EO: Intrastate
BYE: 06-Sep-2025

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

343
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0036

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits from September 8, 2024 through September 6, 2025 (decision # L0006425968). Claimant filed a timely request for hearing. On January 14, 2025, ALJ Christon conducted a hearing and issued Order No. 25-UI-279847, modifying decision # L0006425968 by concluding that claimant was disqualified from receiving benefits effective September 8, 2024, and until requalified under Department law. On January 14, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) HIV Alliance, Inc. employed claimant as a peer support specialist from January 2, 2020 through September 13, 2024.

(2) The employer's attendance policy required that employees notify the employer via phone, email, or text message before the start of any shift from which they would be absent. The employer's anti-harassment policy prohibited employees from engaging in, "conduct that can be considering harassing… [including] actions, words, jokes, or comments based on an individual's race[.]" Exhibit 1 at 9. The anti-harassment policy also stated, "Any employee, who becomes aware of or experiences an incident of harassment, whether by witnessing the incident or being told of it, must report it to their immediate supervisor or the Executive Director… While it is not required, [the employer] encourages you to communicate directly with the alleged harasser, and make it clear that their behavior is unacceptable, offensive, or inappropriate." Exhibit 1 at 9. The employer provided claimant with copies of these policies when she was hired, and claimant signed an acknowledgment that she had received them.

Claimant also signed an acknowledgment of receipt of these policies when they were updated in April 2024.

(3) Claimant's start time varied somewhat from day to day, depending on the needs of her clients, but she understood that she was expected to arrive between 7 a.m. and 9 a.m.

(4) In 2023, claimant was involved in a motor vehicle accident that caused her to miss work while she was temporarily without transportation. During that period of time, claimant did not adhere to the employer's attendance policy by notifying the employer of her absence before the start of each shift she had missed. The employer did not indicate to claimant during that time that she should change her conduct to adhere to the policy, and claimant was not aware that she had been violating the employer's expectations.

(5) On August 8, 2024, claimant returned to work from a leave of absence related to her being the victim of domestic violence. On August 14, 2024, claimant contacted her manager at 9:35 a.m. to notify him that she would not be in that day due to "an urgent situation at home." Exhibit 1 at 4.

(6) On August 22, 2024, claimant was working in her office when a client walked by on their way out of the premises. The client began "venting about a situation" while using obscene language, including a racial slur, "the n-word." Transcript at 24–25. Neither claimant nor any of her nearby coworkers intervened or addressed the situation with the client. However, one of the nearby coworkers who also witnessed the incident complained to management that claimant had not addressed the situation. Claimant's manager subsequently spoke to claimant about the incident and warned her, "If you hear any client or staff for that matter using the 'n-word,' that kind of language is prohibited. Clients who want to continually use that language would need to leave immediately." Exhibit 1 at 5. The manager also told claimant that she should notify him if she witnessed similar incidents in the future. Claimant understood the expectations that the manager explained to her, but had not previously been aware that the employer had expected her to report, or intervene in, this type of incident.

(7) On or around September 1, 2024, claimant was involved in another motor vehicle accident that resulted in her vehicle being deemed a total loss. Claimant lived in a remote area which was not served by public transportation, and was only able to get to work by car. Claimant also had no friends or neighbors nearby who were able to give her a ride to work, and could not pay for a taxi because her credit card had recently been stolen. As a result, claimant was not able to go to work until she obtained another vehicle.

(8) On September 3, 2024, claimant contacted her manager at 9:27 a.m. to notify him that she would not be at work because of her lack of transportation. On September 4, 2024, claimant was again absent from work, but did not contact her manager until 10:05 a.m., after he had contacted her to ask her where she was. On September 6, 2024, claimant was again absent from work, but did not contact her manager. On September 9, 2024, claimant was absent from work again, and contacted her manager at 10:15 a.m. that morning to let him know of her absence. Claimant's manager subsequently contacted claimant and explained to her that she was required to notify the employer before the start of her shift if she was going to be absent.

(9) On September 10, 2024, claimant contacted her manager at 8:30 a.m. and told him that she would be absent from work that day. Also that day, claimant received a call from one of her coworkers, who was checking on claimant because of her absences and the difficulties she had been encountering. At the time, claimant, who had been trying to buy a vehicle without the ability to go to a dealership or test drive it, was "distraught," "crying," and "hyperventilating" over her situation. Transcript at 22. While describing to the coworker her frustrating efforts to buy a vehicle, claimant said about the car dealership employees, "They are acting like a bunch of 'n-word' racial slurs." Exhibit 1 at 5; Transcript at 22–23. After making this statement, claimant stopped talking due to embarrassment. Claimant later sent the coworker a text message apologizing for the use of the slur.

(10) On September 11, 2024, claimant contacted her manager at 10:56 a.m. and notified him that she would not be at work that day.

(11) On September 13, 2024, the employer discharged claimant because she had violated the employer's anti-harassment policy by using a racial slur during her conversation with a coworker on September 10, 2024.

CONCLUSIONS AND REASONS: The employer failed to establish that claimant's discharge was for misconduct, and not 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 a preliminary matter, the record shows that the employer's decision to discharge claimant was motivated by claimant's use of a racial slur during her conversation with a coworker on September 10, 2024,[1] and her recent failures to timely notify the employer of her absences, the last of which occurred a day after the September 10, 2024 incident. It is therefore necessary to determine the proximate cause of claimant's discharge from work. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

Despite the fact that the September 10, 2024 incident was not the chronologically-last incident that led to claimant's discharge, the record shows that it was the proximate cause of the discharge. At hearing, the employer's witness testified that while there were "a series of… incidents around attendance… there was a final incident… regarding language concerns." Transcript at 6–7. The employer's witness also testified that they would have discharged claimant for the September 10, 2024 incident even if she had not failed to give timely notice of her absence on September 11, 2024. Transcript at 13. Given this testimony, and the fact that the employer had tolerated several instances of claimant's failure to timely notify them of her absences from work shortly before the September 10, 2024 incident, the record shows that the September 10, 2024 incident likely was the proximate cause of the discharge.

Claimant's use of the racial slur during the September 10, 2024 conversation was a willful violation of the employer's standards of behavior. Claimant was aware of and understood the employer's anti-harassment policy, which prohibited the use of such language. Following the August 22, 2024 incident, claimant's manager specifically told claimant that the use of such language by clients or staff was prohibited, and claimant's response to having said the slur during the September 10, 2024 phone call indicated that she understood this. The record therefore shows that claimant knew that using such language violated the employer's expectations. The record further shows that despite claimant's emotional state at the time, her use of the racial slur during the September 10, 2024 phone call was a conscious act. Claimant therefore willfully violated the employer's policy and expectations.

The order under review concluded that claimant's use of the racial slur on September 10, 2024 was not an isolated instance of poor judgment because it exceeded mere poor judgment, explaining, "Under the

[1] Herein, "the September 10, 2024 incident" refers to claimant's use of a racial slur that day, despite the fact that the employer also alleged that claimant had violated their attendance policy that day.

circumstances, no reasonable employer would consider it possible to continue to employ claimant after her use of that word to a coworker or any other person and in fact, employer's witness testified that claimant was not eligible for rehire after the final incident leading to discharge, the use of the offensive racial slur." Order No. 24-UI-279847 at 5. However, the record does not support a conclusion that claimant's use of the racial slur on September 10, 2024 exceeded mere poor judgment.

To be clear, claimant's use of the slur was poor judgment, and understandably offensive. However, under OAR 471-030-0038(1)(d)(D), an act exceeds mere poor judgment only if it violate the law, is tantamount to unlawful conduct, creates an irreparable breach of trust in the employment relationship, or otherwise makes a continued employment relationship impossible. The employer has not met their burden to show that claimant's conduct fell under any of these provisions. Under the circumstances, claimant's use of the slur to the coworker did not violate the law and was not tantamount to unlawful conduct. Nor did it create an irreparable breach of trust in the employment relationship, as it did not involve, for example, dishonesty, cheating, theft, self-dealing, or abuse of official position. Nor did claimant's use of the slur otherwise make a continued employment relationship impossible, as it did not impede any essential aspect of the relationship or threaten its continued existence. As such, claimant's conduct did not exceed mere poor judgment.

The remaining issue is whether claimant's poor judgment on September 10, 2024 was isolated, meaning whether it was a single or infrequent occurrence, and not a repeated act or part of a pattern or other willful or wantonly negligent behavior. Because claimant had not used a racial slur on prior occasions, her use of such language on September 10, 2024 was a single occurrence, and not a repeated act, so the issue becomes whether her use of the slur was part of a pattern or other willful or wantonly negligent behavior.

As for the August 22, 2024 incident in which claimant witnessed a client using the same racial slur, the employer did not their burden to show that claimant's failure to intervene was a willful or wantonly negligent violation of their standards of behavior. While the employer's anti-harassment policy broadly prohibited the use of such language, it did not mention the use of such language by clients or other non-employees, and the record fails to show that claimant otherwise knew or should have known that she was expected to report the client's use of the racial slur to her supervisor. Additionally, the policy specifically stated that it did not require employees to "communicate directly with the alleged harasser." Exhibit 1 at 9. Thus, even if the policy covered actions taken by non-employees, it did not require claimant to directly intervene, and claimant's failure to do so was not a violation of the employer's policy.

As for claimant's violations of the employer's attendance policy, the record shows that only one of these instances constituted a willful or wantonly negligent violation of the employer's standards of behavior. In 2023, claimant was involved in a motor vehicle accident and, as in September 2024, was unable to get to work for a period of time due to her lack of transportation. Claimant testified that she had handled her absences from work in 2023 in the same manner as she did after the September 2024 accident, and the employer raised no concerns with her behavior at that time. Transcript at 54. The employer did not rebut this testimony. The record therefore fails to show that, as of the date of the September 2024 accident, claimant knew or should have known that the employer expected her to handle her absences differently than she had done in 2023. Thus, regardless of what the employer's policy stated, the record does not show that in failing to notify the employer of her absences between August 14, 2024 and September 9,

2024 before the start of her shifts, claimant violated the employer's expectations willfully or with wanton negligence.

On September 9, 2024, after claimant again failed to notify the employer of her absence before her shift started, claimant's manager reiterated the policy to claimant and explained that she was expected to adhere to it. As such, claimant knew or should have known at that point that she was required to notify the employer before the start of her shift if she was going to be absent from work. On September 10, 2024, claimant notified the employer at 8:30 a.m. that she would be absent that day. Because claimant was expected to be at work between 7 a.m. and 9 a.m. on any given day, depending on the needs of the client, the employer did not meet their burden to show that claimant failed to notify them of her absence before the start of her shift on September 10, 2024.

On September 11, 2024, claimant did not notify the employer of her absence until nearly 11 a.m., well after the latest time she was expected to be at work. The record does not show that claimant was prevented from notifying the employer of her absence before her shift started. Because claimant knew or should have known the employer expected her to notify them of her absence before the start of her shift, her failure to do so demonstrated indifference to the consequences of her failure to act, and therefore was, at best, wantonly negligent.

In sum, while the employer alleged a number of violations of their attendance and anti-harassment policies, and expectations relating to those policies, the record shows that only two of these incidents, claimant's use of the racial slur on September 10, 2024 and her failure to timely notify the employer of her absence on September 11, 2024, were willful or wantonly negligent. And although the two incidents occurred close in time, they were dissimilar and unconnected, and not sufficient to establish a "pattern of wantonly negligent behavior."

In sum, because the record fails to show that claimant's use of the racial slur on September 10, 2024 was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence, it fails to establish that claimant's discharge was for misconduct, and not an isolated instance or poor judgment. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Order No. 25-UI-279847 is set aside, as outlined above.

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

DATE of Service: <u>February 24, 2025</u>

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

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 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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