

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0095**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 2, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 102740). The employer filed a timely request for hearing. On January 3, 2024, ALJ Frank conducted a hearing, and on January 5, 2024, issued Order No. 24-UI-244881, reversing decision # 102740 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective September 3, 2023. On January 22, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Winco Foods, Inc. employed claimant, most recently as a meat cutter, from June 17, 2016, until September 8, 2023.

(2) The employer maintained a policy which stated, in relevant part, that employees must “contribute to a positive work environment through cooperative and professional interactions with co-workers, customers, and vendors... [and] be courteous to customers and fellow co-workers and cooperate with other employees at all times.” Transcript at 5. The policy also stated that “employees may not use or engage in threatening, intimidating, or coercive language [or] conduct or use or engage in abusive or foul language.” Transcript at 5. Claimant received a copy of this policy as recently as 2022, and understood what it required of her.

(3) On August 13, 2023, one of claimant’s coworkers, “E,” disposed of a container of soda that belonged to claimant. When claimant learned of this, she believed that E had done so maliciously, and became upset. Claimant then began arguing with E, raising her voice and “yelling” as she did so. Transcript at 31. E sought help from the manager of the adjacent seafood department, but when the seafood department manager arrived, she was unable to de-escalate the situation and claimant continued yelling. The seafood department manager then sought help from the assistant general manager to calm claimant down.

(4) On August 17, 2023, the employer issued claimant a “final written warning” for having violated the employer’s policy during the August 13, 2023, incident by “being disrespectful” to E. Transcript at 12. The written warning stated, in relevant part, that claimant “is also being reminded to bring any concerns she has regarding her fellow employees and potential policy violations to a manager, [assistant store manager], or department manager so it can be addressed appropriately,” and that she could be discharged for engaging in another similar violation. Transcript at 12.

(5) On September 1, 2023, claimant was again working with E, who directed claimant to tray some bulk chicken. E had previously been deputized to act as a supervisor when a member of management was not present, and had specifically been directed by management to assign this task to claimant. However, claimant felt that E did not have the authority to tell her what to do, told E to “mind [her] own business,” and proceeded to argue with E about it. Transcript at 37. Claimant raised her voice during the exchange, and did not disengage or lower her voice even when directed to do so by a department manager who attempted to intervene. Claimant did not disengage until the department manager told her that he was going to speak to the store’s general manager.

(6) The general manager discussed the incident with claimant shortly after it occurred. The next day, September 2, 2023, the employer suspended claimant pending investigation of the matter. On September 8, 2023, the employer discharged claimant for having violated their policy regarding cooperative and professional interactions with co-workers, specifically during the incident on September 1, 2023.

**CONCLUSIONS AND REASONS:** Claimant was discharged 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).

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 employer discharged claimant because she violated their policy regarding cooperative and professional interactions with co-workers. Claimant had been given a copy of this policy the previous year and, at hearing, testified that she understood what it required. Transcript at 35. Claimant also testified that she did not believe she had ever violated the policy, and suggested that she was discharged because she was "set up" by management and that E and the store's assistant manager were "out to get" claimant. Transcript at 35. However, claimant did not offer evidence to support this allegation. Further, the record supports the conclusion that claimant did violate the employer's policy.

In particular, the final incident which led the employer to discharge claimant occurred on September 1, 2023, when claimant argued with and raised her voice towards a coworker who had been directed to assign a particular task to claimant. Claimant's refusal to follow the directions that E gave her, and subsequently engaging in a raised-voice argument, does not comport with the policy's requirement to engage in "cooperative and professional interactions."

Claimant was aware of the policy and had been warned about two weeks prior that any additional violations of the policy could lead to her discharge. Therefore, the record supports the inference that claimant conducted herself on September 1, 2023, without regard for the consequences of her actions. Claimant's violation of the policy that day was at least wantonly negligent.

Further, claimant's conduct on September 1, 2023, cannot be excused as an isolated instance of poor judgment. In order for conduct to be an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. On August 13, 2023, claimant engaged in conduct similar to her conduct during the final incident, by engaging in an argument with E over a container of soda that E had discarded, raising her voice, and refusing to calm down or de-escalate until a member of upper management intervened. As with the final incident, claimant was already aware of the employer's policy regarding how she was required to interact with others, and violated that policy by failing to engage in "cooperative and professional interactions."

Additionally, claimant persisted with her conduct even after a nearby department manager attempted to intervene. That manager's attempt at intervention signaled to claimant that claimant was not following the employer's policy regarding interactions with others. Because claimant persisted despite the

attempted intervention, she acted without regard for the consequences of her actions in that incident as well. Therefore, the August 13, 2023, also was a wantonly negligent violation of the employer's standards of behavior. As a result, claimant's conduct during the final incident was not isolated, but instead a repeated act, and not an isolated instance of poor judgment.

Because claimant was discharged for a willful or wantonly negligent violation of the employer's standards of behavior, and the violation was not an isolated instance of poor judgment, claimant was discharged for misconduct. Claimant therefore was disqualified from receiving unemployment insurance benefits effective September 3, 2023.

**DECISION:** Order No. 24-UI-244881 is affirmed.

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

**DATE of Service:** February 29, 2024

**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 الاستئناف 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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