

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0117**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 18, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective October 9, 2022 (decision # 95238). Claimant filed a timely request for hearing. On December 19, 2022, ALJ D. Lee conducted a hearing, and on January 3, 2023 issued Order No. 23-UI-211458, reversing decision # 95238 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 19, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) A Dog's Life Pet Grooming employed claimant as a dog groomer from March 9, 2020 until October 12, 2022.

(2) The employer expected their employees not to walk off the job during their shifts without permission from the employer's owner to do so.

(3) On March 16, 2022, claimant slapped a dog at work while grooming it. The owner told claimant that she would discharge claimant if claimant ever slapped a dog again. Claimant did not slap a dog at work again.

(4) On April 13, 2022, claimant left work for the day midway through her shift. Claimant had permission to leave when she did that day because the owner told her all the dog grooming was done for

the day and claimant might as well go home. However, the owner thought claimant walked off the job during her shift without permission and gave claimant a verbal warning for doing so.

(5) On October 11, 2022, claimant was scheduled to work from 8:00 a.m. to 5:00 or 6:00 p.m. When claimant arrived for her shift that morning, she was anxious because she had had car trouble and her husband was ill. Shortly after starting her shift, claimant felt that a coworker had inserted herself between claimant and a customer by helping lead a dog into the building. This caused claimant to begin arguing with the coworker. Claimant became upset and decided to go home. At about 8:24 a.m., claimant sent the owner a Facebook message stating, "I cannot do today. I'm going home." Transcript at 15.

(6) A minute later, claimant walked out on her shift. Claimant did not ask permission before leaving. Claimant stated aloud that she was leaving as she stepped out of the door but did not make sure the owner heard her. The owner was present and saw claimant leave but did not know why claimant did so until she saw claimant's Facebook message later in the day.

(7) Claimant worked the next day, October 12, 2022. At the end of claimant's shift, the owner gave claimant a termination letter and discharged claimant. The main reason the owner discharged claimant was because claimant walked out on her shift on October 11, 2022. Other reasons for the discharge listed in claimant's termination letter included the March 16, 2022 dog slap incident and the incident where the owner believed claimant walked out on her shift without permission on April 13, 2022.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not 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) (September 22, 2020). "[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).

At hearing, the employer's owner testified that had claimant not walked off the job during her shift on October 11, 2022 without permission, the employer would not have discharged claimant. Transcript at 18, 21. Therefore, the proximate cause of claimant's discharge was the October 11, 2022 incident. *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).

When claimant walked out on October 11, 2022, she breached the employer's expectation that employees not walk off the job during their shifts without permission with at least wanton negligence.

Claimant knew and understood the prohibition against walking off the job without permission as a matter of common sense and also because she had received a warning for doing so previously on April 13, 2022. Although, as discussed below, the employer did not meet their burden to show that claimant had actually violated the expectation on the April 2022 occasion, the fact that the owner believed claimant had walked out on her shift and warned her was sufficient to make claimant aware of the expectation. Claimant was upset when she walked out on October 11, 2022. Though upset, claimant was conscious of her conduct when she walked off the job and knew or should have known that it would probably result in a breach of the employer's reasonable expectation. Claimant was also indifferent to the consequences of her actions because she left without asking for permission, even though the owner was present in the store and available to consider a request for claimant to go home. Therefore, claimant's conduct was a wantonly negligent violation of the employer's expectations.

However, claimant's wantonly negligent conduct on October 11, 2022 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 principles, the record shows that the October 11, 2022 incident was an isolated act. Although the owner warned claimant for leaving work without permission previously on April 13, 2022, the employer did not meet their burden to show that claimant violated the employer's expectation willfully or with wanton negligence on that occasion. At hearing, the owner testified that she did not recall the circumstances of claimant leaving work that day. Transcript at 13. Claimant, in contrast, testified that she had permission to leave when she did because the owner told her all the dog grooming was done for the day and claimant might as well go home. Transcript at 34. Given that the owner could

not recall details and that the burden of persuasion rests with the employer, the weight of the evidence favors claimant's account. Therefore, claimant had permission to leave on April 13, 2022 and did not breach the employer's expectations that day.

The employer also did not meet their burden to prove that the March 16, 2022 dog-slapping incident was a willful or wantonly negligent breach that could be viewed in combination with the October 11, 2022 final incident so as to render the final incident not a single or infrequent occurrence. Claimant admitted to slapping the dog. Transcript at 30. Claimant also alleged that the owner had slapped dogs, raising the possibility that the employer condoned such conduct. Transcript at 30. Although the owner testified that she told claimant she would discharge claimant if claimant ever slapped a dog again, the employer did not offer evidence to prove that at the time claimant slapped the dog on March 16, 2022, claimant knew that doing so was prohibited. Transcript at 16.

Even if the employer had established that claimant knew that slapping the dog on March 16, 2022 was prohibited, and thus that claimant's conduct was a willful or wantonly negligent breach, it is not evident that the single dog-slapping incident would be sufficient to view the October 11, 2022 walkout as not constituting an isolated act. Claimant slapped a dog at work once, the incident occurred some seven months before the October 11, 2022 final incident, and the dog slap would have amounted to a violation of an employer expectation distinct from the prohibition against walking off the job. Therefore, even if claimant's slapping of a dog on March 16, 2022 was willful or wantonly negligent conduct, the employer did not show that the existence of that violation was sufficient to make the October 11, 2022 final incident a repeated act or pattern of other willful or wantonly negligent behavior. For the above reasons, claimant's violation of the employer's expectations on October 11, 2022 was a single or infrequent occurrence.

Furthermore, claimant's conduct on October 11, 2022 did not exceed mere poor judgment. Walking out on her shift did not violate the law nor was it tantamount to unlawful conduct. It did not represent an irreparable breach of trust as it did not involve dishonesty, cheating, theft, self-dealing, or the like. It also did not make a continued employment relationship impossible. It was possible for the employment relationship to have continued, considering that claimant worked the entirety of her shift the next day, October 12, 2022, before the employer discharged her.

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. 23-UI-211458 is affirmed.

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

**DATE of Service:** March 15, 2023

**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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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 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 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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