

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0226**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 3, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 81139). The employer filed a timely request for hearing. On February 20, 2024, ALJ Messecar conducted a hearing, and on February 21, 2024 issued Order No. 24-UI-248515, reversing decision # 81139 by concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving benefits effective October 15, 2023. On March 1, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Walmart Associates, Inc. employed claimant as a personal shopper at one of the employer's retail stores from approximately November 2022 through October 26, 2023.

(2) The employer maintained a "Violence-Free Workplace Policy" which, in relevant part, prohibited "any form of violence" in the workplace. Exhibit 1 at 1. The policy defined "violence" to include, in relevant part, conduct or communication which "harms, damages, injures, harasses, intimidates, bullies, threatens, stalks, taunts, forces, coerces, restrains, or confines another person; or reasonably causes someone to fear for their health or safety[.]" Exhibit 1 at 1. Claimant was provided with a copy of this policy around the time he was hired, and was also given computer-based training on the policy.

(3) At some point prior to October 19, 2023, claimant suffered a seizure at work. Another employee took a picture of claimant while the seizure was occurring, and subsequently showed that picture to other employees. The store manager eventually learned about this, and began an investigation to determine whether the employee who took the picture should face disciplinary action.

(4) On October 19, 2023, claimant returned to work after his seizure.<sup>1</sup> By this time, the store manager had concluded her initial investigation into the employee who had taken claimant's picture, and was awaiting directions from the employer's "ethics team" as to "what kind of accountability" they should impose on that employee. Transcript at 9. At the time that claimant returned to work, he was aware of the other employee's actions, but was not yet aware that the employer had conducted an investigation into the matter.

(5) Upon claimant's return to work, he confronted the other employee about the picture she had taken of him and demanded that she delete the picture from her phone. Claimant also told her that he would be speaking to the human resources (HR) department about the matter and would try to "get her fired." Transcript 21. Claimant did so because he felt that, in taking his picture while he was having a seizure and showing it to coworkers, the other employee had violated his privacy while he was in a "very vulnerable situation." Transcript at 21.

(6) Later on, October 19, 2023, after claimant had already confronted the employee who took his picture, the store manager and another member of management called claimant into the store manager's office for a meeting. During that meeting, the store manager informed claimant of the status of the investigation into the other employee, and also told claimant not to speak to the other employee because the matter was still pending. Claimant was upset during the course of the meeting and spoke with an "agitated tone" as he told the managers that "they needed to do something about" the other employee. Transcript at 20. The general manager felt that claimant was "threatening" her and the other manager, which made them "very uncomfortable" and that he was going to hurt them. Transcript at 12–13. The general manager also felt that claimant was not listening to her regarding the investigation process, but was instead intent on having the other employee discharged. As a result, the general manager suspended claimant and asked him to leave her office. Claimant left and went to the store's break room to retrieve his possessions.

(7) While claimant was in the break room, he again spoke to the coworker who had taken the picture of him, and reiterated that he intended to have her discharged. Claimant left the store shortly thereafter.

(8) On October 26, 2023, after an investigation into claimant's own behavior, the employer discharged claimant because they felt he had violated their policy by engaging in threatening behavior during and after his meeting with the store manager on October 19, 2023.

**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. "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

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<sup>1</sup> The record is unclear as to how long claimant was off work following the seizure, but it appears that claimant was absent for several days, at least. *See* Transcript at 9 (employer's witness testifying, "...[claimant] was just returning to work and none of us knew he was actually back to work that day.")

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 due to his behavior following an incident in which another employee took a picture of claimant while he was having a seizure, and then showed that picture to other employees. In particular, the employer’s store manager testified at hearing that she would not have discharged claimant if he had not “threatened [her] and refused to leave [her] office,” which was putatively a violation of the employer’s policy regarding workplace violence. Transcript at 12. Additionally, the store manager testified that, after claimant left the meeting with the two managers, he continued to make threatening statements against the managers such as “they better watch out,” “she’ll pay,” and “I’ll be back.” Transcript at 7–8. According to the store manager, those “threats” were not issued towards anyone actually in the break room at the time. Transcript at 7. By contrast, while claimant admitted to being “agitated” during the meeting with the managers, he denied having issued any such “threats.” Transcript at 20.

In weighing these conflicting accounts, the order under review found the employer’s more credible, concluding, “Both claimant and the employer provided firsthand testimony of what occurred. The employer’s testimony was more detailed and less evasive than claimant’s account of what occurred, and the employer’s testimony was used to establish the facts on this matter.” Order No. 24-UI-248515 at 3.

The record does not support this conclusion. First, regarding any discussion which occurred between claimant and the store manager in the meeting itself, the evidence as to whether claimant issued threats towards the managers is equally balanced. Irrespective of the fact that claimant's testimony was less "detailed" than the employer's, claimant rebutted the employer's assertions that he issued threats against the managers. Further, while claimant appeared somewhat flustered during portions of his testimony, this appeared to be largely a response to being repeatedly interrupted while trying to testify, rather than any obvious intent to evade the ALJ's questioning. The implication that claimant's testimony is less credible than the employer's lacks merit, and on this record claimant's testimony is equally as credible as the employer's. Because the employer bears the burden of proof in this case, they have not met their burden to show that claimant issued threats towards the managers during the meeting.

Additionally, regarding the alleged "threats" that claimant issued towards the managers while he was in the break room, the record indicates that the employer's witness was not actually present while claimant allegedly made those "threats," as she testified that they were not made towards anyone in the room at the time. This testimony was therefore hearsay, which is entitled to less weight than claimant's first-hand account in which he denied having made such statements. For the above reasons, claimant's testimony that he did not issue "threats" towards the managers, either during or after the meeting, is afforded more weight, and the facts have been found accordingly. Therefore, to the extent that the employer discharged claimant because he allegedly issued threats (such as "they better watch out" or "she'll pay") towards or regarding the managers he met with on October 19, 2023, claimant was not discharged for misconduct because the record does not show that he actually engaged in this behavior, as explained above.

The record does show that, following the meeting with the managers, claimant again spoke to the employee who had taken his picture, directly in defiance of the store manager's directions not to do so because of the pending investigation into the other employee's conduct. It was reasonable for the store manager to tell claimant not to speak to the other employee and allow the investigation process to conclude, and claimant's defiance of that directive was therefore a willful or wantonly negligent violation of the employer's standards of behavior. However, to the extent that the employer discharged claimant for this reason, claimant's conduct was, at worst, an isolated instance of poor judgment.

The record does not show that claimant had ever previously violated the employer's standards of behavior willfully or with wanton negligence, and claimant's conduct was therefore isolated. Additionally, despite some suggestions in the record that claimant's statements to the other employee of his intent to have her discharged constituted "threats" towards her,<sup>2</sup> a statement of intent to press for another employee to face the employer-imposed consequences of their *own* misdeeds is not a threat of violence or bodily harm, such that it might be considered unlawful conduct or tantamount to unlawful conduct. Finally, the record does not show that claimant's reiteration of his intention to have the other employee discharged created an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. Therefore, to the extent that claimant was discharged for this reason, claimant's conduct here was an isolated instance of poor judgment, which is not misconduct.

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<sup>2</sup> See, e.g., Transcript at 17-18.

For the above 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. 24-UI-248515 is set aside, as outlined above.

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

**DATE of Service: April 12, 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.

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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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