

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0109

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 23, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and was disqualified from receiving benefits effective September 29, 2024 (decision # L0007907874).¹ Claimant filed a timely request for hearing. On February 4, 2025, ALJ Micheletti conducted a hearing, and on February 7, 2025, issued Order No. 25-UI-282426, reversing decision # L0007907874 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits as a result of the work separation. On February 19, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bogatay Construction, Inc. employed claimant as a laborer from July 23, 2018, through October 3, 2024.

(2) The employer expected that their employees would not take the employer's fuel for their personal use, and would respond truthfully when questioned about the use of employer resources. Claimant understood these expectations.

(3) On October 1, 2024, claimant's stepfather, with whom claimant had a contentious relationship, took \$100 from claimant's mother's wallet without her permission. Claimant's mother told claimant about this, which angered claimant.

(4) Later on October 1, 2024, claimant drove a truck belonging to the employer and parked it near both his residence and his mother and stepfather's residence. The employer permitted this use of their truck. Claimant's stepfather approached claimant and requested to pay \$60 to claimant to siphon diesel fuel

¹ Decision # L0007907874 stated that claimant was denied benefits from September 29, 2024 to November 15, 2025. However, decision # L0007907874 should have stated that claimant was disqualified from receiving benefits beginning Sunday, September 29, 2024 and until he earned four times his weekly benefit amount. See ORS 657.176.

from a 100-gallon tank in the back of the employer's truck to claimant's stepfather's vehicle. Claimant, angered by his stepfather having taken the \$100 from his mother, agreed to this and accepted \$60 from his stepfather. However, claimant planned to return the \$60 to his mother while only pretending to fill the vehicle with siphoned fuel.

(5) The employer's fuel tank did not contain a gauge, and records were not kept of authorized usage of the fuel. The employer therefore could not determine with specificity how much fuel the tank contained or should contain at any given time.

(6) Claimant repositioned the employer's truck next to his stepfather's vehicle, turned on a pump attached to the diesel tank, and connected a hose from that tank to the tank of his stepfather's vehicle. Claimant left closed a valve to prevent transmission of fuel from the employer's tank to his stepfather's tank, though it would appear to anyone in proximity that fuel was being transferred. A neighbor recorded video of claimant standing next to the siphon hose with the pump audibly operating and sent the video to the employer.

(7) The employer viewed the video shortly after it was sent and immediately called claimant for an explanation. Claimant admitted to standing by the employer's truck and stated that his stepfather's vehicle was nearby it, but denied that anything more than that was occurring. Claimant did not explain his plan to recover money from his stepfather by making it look as if he were siphoning the employer's fuel because he was "mortified. . . and didn't want to tell [the employer's owner] [his] family problems." Transcript at 34-35.

(8) The employer believed that claimant was not being truthful in saying he was merely standing near the vehicles, given video evidence showing claimant's involvement in the apparent siphoning. That day, the employer discharged claimant based on their belief that he had siphoned diesel fuel for personal use and failed to truthfully explain the incident to the employer.

(9) On October 3, 2024, the employer conducted an "exit interview" with claimant in which he explained what his intentions had been with regard to his stepfather and the fuel, and denied that any fuel had actually been siphoned. Transcript at 17.

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 that he misappropriated their diesel fuel and made false or misleading statements about the incident. The employer reasonably expected that their employees would not take fuel for their own use, and would respond truthfully when asked to account for the employer’s property entrusted to them. Claimant understood these expectations.

The employer presented circumstantial evidence supporting their belief that claimant siphoned their fuel into his stepfather’s truck. This included video evidence that they assert depicted claimant standing near a hose connecting the employer’s diesel fuel tank to claimant’s stepfather’s truck while the pump motor connected to the employer’s tank could be heard operating. *See* Exhibit 2. A witness who captured the video testified that this is what she believed the video to depict, though she admitted she could not tell whether fuel was actually flowing from the employer’s tank to the truck through the hose. Transcript at 34.

In contrast, claimant testified that in an effort to return \$60 to his mother that he believed was wrongfully taken by his stepfather, he agreed to sell the employer’s fuel to his stepfather without intending to actually transfer the fuel out of the employer’s tank. Transcript at 24-25. Claimant admitted connecting the siphon hose and turning on the employer’s fuel tank pump, but maintained that he had adjusted the pump so that the fuel was “not flowing.” Transcript at 25. Further, claimant testified, and the employer did not rebut, that the employer’s fuel tank did not contain a gauge, and records were not kept of authorized usage of the fuel, so it was impossible for the employer to determine whether any fuel was missing from the tank by inspecting it or through fuel purchase records. Transcript at 27.

In weighing this evidence, claimant's testimony that he did not transfer any of the employer's fuel to his stepfather's truck, though he pretended to do so, is not necessarily contradicted by the video evidence or eyewitness testimony regarding the incident. Therefore, the employer failed to show by a preponderance of the evidence that claimant misappropriated their fuel in violation of policy.

However, the employer's president testified that he called claimant after viewing video of the incident, and spoke with him "within a couple of minutes" of the incident occurring. Transcript at 11-12. The president testified that claimant said he "was standing there staring at his [work] truck" and that he "was just wiping it off." Transcript at 10. He also testified that claimant told him, "[T]here's a brown truck next to mine. It's my father's truck." Transcript at 11. The president asked claimant "if he was lying" and claimant "hesitated and then said 'no.'" Transcript at 12. Claimant did not rebut this account of the conversation, explaining, "On the phone like. . . I was not myself. But I reassured him that no fuel came out of the tank. And I was just. . . ashamed to tell him my problems; my family problems." Transcript at 24.

The record shows that the employer made a reasonable inquiry of claimant regarding property they entrusted to his care, and which they had reason to suspect was being misappropriated or misused. As previously discussed, the employer has not shown that claimant actually misappropriated their fuel, and therefore has not shown that claimant's denials of having misappropriated it were untruthful. However, claimant consciously withheld important information from the employer regarding the public misuse of their property to deceive his stepfather into giving him money. He did so to conceal his activities, more likely than not because he knew the employer would disapprove of them. In doing so, claimant demonstrated indifference to the consequences of his actions.

However, to the extent that this constituted a wantonly negligent violation of the employer's reasonable expectations, it is nonetheless not misconduct because it was an isolated instance of poor judgment. The record does not suggest that this incident was other than a single or infrequent occurrence, and it involved the conscious exercise of poor judgment, as claimant admitted in his testimony. *See* Transcript at 28, 35. Further, claimant's actions in misleading the employer as to what he was doing or had done with their diesel fuel tank and pump in public view did not exceed mere poor judgment. Claimant's actions did not violate the law and were not tantamount to unlawful conduct, as the employer did not show by a preponderance of the evidence that claimant misappropriated or attempted to misappropriate the employer's fuel.

The employer's president asserted that claimant may not have been discharged had he "been upfront and honest" during the telephone call, suggesting that claimant's lack of candor was the reason the employer felt the employment relationship could not continue. Transcript at 13. However, a determination of whether a claimant's conduct caused a breach of trust is objective, not subjective, and an employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not. *Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009). Claimant's lack of candor to avoid discussing with the employer the "mortif[ying]" details of a family dispute and plan to deceive his stepfather into returning money to his mother, particularly given that he disclosed those details in an exit interview after being discharged, does not show that claimant would likely have been dishonest with the employer about matters of greater import in the future. Transcript at 34-35. The employer has therefore not shown that claimant's actions objectively created an irreparable breach of trust in the employment

relationship, or otherwise made a continued employment relationship impossible. Accordingly, claimant's actions amounted, at most, to an isolated instance of poor judgment, and 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. 25-UI-282426 is affirmed.

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

DATE of Service: March 20, 2025

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

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، می توانید با استفاده از دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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