

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0310**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 28, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective November 5, 2022 (decision # 145152). Claimant filed a timely request for hearing. On March 7, 2023, ALJ Adamson conducted a hearing, and on March 10, 2023 issued Order No. 23-UI-218712, affirming decision # 145152. On March 15, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Portland Retail Operation employed claimant as a deli clerk at their grocery store from August 18, 2020 until November 17, 2022.

(2) The employer expected that their employees would not initiate physical altercations with others on store property, whether or not the employee was working at the time.

(3) The employer allowed claimant to live in his vehicle in the store's parking lot. Throughout 2022, claimant's vehicle was repeatedly vandalized and burglarized, and claimant felt "stalked and harassed" by the two men he believed to be responsible. Transcript at 17.

(4) On November 9, 2022 or November 10, 2022, claimant was walking down the street and observed the two men who had been harassing claimant running away from claimant's vehicle "that they had just broke[n] into." Transcript at 21. Claimant discovered his driver license "and several other personal possessions" missing from the vehicle. Transcript at 21. Claimant notified police, who began to take his report but were called away on a more urgent matter before finishing. Claimant then returned some cans for their deposit and walked to a fast food restaurant. As he was returning to the store parking lot, claimant observed one of the two men using the store's bottle return, which was located near where claimant's vehicle was parked and in public view. Claimant ran over to the man, demanded his property back, and when the man refused, claimant pushed him "a couple [of] times," grabbed him "in a choke hold," and brought him to the ground. Transcript at 9. They wrestled on the ground for "a few minutes."

Transcript at 9. Claimant retrieved his stolen belongings from the man and the altercation ended. Claimant was not in work uniform or performing work for the employer when the incident occurred. Claimant was not arrested and no charges were brought against claimant by the employer or the man involved in the incident. Transcript at 9.

(5) On November 11, 2022, the employer's managers reviewed surveillance video of the altercation after having been alerted to the incident by an employee who witnessed it. The employer suspended claimant from work pending investigation into the incident.

(6) On November 17, 2022, the employer discharged claimant for initiating a physical altercation on store property.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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. OAR 471-030-0038(3)(a) 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

The order under review concluded that claimant was discharged for misconduct that did not constitute an isolated instance of poor judgment, because his actions exceeded more poor judgment in that they violated the law. Order No. 23-UI-218712 at 3. The record does not support this conclusion.

The employer discharged claimant because claimant initiated a physical altercation on store property. The employer expected that their employees would not initiate physical altercations at their store, whether or not the employee was working at the time. Claimant did not contend that this expectation was unreasonable, and it may be inferred that claimant was aware of this expectation because a reasonable and prudent person would not engage in physical altercations at their workplace.

Even though claimant was not performing work duties for the employer when the incident occurred, it was nevertheless connected with his work. “[W]here the conduct or activities for which the claimant is discharged occurred off the working premises and outside the course and scope of employment, the employer must, in order to show that the conduct is work-connected, point to some breach of a rule or regulation that has a reasonable relation to the conduct of the employer's business.” *Geise v. Employment Division*, 27 Or App 929, 557 P2d 1354 (1977). Here, the conduct occurred on the employer’s premises where it could have been viewed by the public and other employees, and was observed by another employee as it occurred. This employee was concerned enough about what he witnessed to report the incident to store management, who investigated and viewed surveillance video. It is therefore reasonable to infer that claimant’s actions disrupted at least one employee’s work at the store, and could have caused safety concerns among those who witnessed it or later learned about it, including claimant’s co-workers and the store’s customers or potential customers. Further, having an altercation on the employer’s premises could potentially subject the employer to liability for any injuries sustained by that customer. For these reasons, the employer’s expectation that their employees would refrain from initiating physical altercations on the property, regardless of whether they were working at the time, had a reasonable relation to the conduct of the employer’s business. Accordingly, the employer established that claimant’s conduct was connected with his work.

While the parties offered conflicting evidence as to whether the events at issue occurred on November 9, 2022 or November 10, 2022, this distinction is irrelevant to the misconduct analysis. The employer’s witness testified that he observed, on surveillance video, an incident which occurred on one of these two days wherein claimant made a “bee-line” to a man who was using the store’s bottle return and initiated physical contact with him, leading to an altercation that lasted several minutes. Transcript at 9. The witness characterized claimant as “the first person to initiate physical contact” in the video and stated that the other man did not “attack” claimant but merely fought “to get [claimant] off him.” Transcript at 9-10. Claimant testified that he felt he did not initiate physical contact, but that the altercation “might have been finished by me at that spot,” and explained that he felt that the conflict was actually initiated by the man’s ongoing actions of harassment, vandalism, and theft against claimant. Transcript at 25. Claimant did not rebut the employer’s testimony describing the video’s depiction of the altercation. Therefore, the employer established by a preponderance of evidence that claimant initiated a physical altercation on their premises.

Further, the record shows conflicting evidence as to whether there was an additional altercation involving claimant and the same man during the days at issue. The employer described surveillance

video depicting the second incident as “pushing and a little bit of contact.” Transcript at 11. Claimant denied a second interaction transpired at all. Transcript at 44-45. As evidence regarding a possible second altercation is no more than equally balanced, and the employer bears the burden of proving misconduct by a preponderance of evidence, it is more likely than not that claimant was not involved in a second altercation. Nonetheless, the employer established that claimant willfully initiated the primary physical altercation on store property in violation of the employer’s reasonable expectations of behavior.

However, claimant’s actions were not misconduct because they constituted an isolated instance of poor judgment. The record does not suggest that claimant’s initiation of the physical altercation was anything other than an isolated incident. As claimant observed the man from a distance, ran over to him, and used physical force only after demanding the return of his property, claimant’s actions demonstrated a conscious decision to take action in initiating the altercation, and therefore his actions involved judgment. Claimant knew or had reason to know that initiating a physical altercation on store property was a violation of the employer’s reasonable standard of behavior, but acted with indifference to the consequences of his actions, thereby evincing poor judgment. Mitigating factors include that claimant had no prior altercations during his employment tenure, his actions were not indiscriminate, and occurred within the context of retrieving his stolen property. Claimant’s actions did not exceed mere poor judgment because they did not create an irreparable breach of trust in the employment relationship, such as by theft or dishonesty, nor did they make a continued employment relationship impossible.

The record does not show that claimant violated the law, as the order under review concluded, or that his actions were tantamount to a violation of that law, because there is insufficient evidence to conclude that claimant caused injury to another.<sup>1</sup> In some circumstances, applying offensive physical contact to another person or engaging in fighting or violent behavior in public would violate the law or be tantamount to a crime.<sup>2</sup> However, in this instance, claimant did not act with the requisite intent to “harass” or “annoy,” or cause “public inconvenience, annoyance or alarm,” but instead engaged in these actions solely with the intent of retrieving his recently stolen property, which claimant reasonably believed the other person possessed. Accordingly, the record does not show that claimant’s actions violated the law or were tantamount to a crime. Therefore, claimant’s actions did not exceed mere poor judgment and constituted an isolated instance of poor judgment, which is excepted from the definition of misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 23-UI-218712 is set aside, as outlined above.

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

**DATE of Service:** April 25, 2023

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<sup>1</sup> ORS 163.160(1)(a) provides in relevant part: A person commits the crime of assault in the fourth degree if the person intentionally, knowingly or recklessly *causes physical injury to another* [emphasis added].

<sup>2</sup> See ORS 166.065 (defining the crime of “harassment”); ORS 166.025 (defining the crime of “disorderly conduct in the second degree”).

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

**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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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