

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0061

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 7, 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 effective July 14, 2024 (decision # L0007081344).¹ Claimant filed a timely request for hearing. On January 6, 2025, ALJ Strauch conducted a hearing, and on January 22, 2025, issued Order No. 25-UI-280615, modifying decision # L0007081344 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective June 23, 2024. On January 24, 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 him 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) Albany Rifle & Pistol Club and Firearms employed claimant as a maintenance worker at their firearms training facility from May 2023 until June 28, 2024. The employer's facility was a 40-acre property, which included shooting range bays, a clubhouse, and a maintenance workshop.

(2) The employer's employee handbook contained a policy governing cigarette smoking by employees on the employer's property. The policy prohibited employees from smoking "during working hours" and barred smoking in "any location that is visible to the public" or "within 10 feet from any entrance, exit, .

¹ Decision # L0007081344 stated that claimant was denied benefits from July 14, 2024, to July 12, 2025. However, because decision # L0007081344 found that the claimant was discharged on June 28, 2024, the decision should have stated that claimant was disqualified from receiving benefits beginning Sunday, June 23, 2024, and until he earned four times his weekly benefit amount. See ORS 657.176.

. . or other building opening” on the property. Exhibit 1 at 1 (emphasis in original removed). Claimant read and received the smoking policy when the employer hired him.

(3) The individuals who used the employer’s shooting ranges used ammunition that emitted lead into the air, and the lead settled around the employer’s property. It was possible to ingest lead that was present on the property by getting it on one’s hands, handling a cigarette, and then smoking the cigarette.

(4) On December 20, 2023, claimant underwent a periodic test of his lead levels, and on January 2, 2024, the hospital informed him that his lead levels were elevated. Claimant had a meeting with the employer’s executive director that day. The director gave claimant another copy of the smoking policy and told claimant to only smoke on his breaks and to always wash his hands before smoking to reduce the risk of lead exposure. On January 4, 2024, the employer gave claimant an action plan that included an item that claimant refrain from smoking except on breaks and lunch.

(5) As to the expectation to smoke only during breaks and lunch, the employer’s policy “was really never clear” to claimant. Transcript at 38. Throughout his employment, claimant did not have set break times. Rather, claimant took breaks whenever he could and, in the summertime, “probably only took half [his] breaks.” Transcript at 29. Claimant “worked through most of [his] breaks” and “smoked on the fly whenever [he] could fit in a break.” Transcript at 29. Claimant often did so while he was “changing equipment or . . . going to the shop for parts[.]” Transcript at 29. When claimant began his employment, his trainer told him that if claimant did not have time for a break, he could “smoke out where [he was] mowing the grass[.]” Transcript at 32.

(6) As to the expectation prohibiting smoking within 10 feet from any building opening, claimant did not smoke inside the maintenance workshop or other buildings, or in the shooting range bays. The employer did not have posted smoking areas. When claimant began his employment, he asked where the smoking area was, and the director said claimant could smoke in graveled areas. Claimant’s trainer told claimant he could smoke by the maintenance workshop but not in the shop, and the two often smoked at a picnic table that abutted the shop. If claimant was smoking near the shop and needed to go inside, he set his cigarette on the ground, entered the shop, then exited the shop and retrieved his cigarette off the ground. Claimant learned this from the trainer and the two followed the practice to ensure that the shop was not exposed to cigarette smoke.

(7) As to the expectation barring smoking in any location that was visible to the public, claimant kept his smoking “out of sight” and was careful never to leave used cigarette butts on the ground. Transcript at 35. Although claimant would smoke near the maintenance workshop, the shop was on a part of the property that was 100 yards away from the shooting ranges and was not visible to the public.

(8) On an occasion between June 17, 2024, and June 28, 2024, the director reviewed camera footage from the maintenance workshop. When he did so, the director observed claimant engaging in conduct he believed violated the employer’s smoking policy.

(9) Among the footage the director viewed were three still shots from June 12, 2024, at 7:26 a.m. *See* Exhibits 9, 10, and 11. The stills depicted claimant either driving or standing by a utility vehicle (also known as a “Gator”) outside the maintenance workshop, a relatively close distance from the shop’s exit

but possibly more than 10 feet away from it. Transcript at 19. In each still, claimant has a cigarette in his mouth but is not smoking the cigarette.

(10) Also among the footage the director viewed were four still shots from June 13, 2024, at 5:30 and 5:31 a.m.² See Exhibits 12, 13, 14, and 15. The stills depicted claimant inside the maintenance workshop and either walking or seated on a riding lawn mower. In each still, claimant has a cigarette in his mouth but is not smoking the cigarette.

(11) Also among the footage the director reviewed were 54 seconds of video from June 13, 2024, at 5:34 a.m. See Exhibit 16. This footage depicted claimant exiting the maintenance workshop on a riding lawn mower, parking and dismounting the mower, and then walking back toward the shop's exit. Exhibit 16 at 0:01 to 0:09. The footage showed claimant reaching the sidewalk in front of the exit and bending over and picking a lit cigarette off the ground. Exhibit 16 at 0:01 to 0:09. The footage depicted claimant turn back toward the mower, take a few steps, and, while a relatively close distance from the shop's exit but possibly more than 10 feet away from it, take a puff from the cigarette. Exhibit 16 at 0:11 to 0:15. The footage then showed claimant grab an object from a nearby Gator, remount the mower, and drive away from the shop while smoking the cigarette. Exhibit 16 at 0:16 to 0:54. The footage showed claimant either standing in a graveled parking area or driving the mower on a graveled pathway while he smoked the cigarette.

(12) On June 26, 2024, claimant had a personal bag with him at work. That day, the director looked inside claimant's bag. Claimant later asked the director why he went through claimant's bag without claimant being there. Audio Record at 1:09:52. In response, the director took claimant to the maintenance workshop, and instructed him to gather his belongings. The director then escorted claimant off the property and told claimant he would be in contact.

(13) On June 28, 2024, the employer's board held a meeting and determined that claimant's alleged violations of the smoking policy depicted on the camera footage from June 12 and June 13, 2024, warranted discharging claimant. Claimant met briefly with the board that day and the board's treasurer informed claimant that the employer was discharging him for his alleged smoking policy violations.

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).

² Claimant typically worked shifts for the employer that began at 5:00 a.m.

The order under review concluded that claimant violated the employer's smoking policy with wanton negligence on June 13, 2024, and that the violation was not an isolated instance of poor judgment or a good faith error. Order No. 25-UI-280615 at 5-8. The order under review therefore concluded that the employer discharged claimant for misconduct. Order No. 25-UI-280615 at 8. The record does not support this conclusion.

As an initial matter, it is necessary to identify the proximate cause of claimant's discharge. Claimant testified that his discharge occurred shortly after the employer's executive director looked inside claimant's bag and then abruptly suspended claimant without explanation, implying that the director's discovery of the contents of the bag was why claimant was discharged. Transcript at 26-27, 42. The employer offered documentary evidence relating to the January 2024 meeting and action plan regarding claimant's elevated lead levels, and presented claimant's alleged June 2024 violations of the smoking policy as justifying discharge because of the risk of claimant's exposure to lead through smoking and the fact that the risk had been discussed with claimant previously in January 2024. *See* Exhibit 3; Exhibit 4; Transcript at 14, 21.

However, at hearing, the director repeatedly testified that the employer discharged claimant for allegedly violating the employer's smoking policy, and that no other reasons led to the decision to discharge claimant. Transcript at 5, 24; Audio Record at 51:03 ("Q: Were there any reasons other than the smoking in violation of policies that led to the decision to discharge? A: That's the reason he was let go, was for smoking."). Accordingly, the proximate cause of the discharge was claimant's alleged June 12, and June 13, 2024, violations of the employer's smoking policy, rather than because of the contents of claimant's bag or whether claimant had complied with the employer's lead safety protocols. *See e.g. 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). Therefore, claimant's alleged June 12, and June 13, 2024, violations of the employer's smoking policy are the focus of the misconduct analysis.

The employer did not meet their burden to prove that claimant violated the smoking policy willfully or with wanton negligence. Three aspects of the smoking policy are relevant: (1) claimant was not to smoke "during working hours" and was to refrain from smoking except on breaks and lunch; (2) claimant was barred from smoking "within 10 feet from any entrance, exit, . . . or other building opening" on the property; and (3) claimant was prohibited from smoking in "any location that is visible to the public." and Exhibit 1 at 1 (emphasis in original removed).

The employer failed to establish a willful or wantonly negligent violation as to the aspect of the policy requiring claimant to smoke only during breaks and lunch. With respect to claimant's alleged violations on June 12, 2024, the employer's evidence, Exhibits 9, 10, and 11, merely show claimant outside the maintenance workshop with a cigarette in his mouth. The cigarette is unlit, with no smoke visible and with the rod of the cigarette the same length in all the stills. The same is true for the stills of claimant's activities inside the workshop on June 13, 2024. This evidence, Exhibits 12, 13, 14, and 15, depicts claimant inside the shop and either walking around or seated on a riding lawn mower but merely holding an unlit cigarette in his mouth. No smoke is visible, there is no burning end of the cigarette, and the cigarette is the same length in each of the stills. Therefore, the stills the employer offered into evidence show only that claimant was holding a cigarette in his mouth on June 12 and June 13, 2024, which is not

sufficient to constitute violations of the expectation to refrain from smoking except during breaks and lunch.

In contrast, Exhibit 16, the 54-second video depicting claimant's activities outside the shop on June 13, 2024 (about five minutes after the stills from that date), does show claimant smoking a cigarette. Specifically, the footage shows claimant pick a lit cigarette off the ground and smoke the cigarette while either standing in a graveled parking area or driving away on a riding lawn mower on a graveled pathway.

This evidence is not sufficient to prove a willful or wantonly negligent violation of the smoking policy. The record shows that claimant read and received the smoking policy when he was hired, and that it contained the stricture that claimant not smoke "during working hours." Exhibit 1 at 1 (emphasis in original removed). Claimant received another copy of the policy on January 2, 2024, and was told at that time and in a January 4, 2024, written action plan to "Refrain from smoking except on breaks and lunch." Exhibit 4 at 1.

However, at hearing, claimant testified that the smoking policy "was really never clear" to him. Transcript at 38. Regarding the expectation to smoke only during breaks and lunch, claimant testified that throughout his employment, claimant did not have set break times. Transcript at 29. Rather, claimant "took breaks whenever [he] could" and in the summertime, "probably only took half [his] breaks." Transcript at 29. Claimant testified that he "worked through most of [his] breaks" and "smoked on the fly whenever [he] could fit in a break." Transcript at 29. Claimant often did so while he was "changing equipment or . . . going to the shop for parts[.]" Transcript at 29. When claimant began his employment, his trainer told him that, "if you ain't got time for a break" claimant could "smoke out where [he was] mowing the grass[.]" Transcript at 32. Also, when claimant began his employment, he asked where the smoking area was, and the director told claimant that he could smoke in graveled areas.

Therefore, the record shows that the general requirements that claimant smoke only during breaks and lunch and not during working hours were never clarified or elaborated upon as to how they applied in claimant's context where there were no set break times and breaks were frequently skipped. There is no indication that the employer ever disabused claimant of the notion that he could "smoke[] on the fly" when he was "changing equipment or . . . going to the shop for parts[.]" Transcript at 29. Nor does the record show that the employer ever contradicted the understanding conveyed to claimant by the trainer that it was acceptable to smoke while mowing if claimant did not have time for a break.

Thus, the video evidence from Exhibit 16 depicting claimant smoking a cigarette while either standing in a graveled parking area or driving away on a riding lawn mower on a graveled pathway was consistent with "smok[ing] on the fly" while changing equipment, something claimant thought he was permitted to do. Transcript at 29. It is also consistent with the trainer's instruction that claimant could smoke while mowing if he did not have time for a break, and did not run afoul of the director's statement that graveled areas were acceptable places to smoke. Accordingly, claimant's conduct of smoking a cigarette on June 13, 2024, as shown in Exhibit 16 was not a willful or wantonly negligent violation of the employer's smoking policy.

Next, the employer failed to prove that claimant willfully or with wanton negligence violated the aspect of the employer's policy that prohibited smoking within 10 feet of the exit of any building on the

employer's property. The employer did not have posted smoking areas, and claimant's only guidance regarding where to smoke from the director was that it was acceptable to smoke in graveled areas. Claimant's trainer told claimant he could smoke by the maintenance workshop but not in the shop, and the two often smoked at a picnic table that abutted the shop. Throughout his employment, claimant refrained from smoking inside the shop or other buildings, as well as in the shooting range bays. Following the trainer's example, if claimant was smoking near the shop and needed to go inside, he would set his cigarette on the ground, enter the shop, then exit the shop and retrieve his cigarette off the ground.

Turning to the employer's evidence, the stills that depict claimant's conduct on June 12, and June 13, 2024, do not establish that claimant was smoking within 10 feet of the maintenance workshop or inside the shop. *See Exhibits 9, 10, 11, 12, 13, 14, and 15.* As discussed above, this evidence shows merely that claimant was holding a cigarette in his mouth and is not sufficient to establish that claimant was smoking the cigarette.

With respect to Exhibit 16, the video depicting claimant's activities outside the shop on June 13, 2024, the footage establishes, at most, that claimant engaged in ordinary negligence in smoking too close to the shop. The footage depicts claimant following the latter part of a practice he testified he learned from the trainer, that is, exiting the shop and retrieving his cigarette off the ground (shown in the video) after having apparently first set it on the ground and entered the shop (presumably occurring before the video began). Transcript at 43; *compare to* Exhibit 16 at 0:01 to 0:09. The footage shows claimant take a first puff from the cigarette while standing a relatively close distance from the shop's exit but possibly more than 10 feet away from it. Exhibit 16 at 0:11 to 0:15. However, at hearing, claimant testified that the video showed him smoking within 10 feet of the shop, estimating that he was "probably four feet too close to the building." Transcript at 31.

Considering claimant's testimony in combination with the video evidence, it is appropriate to conclude that claimant was smoking within 10 feet of the shop's exit. However, claimant's act of smoking within 10 feet of the shop's exit occurred while claimant was following the practice he learned from the trainer of setting the cigarette on the ground, which the two employees did to ensure that smoking did not occur inside the shop. Because the violation occurred while following a practice that was intended to spare the maintenance workshop of being exposed to cigarette smoke, the record fails to show that claimant was acting with indifference to the consequences of his actions. Therefore, claimant's act of smoking too close to the shop's exit as depicted in Exhibit 16 was not wantonly negligent. Given that claimant was only a matter of a few feet too close to the shop, claimant likely had merely been careless in judging the distance, which is an example of, at most, ordinary negligence. A violation of an employer's policy that occurs as a result of ordinary negligence does not amount to misconduct connected with work. Accordingly, claimant's conduct of smoking a cigarette too close to the shop exit on June 13, 2024, was not a willful or wantonly negligent violation of the employer's smoking policy.

Finally, the employer failed to prove that claimant willfully or with wanton negligence violated the aspect of the employer's policy that prohibited smoking in any location that is visible to the public. The employer's evidence only shows claimant smoking near the maintenance workshop on one occasion on June 13, 2024. At hearing, the employer conceded that the shop was on a part of the property that was 100 yards away from the shooting ranges and not visible to the public. Transcript at 22, 47. Claimant also

testified that he kept his smoking “out of sight,” “hid it,” “didn’t smoke around nobody”, and was careful never to leave used cigarette butts on the ground. Transcript at 31, 35.

For these reasons, claimant was discharged but not for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 25-UI-280615 is set aside, as outlined above.

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

DATE of Service: March 4, 2025

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

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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

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Email: appealsboard@employ.oregon.gov

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