

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0643**

*Request to Reopen Allowed*  
*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 16, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 95418). The employer filed a timely request for hearing. On March 22, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for April 5, 2023. On April 5, 2023, the employer failed to appear at the hearing, and on April 6, 2023, ALJ Chiller issued Order No. 23-UI-221228, dismissing the employer's request for hearing due to their failure to appear and leaving decision # 95418 undisturbed. On April 13, 2023, the employer filed a timely request to reopen the hearing. On May 5, 2023 and continuing on May 24, 2023, ALJ Chiller conducted a hearing, and on May 26, 2023 issued Order No. 23-UI-226271, allowing the employer's request to reopen the hearing and reversing decision # 95418 by concluding that claimant was discharged for misconduct and therefore disqualified from receiving benefits effective November 20, 2022. On June 5, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant did not declare that she provided a copy of her argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information, such as the new information in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the order under review allowing the employer's request to reopen the hearing, and concluding that the *final* incident which occurred on November 21, 2022 was a willful or wantonly negligent disregard of the employer's standards of behavior, are **adopted**. The remainder of this decision addresses whether claimant's conduct constituted an isolated instance of poor judgment.

**FINDINGS OF FACT:** (1) Victoria's Secret Stores, LLC employed claimant as a sales associate from November 22, 2021 until November 22, 2022.

(2) The employer maintained a dress code which required employees to wear only solid black or white clothing, without any branded logos on tops, jackets, or pants, while on the sales floor. Claimant was aware of this policy.

(3) On October 3, 2022, one of claimant's supervisors observed her failing to offer a customer an application for the employer's store credit card, which the employer felt was a violation of their "inclusion" policy, in which "every customer [was to be] offered the exact same thing[.]" May 5, 2023 Transcript at 28–29. Claimant told the supervisor that she did not offer the credit card application to the customer "because it would ruin their credit." Transcript at 29.

(4) On October 18, 2022 and October 31, 2022, the employer gave claimant verbal warnings for having "consistently violated dress code policy by wearing branded logos from other companies, specifically a Nike hooded jacket." May 5, 2023 Transcript at 23–24. On some of these occasions, claimant would "take the clip off her headset, fold the logo over, and clip the headset there so [the employer] couldn't tell, or she would wear her hair down to also cover the logo." May 5, 2023 Transcript at 25–26.

(5) On November 22, 2022, the employer discharged claimant in connection with an incident that had occurred the prior day.

**CONCLUSIONS AND REASONS:** Order No. 23-UI-226271 is reversed, and this matter remanded for further development of the record to determine whether the final incident which led the employer to discharge claimant was an isolated instance of poor judgment.

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).

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).

As partially affirmed, above, the employer discharged claimant due to a November 21, 2022 incident which constituted a willful or wantonly negligent disregard for the employer's standards of behavior. The order under review concluded that this incident constituted misconduct because it was not an isolated instance of poor judgment, as claimant had "refus[ed] to follow a store policy... to offer all customers credit cards." Order No. 23-UI-226271 at 6. The record as developed does not support this conclusion.

As a preliminary matter, the record as developed does not actually show what the employer's policy was regarding offering credit card applications to customers. At hearing, the store's general manager alluded to the requirement being one of several "behaviors that we're expected to demonstrate with every single customer." May 5, 2023 Transcript at 28. However, the employer did not actually explain what is required of employees in this regard. Furthermore, the ALJ did not ask claimant any questions about why she refused to offer the credit card to the customer on October 3, 2022. On remand, in order to determine whether claimant's refusal in this instance constituted a willful or wantonly negligent violation of the standards of behavior that the employer had the right to expect of claimant, the ALJ should both inquire as to what the employer's policy actually required, and provide claimant with an opportunity to rebut the employer's testimony or explain her actions.

Furthermore, additional inquiry is required to determine whether any or all of claimant's instances of violating the employer's dress code constituted willful or wantonly negligent disregards of the

employer's standards of behavior.<sup>1</sup> That claimant wore a jacket or hoodie with the logo of another brand while at work is not in dispute. However, at hearing, claimant testified:

The only thing that I had even ever been spoken to about was dress code, and it would simply be a reminder of going from the back room to the floor, needing to take off my sweatshirt before.

May 24, 2023 Transcript at 32–33. Furthermore, the store's general manager testified that employees could "wear sweatshirts when they do processing" in the back of the store. May 5, 2023 Transcript at 38. Based on these statements, it appears that claimant may have been permitted to wear the offending garment at certain times, or in certain parts of the store, and that her alleged violations of the employer's dress code may therefore have not been violations at all or may have been violations that were unintentional or not wantonly negligent. On remand, the ALJ should develop the record to show precisely what the employer's dress code permitted, as well as what reason claimant had, for each particular alleged violation, for not observing the dress code, in order to determine whether any or all of those alleged violations constituted willful or wantonly negligent behavior. Because the record also suggests that claimant made conscious efforts to hide or obscure the logo on the offending garment, the ALJ should provide claimant with the opportunity to explain her actions in those instances.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for an isolated instance of poor judgment, Order No. 23-UI-226271 is reversed, and this matter is remanded.

**DECISION:** Order No. 23-UI-226271 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** July 17, 2023

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-226271 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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<sup>1</sup> The order under review did not consider claimant's dress code violations to be relevant to the isolated instance of poor judgment analysis because they "do not establish a continuing pattern of a particular type of inappropriate behavior and thus are not related to the behavior that led to claimant's discharge." Order No. 23-UI-226271 at 6. However, the ALJ should note that under OAR 471-030-0038(1)(d)(A), a final incident of willful or wantonly negligent behavior is "isolated" if it is a "single or infrequent occurrence rather than a repeated act or pattern of *other willful or wantonly negligent behavior*." (emphasis added). The rule does not require prior instances of willful or wantonly negligent behavior to be of a same or similar type as the behavior exhibited in the final incident in order for the final incident to be considered not "isolated."

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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.

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