

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-1195**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 10, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 122305). The employer filed a timely request for hearing. On December 4, 2019, ALJ Murdock conducted a hearing, and on December 10, 2019 issued Order No. 19-UI-140952, affirming the Department's decision. On December 30, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record, including the employer's argument, with the exception of Exhibit 2. Exhibit 2 was a digital video of the incident introduced by the employer that was received into evidence by the ALJ, without objection by claimant. Although the Exhibit 2 video was provided to EAB in digital format as part of the record, EAB was unable to access the contents of the digital file and did not consider that exhibit when reaching this decision. Likewise, EAB disregarded those portions of the employer's written argument which referenced the contents of the video received into evidence as Exhibit 2, except insofar as they reflected the parties' testimony about the events at issue.

**FINDINGS OF FACT:** (1) Jacksons Food Stores employed Claimant as a Customer Service Representative at one of its gas station/convenience store locations from May 21, 2018 to September 13, 2019.

(2) The employer had a "Standards of Conduct" section in its Employee Handbook which generally expressed the expectation that employees would perform their jobs with a "high degree of personal integrity" and specifically referenced certain behaviors that if undertaken might lead to dismissal. Exhibit 1. Among these behaviors were "[d]iscourtesy, immoral conduct, or rudeness that would affect the company's goodwill" and "[a] violation of the standards of behavior, which the employer has a right to expect." Exhibit 1. By signing the "Employee Handbook Acknowledgement," claimant acknowledged that he "read and understood all policies and procedures", that "as a condition of [his] continued employment ... [he] must adhere to all these policies and procedures", and that he "[understood] that

disregard for these policies and procedures will be considered cause for dismissal.” Exhibit 1. Claimant signed the acknowledgment on May 17, 2018.

(3) On September 12, 2019, claimant was working an evening shift primarily pumping gas for outside customers, while a co-worker was attending to customers inside the convenience store. As claimant’s shift was nearing its conclusion, claimant entered the convenience store to use the restroom.

(4) After later exiting the restroom, claimant noticed his co-worker watching a customer nearby mopping the floor where a spill had occurred. Claimant “lost his cool” and shouted “What the fuck is this?” when he both observed his co-worker watching the customer mop the floor, and also perceived that his co-worker had failed to attend to the needs of other customers both inside the store and outside at the gas pumps. Audio Record at 9:00; 25:15. Claimant took the mop and bucket from the customer, who tried to explain her intent in trying to mop up the mess created by one of her children. Claimant proceeded to engage in a verbal confrontation with the customer in front of her three young children. The verbal confrontation included claimant shouting the following statements to the customer: “Don’t talk over me”; “No, I’m not going to fucking relax”; “get out of my way”; “good fucking lord”; and “shut the fuck up and go home”. Audio Record at 11:30 to 11:48. Claimant’s “tirade” also included him throwing a “wet floor” sign on two separate occasions (once toward the counter, and once toward the sales floor) and slamming the mop bucket into the “Employee’s Only” door. Audio Record at 26:04; 27:45 to 28:10.

(5) Claimant ultimately exited the store after his outburst and returned to his duties tending to the gas pumps. As he walked through the door claimant stated, “Shut the F up and go home.” Audio Record at 11:44. At that point, the customer approached the co-worker at the front counter to express her fear that claimant might damage her truck. The customer left the store without leaving any contact information.

(6) Surveillance video of the September 12, 2019 incident was ultimately brought to the attention of the employer’s District Manager who, after viewing the video and consulting with the employer’s Regional Manager, notified claimant of his separation from employment. The decision to discharge claimant was based on claimant’s violation of the employer’s standards of conduct, including the provisions against discourtesy, immoral conduct, and rudeness, which affect the employer’s good will with its customers. Claimant explained to the District Manager that his actions on September 12, 2019 were the result of him being “under stress.” Audio Record at 13:20. The District Manager was not aware of any previous occasion where claimant had engaged in this type of conduct.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant’s discharge was 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) (December 23, 2018). “[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).

Isolated instances of poor judgment do not constitute misconduct. OAR 471-030-0038(3)(b). However, isolated “[a]cts 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 will not exculpate a claimant from a finding of misconduct. OAR 471-030-0038(1)(d)(D).

The order under review found that claimant’s actions were wantonly negligent because claimant knew or should have known that his actions toward both his co-worker and the customer violated the employer’s reasonable standards of conduct and reflected a disregard for the business interests of Jacksons Food Stores. Order No. 19-UI-140952 at 3-4. Nevertheless, the order concluded that claimant was not disqualified from benefits because his actions “did not exceed an isolated instance of poor judgment.” Order No. 19-UI-140952 at 4. Specifically, the order determined that claimant’s conduct “was a very brief, single and isolated incident and was not tantamount to dishonest or unlawful behavior,” that “the record [did] not show that any damage occurred,” that “the customer did not seem afraid for her personal safety or the safety of her children and only expressed concern about her vehicle at the fuel station to the co-worker when claimant left the store,” and that “[the customer] did not involve the police or even file a formal complaint to the company.” Order No. 19-UI-140952 at 4. As such, the order determined that claimant’s conduct did not amount to misconduct under Oregon law because it was excusable as an isolated instance of poor judgment.

While we agree with the order under review that claimant’s conduct reflected a wantonly negligent disregard for the employer’s standards of conduct and business interests, we cannot agree with the order’s further conclusion that claimant’s conduct constituted an “isolated instance of poor judgment” and was, therefore, not misconduct. Rather, the record reflects that claimant engaged in a profanity-laced outburst directed toward a customer and did so in the presence of the customer’s children. As part of this outburst, claimant tossed, on more than one occasion, a “wet floor” sign creating the potential for damage to company property and/or injury to his co-worker or a customer. Finally, the record established that when claimant departed the store to return to the gas pumps, the customer relayed her concern to the co-worker that claimant might cause damage to her truck.

While it is true that the record does not demonstrate that any of these actions violated the law or was tantamount to a violation of law, the preponderance of the evidence does establish that claimant’s outburst violated the employer’s “Standards of Conduct” policy prohibiting “[d]iscourtesy, immoral conduct, or rudeness that would affect the company’s goodwill” and “[violations] of the standards of behavior, which the employer has a right to expect.” Claimant’s unprovoked actions in swearing at a customer in front of her children and throwing company property without any regard for the safety of nearby customers created an irreparable breach of trust between himself and the employer after which no reasonable employer would have continued to employ claimant after this incident. OAR 471-030-0038(1)(d)(D). Likewise, there is no reasonable view of the facts in this case which would support the conclusion that claimant’s actions were the result of a good faith error, particularly given the fact that claimant acknowledged during the hearing that he was “very embarrassed” about the incident and that he “overreacted.” Audio Record at 22:32; 25:46.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 19-UI-140952 is set aside, as outlined above.

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

**DATE of Service: February 5, 2020**

**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 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**

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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.

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