

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0400**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 24, 2024, 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 # 142428). The employer filed a timely request for hearing. On April 5, 2024, ALJ Goodrich conducted a hearing, and on April 12, 2024, issued Order No. 24-UI-252184, affirming decision # 142428. On April 26, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

**FINDINGS OF FACT:** (1) Nostrana employed claimant at their restaurant as an events assistant and personal assistant to the owner from September 8, 2022, until October 3, 2023.

(2) On September 26, 2023, claimant attended a meeting with some of the employer's managers. Claimant's role was to take notes for the benefit of the owner, who was not present. A document containing the meeting's agenda was accessible to other staffers not invited to the meeting, including the restaurant's bar director. The agenda listed one of the items for discussion as "bar team structure." Transcript at 18-19.

(3) When that agenda item was discussed at the meeting, the employer decided they would discharge the bar director and would begin a "very slow and measured exit strategy" to accomplish this. Transcript at 7. The employer expected that claimant would not disclose this information to anyone other than the owner or those privy to what transpired at the meeting and claimant understood this expectation.

(4) Approximately a week prior to the meeting, the bar director had hosted an event that claimant believed “went terribly.” Transcript at 26. The bar director feared being discharged based, in part, on this event. The bar director’s fear was compounded when she saw that “bar team structure” would be discussed by management at a meeting to which she had not been invited.

(5) On approximately September 29, 2023, the bar director had recently returned to work after the death of a family member and turned to claimant, whom she considered a friend, to discuss her personal distress and job concerns. The bar director “discussed leaving [the employer]” and “mentioned seeing the thing on the agenda[.]” Transcript at 26. Claimant told the bar director that she could not discuss anything related to the September 26, 2023, meeting and that she needed to address any questions regarding it to the restaurant’s general manager or director of operations. Transcript at 26.

(6) During the September 29, 2023, conversation with claimant, the bar director asked claimant’s advice about leaving the employer. The bar director had previously brought up the idea of quitting on approximately four prior occasions during their mutual tenure, and claimant “had convinced her to stay” each of those times. Transcript at 30. However, on this occasion, claimant told her to “follow her intuition.” Transcript at 26. Claimant gave this advice from “a friendship point of view” because it seemed to claimant, based on the bar director’s recent work performance, that she “was on a path of self-sabotage” and “was more burnt out than ever because of other medical and familial things that were happening.” Transcript at 30. Claimant did not consider this a disclosure of the employer’s plan to discharge the bar director or of anything discussed at the meeting.

(7) Following the conversation with claimant, the employer noticed a “very dramatic initial shift in the behavior and temperament of the bar director.” Transcript at 10. The employer suspected that the cause was claimant’s disclosure to the bar director of their intention to discharge her. However, the bar director initially denied this and only expressed that she believed she was going to be discharged and did not demonstrate any knowledge of the details as to how or when the employer planned to discharge her. After an investigation which included reviewing surveillance footage of the area around the September 26, 2023, meeting to see if anyone could have overheard the meeting, repeated questioning of the bar director by the employer, and “an intervention” involving several members of management, the bar director “eventually stated that it was [claimant]” who provided the information. Transcript at 38-39.

(8) On October 3, 2023, the employer called claimant to a meeting at which they discharged her for disclosing confidential information to the bar director from the September 26, 2023, meeting.

**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 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 they believed she disclosed confidential information to the bar director regarding their intent to discharge her. The employer reasonably expected that claimant would keep this information confidential, and claimant understood this expectation. However, the employer has not met their burden of showing by a preponderance of evidence that claimant willfully or with wanton negligence disclosed the confidential information.

The employer presented hearsay testimony that the bar director learned in late September 2023 that the employer intended to discharge her, and that she identified claimant as the source of that information. Claimant gave first-hand testimony about her conversation with the bar director after the September 26, 2023, meeting. Claimant testified that the bar director, whom she considered a friend, approached her for advice because she suspected that her job was in jeopardy after poor performance at an event the week prior, and due to management discussing “bar team structure” at a meeting to which she had not been invited. Transcript at 26. The bar director’s request for advice from claimant was phrased as an intention to quit work. The bar director had expressed this intent to claimant for other reasons on approximately four prior occasions, during which claimant persuaded her not to quit. However, this time, claimant did not advise the bar manager not to quit, but instead told her to “follow her intuition.” Transcript at 26. Claimant testified that this advice was given not as a way to disclose the employer’s plan to discharge the bar director, but because various personal and work-related factors made claimant

believe that this was the best advice to give her as her friend. Transcript at 30. Claimant's first-hand account of this conversation is entitled to greater weight than the non-specific hearsay account of the bar director, as related by the employer at hearing, and the facts have been found accordingly.

It can reasonably be inferred, based on the circumstances, that the bar director would likely have interpreted any response or deflection from claimant, other than advising her not to quit, as an indication that claimant knew the bar director's job was in jeopardy. Claimant was therefore in the difficult position of deflecting the bar director's query or advising her not to quit, though claimant believed this was not in her friend's best interest based on factors other than the confidential information to which she was privy. Claimant chose to deflect the request for advice, testifying that she did not believe her direction to "follow your intuition" to be a disclosure of confidential meeting details. Transcript at 30. Claimant therefore did not willfully disclose confidential information.

While claimant's response had the apparent effect of serving as confirmation to the bar director of the bar director's belief that her job was in jeopardy, thereby effectively conveying confidential information, this evinced no more than ordinary negligence. Responding in a non-committal way to the bar director's suggestion of quitting work, rather than directly advising her to quit or revealing details of the employer's plan, suggests that claimant was not indifferent to the consequences of her actions or to the employer's interests. Claimant mistakenly believed that her response would not betray the employer's confidence, and the employer has not shown that this mistake constituted *wanton* negligence. Moreover, even if claimant's actions had risen to the level of *wanton* negligence, the record suggests that it would have been an isolated instance of poor judgment, which is not 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. 24-UI-252184 is affirmed.

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

**DATE of Service:** June 6, 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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