

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0813**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 16, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective May 30, 2021 (decision # 104909). Claimant filed a timely request for hearing. On September 17, 2021, ALJ Winslow conducted a hearing, and on September 21, 2021 issued Order No. 21-UI-175279, reversing decision # 104909 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On October 7, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring 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).

However, even had EAB considered the employer's argument, it would not have changed the outcome of this decision. The employer's written argument asserted that the order under review did not address whether claimant's foul language toward the employer in the final incident that prompted the employer to discharge claimant created an irreparable breach of trust in the employment relationship. The order addressed this issue summarily by concluding that "a single instance of name-calling does not make a continued employment relationship impossible." Order No. 21-UI-175279 at 3–4. This conclusion is supported by the record and Oregon law. The standard for whether a claimant created an irreparable breach of trust in an employment relationship is objective, meaning that the employer must prove that it is more likely than not that any reasonable employer would also have considered the conduct at issue to have exceeded mere poor judgment. *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"). The record does not show that a reasonable employer would have concluded that claimant's conduct during the final incident caused an irreparable breach of trust or made a continuing employment relationship with claimant impossible. Claimant's conduct was mitigated by the employer's response when claimant

complained about how the office manager treated claimant when claimant was out sick and called the office manager. The office manager criticized claimant for visiting family who later became sick with COVID-19, and hung up on claimant. When claimant returned to work and complained to the owner about the telephone call with the office manager, claimant was angered and dissatisfied by the owner's response when he told claimant that she did not need to work for the employer, and should not tell the owner how to run the business. Claimant's foul language was limited to one word, and did not persist over a period of time. Considering the totality of the circumstances, the record does not support the conclusion that a reasonable employer would conclude that claimant's conduct was likely to recur, or had caused an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. We therefore conclude that claimant's conduct did not exceed mere poor judgment.

The written argument also asserted that claimant's conduct in the final incident was not isolated because claimant had engaged in prior incidents of misconduct including believing that the work environment "was not run well" and being absent from work during the employer's busiest time of the year shortly before the final incident. The record does not show that either claimant's belief about how the employer ran its business or her absences from work were misconduct. The employer did not discipline claimant for either of those matters. Claimant's conduct during the final incident was an isolated instance of poor judgment, and claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the order under review is **adopted**.

**DECISION:** Order No. 21-UI-175279 is affirmed.

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

**DATE of Service:** November 12, 2021

**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 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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