

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0784**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 13, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0005917523). The employer filed a timely request for hearing. On October 18, 2024, ALJ Ensign conducted a hearing, at which claimant failed to appear, and on October 25, 2024 issued Order No. 24-UI-270834, affirming decision # L0005917523. On November 7, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument in reaching this decision.

**FINDINGS OF FACT:** (1) MC-KO LLC employed claimant as a stocker in the freezer section of their grocery store from July 6, 2022 until July 8, 2024.

(2) The employer expected their employees to treat coworkers and supervisors in a respectful and nonthreatening manner. The employer's employee handbook contained this policy. Claimant received and signed the handbook upon hire.

(3) On March 23, 2024, claimant was verbally abusive toward one of his managers, and called the manager an "idiot." Transcript at 19.

(4) At some point during claimant's employment, claimant went to a dental appointment during a work shift without clocking out. Shortly afterward, the employer counseled claimant regarding the incident, informing him that tending to personal matters while on the clock was "time theft" and was prohibited. Transcript at 28.

(5) At or shortly before the beginning of June 2024, claimant talked on his phone and texted for about a two-hour period during a work shift. In early June 2024, the employer had a counseling session with

claimant regarding the incident. In the counseling session, the employer reminded claimant that tending to personal matters while on the clock constituted time theft and was prohibited.

(6) During the spring and early summer of 2024, claimant had “almost daily confrontations” with several different managers. Transcript at 17. During these encounters claimant would “get[] in their faces,” and yell at the managers. Transcript at 17. The employer counseled claimant after many of these confrontations, but claimant’s behavior did not improve.

(7) On July 6, 2024, claimant was working a shift and the employer’s owner told him to mop up a mess someone had made on the store’s floor. Claimant did not do as the owner instructed and became angry. Claimant approached the owner “very aggressively” with his hands balled up into fists and “got in [the owner’s] face.” Transcript at 8. Claimant’s face was red, and his cheeks were puckered in anger. For a moment, the owner felt physically threatened.

(8) The owner had a discussion with claimant about the employer’s expectations and the situation resolved. As the day progressed, the owner noticed that claimant still had not mopped up the mess. Also on that shift, the employer called claimant to the cash registers to be a back-up cashier, but claimant did not respond. The employer also asked claimant to count how many recyclable items had been redeemed in the store’s bottle drop machine, but claimant did not carry out that duty.

(9) July 7, 2024 was claimant’s scheduled day off from work. On July 8, 2024, the employer discharged claimant for his threatening behavior toward the owner that had occurred on July 6, 2024. When claimant went to the grocery store on July 8, 2024 to pick up his final paycheck, the employer had security present.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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 order under review concluded that claimant's threatening conduct on July 6, 2024 violated the employer's expectations but that the incident was an isolated instance of poor judgment and, therefore, was not misconduct. Order No. 24-UI-270834 at 3. The record does not support this conclusion.

The employer discharged claimant for his July 6, 2024 threatening behavior toward the owner. The record shows that, on July 6, 2024, claimant became angry after being instructed to mop up a mess, and aggressively approached the employer's owner. With his hands balled up into fists, claimant then "got in [the owner's] face." Transcript at 8. Claimant's face was red, and his cheeks were puckered in anger during the incident. The owner felt physically threatened for a moment.

Claimant's conduct was at least a wantonly negligent violation of the employer's standards of behavior. By aggressively approaching the owner with balled up fists and an angry facial expression, claimant acted consciously and with indifference to the consequences of his actions. Claimant knew or should have known that his conduct would probably result in a violation of the employer's expectations. As a matter of common sense and ordinary workplace practice, it is understood that when a manager gives an employee a work command, it is not appropriate for the employee to approach the manager in a threatening and hostile manner. Further, the employer's employee handbook, which claimant received and signed at hire, contained a policy setting forth the employer's expectation that employees treat coworkers and supervisors in a respectful and nonthreatening manner. Therefore, claimant's conduct on July 6, 2024 violated the employer's expectations with at least wanton negligence.

Claimant's conduct was not an isolated instance of poor judgment. Claimant's behavior on July 6, 2024 was a repeated act or pattern of other willful or wantonly negligent behavior, and so was not isolated. On March 23, 2024, claimant was verbally abusive toward one of his managers, calling the manager an "idiot." Transcript at 19. This conduct was a willful or wantonly negligent violation of the employer's expectation that claimant treat supervisors in a respectful and nonthreatening manner. Also, at or shortly before the beginning of June 2024, claimant talked on his phone and texted for about a two-hour period during a work shift. This was a willful or wantonly negligent violation of the employer's expectation

that tending to personal matters while on the clock was prohibited, which the employer had previously advised claimant of when they counseled him after he went to a dental appointment during a work shift without clocking out. Lastly, during the same July 6, 2024 work shift in which claimant approached the owner aggressively, he also was insubordinate by refusing to mop up a mess, and ignoring instructions to be a back-up cashier and to do a bottle drop count. Claimant should have known as a matter of ordinary workplace practice that he was required to carry out reasonable job commands, and the record does not offer any evidence that provides an excuse or justification for claimant failing to do as he was instructed. Therefore, claimant's insubordination in refusing to mop up the mess, be a back-up cashier, and do a bottle drop count on July 6, 2024 were willful or wantonly negligent violations of the employer's expectations.<sup>1</sup> For these reasons, because claimant's threatening behavior on July 6, 2024 was not isolated but was part of a pattern of other willful or wantonly negligent behavior.

Claimant's threatening conduct on July 6, 2024 was also not an isolated instance of poor judgment because it exceeded mere poor judgement by making a continued employment relationship impossible. By aggressively approaching the owner with an angry facial expression and balled up fists, claimant instilled fear and intimidation in the owner. The owner testified that, during the encounter, he felt physically threatened for a moment and that when claimant came to pick up his final paycheck on July 8, 2024, the owner made sure to have security present. Transcript at 8, 17-18. The record also shows that in the last six months of his employment, claimant had "almost daily confrontations" with several different managers at the grocery store. Transcript at 17. The employer's owner testified that the employer counseled claimant after these encounters, but claimant's behavior "got worse." Transcript at 17. Given the lack of respect and hostility directed by claimant toward multiple managers and the owner, the record supports that claimant's threatening behavior made a continued employment relationship impossible.

For these reasons, the employer discharged claimant for misconduct and claimant is disqualified from receiving unemployment insurance benefits effective July 7, 2024.

**DECISION:** Order No. 24-UI-270834 is set aside, as outlined above.

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

**DATE of Service: December 11, 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 stated above.** See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose

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<sup>1</sup> At hearing, the employer's owner testified that he had decided to discharge claimant "at the moment when it was threatening" but wanted to speak first with his business partner and store manager before taking action. Transcript at 9. The owner testified that "as the day progressed" claimant also did not take cashier calls or do bottle drop counts and then "left the store with the floor still a mess[.]" Transcript at 9. The owner testified that he discussed the matter with others and discharged claimant on July 8, 2024. Transcript at 25. More likely than not, therefore, the reason for claimant's discharge was his July 6, 2024 threatening behavior, distinct from his insubordination. Claimant's refusals to mop up the mess, be a back-up cashier, and do a bottle drop count therefore are regarded as incidents distinct from the reason for claimant's discharge, and thus may be considered for purposes of whether claimant's threatening conduct was part of a pattern of other willful or wantonly negligent behavior.

the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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**

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់យើងទេ បើសិនជាអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះទេ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**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 دستورالعمل 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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