reach a decision as to whether or not he said it.

concluded that it could no longer trust claimant to work safely or refrain from that sort of conduct in the future. Claimant's conduct therefore created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. His conduct exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 19-UI-125266 is modified, as outlined above.

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

**DATE of Service:** April 11, 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**

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**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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