EO: Intrastate
BYE: 03-Jan-2026

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

344
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0188

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 28, 2025, 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 December 17, 2024 (decision # L0008928069).[1] Claimant filed a timely request for hearing. On March 4, 2025, ALJ Lucas conducted a hearing, and on March 6, 2024, issued Order No. 25-UI-285232, reversing decision # L0008928069 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On March 24, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument.

FINDINGS OF FACT: (1) Comprehensive Options for Drug Abusers, Inc. employed claimant as an alcohol and drug service technician at their rehabilitation facility from October 24, 2023, to December 17, 2024.

(2) The employer had written policies prohibiting "all forms of harassment, including but not limited to sexual harassment, bullying, and other similar activities," and "creating an unsafe situation in the workplace or putting another person in harm's way." Transcript at 7. Claimant acknowledged receipt of these policies at hire.

(3) On December 20, 2023, the employer warned claimant for having asked a coworker an unwelcome question about their sexual orientation, and in a separate incident, having asked a patient to "guess with

[1] Decision # L0008928069 stated that claimant was denied benefits from December 29, 2024, to January 3, 2026. However, because decision # L0008928069 found that claimant was discharged on December 17, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, December 15, 2024, and until he earned four times his weekly benefit amount. *See* ORS 657.176.

one gesture where [claimant was] from" while claimant made a "Nazi salute." Transcript at 31. Claimant did not think that the employer would disapprove of either action. Following the warning, the employer expected that claimant would not attempt to discuss other employees' sexual orientations. However, claimant believed, following the warning, that the employer expected that he would "develop. . . a history with someone or a rapport with someone prior to engaging in anything that might be considered offensive or unnecessary," such as discussing their sexual orientation. Transcript at 20-21.

(4) On May 3, 2024, claimant asked a coworker "if she was gay" because "based off her appearance, that was [claimant's] assumption," and he "would have bet a bunch of money on that one." Transcript at 32. Claimant thought that this would not violate the employer's expectation because, unlike the December 2023 incident, claimant "had a longer conversation before [he] asked that. It wasn't like. . . her first day there and [claimant] asking that. It was a while into it." Transcript at 33.

(5) On May 15, 2024, the employer and claimant entered into a written "Last Chance Agreement" as a result of claimant's conduct on May 3, 2024. Exhibit 1 at 7. The agreement stated that claimant "will demonstrate appropriate boundaries with patients, staff and external vendors at all times [and] will conduct himself in a professional, work-appropriate manner, especially refraining from personal conversations with or about co-workers and items of a sexual nature." Exhibit 1 at 7. Claimant believed that the word "refrain" meant that he "should think hard and fast before [he] do[es]" something, not that he was "prohibited" from doing that thing. Transcript at 22.

(6) On December 15, 2024, claimant reported for work and was to relieve a co-worker, D., whose shift was ending. At a time when D. was not present, a patient approached claimant and complained that D. had not given him his medication. Claimant took the patient to the medication room while the patient continued to complain about D. Claimant did not interrupt the patient or dissuade him from continuing to complain about D. because he thought it was the best course of action "to get him to calm down a bit." Transcript at 25. While claimant was dispensing the medication, D. entered the room and "had a little bit of back and forth" with the patient. Transcript at 25.

(7) After the patient left the room, claimant thought he could "help out" D. by advising D. about "dealing with patients. . . showing a disdain for [them]." Transcript at 25. Claimant said something to the effect of, "[T]here were going to be patients that we get along with and patients that we don't get along with. And they're here for 90 days so don't get too butt hurt because somebody is not jiving with you." Transcript at 25-26. Claimant also "expressed" to D., "[T]here are different ways of dealing with somebody who's aggravated like that. You could ask. . . other co-workers how they deal with problematic people. If you talk with their counselor you could have. . . [their] counselor talk with them as well as the supervisor." Transcript at 26. Claimant believed his statements were "a thing of, '[D]on't worry about what other people feel about you. Worry about how you feel about yourself.'" Transcript at 26. Claimant did not specifically tell D., "Nobody likes you," and did not intend to convey that sentiment. Transcript at 25-26. Claimant thought that he was "being helpful" by making these statements. Transcript at 34.

(8) After that conversation ended, claimant believed that D. was going to leave work for the day. D. intended to perform a task in the kitchen prior to leaving, but claimant was unaware of this. D. asked for a set of keys that claimant possessed at that time, which included the kitchen key, but did not state why they needed the keys. Claimant assumed that D. only wanted to stop by the office, which was where

claimant was going. Claimant therefore withheld the keys from D. for "a couple minutes," which claimant considered "joking around with [D.] a little bit." Transcript at 27. They both then walked to the office, and when claimant put the key in the office door, D. grabbed the set of keys and went to the kitchen. Claimant realized from these actions and "the look in D.'s eye" that D. had needed the keys to go to the kitchen and meant to convey to claimant, "[Y]ou're messing with me too much here." Transcript at 28. Claimant then asked, "[W]hy didn't you tell me you wanted in there?" Transcript at 28.

(9) Claimant would not have "teas[ed]" D. by withholding the keys if he had understood D.'s intentions and feelings about the situation. Transcript at 28. Claimant felt that he "had gotten along splendidly" with D. and "had that kind of relationship," such that D. would not disapprove of his "joking around" in that manner. Transcript at 10, 27, 34. Shortly thereafter, claimant thought he saw D. get into an Uber and leave work, which was D.'s customary practice. Claimant was therefore surprised a short time later to see D. still in the building, and mentioned to D. that he thought he had seen them get into the Uber. D. interpreted this as claimant telling D. to leave work, and D. then called an Uber and left work early because the situation was so "uncomfortable." Transcript at 8. D. later complained to the employer about the day's events.

(10) On December 17, 2024, the employer discharged claimant. Prior to discharging him, the employer questioned claimant about his December 15, 2024, interactions with D., and whether he had, without reference to specific dates, attempted to enter parts of the employer's facility through exterior windows, or had touched patients on their back or shoulder or initiated hugs with them.[2] The employer would not have discharged claimant on December 17, 2024, but for his interactions with D. on December 15, 2024.

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.

[2] There was insufficient evidence at hearing to conclude that the employer believed claimant violated their expectations regarding the other subjects of this questioning.

> (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 violated their harassment policy and "Last Chance Agreement" on December 15, 2024, during his interactions with a coworker. The employer asserted that the decision to discharge claimant was based on "a pattern of behavior," and that three instances of unwelcome conduct toward coworkers over the span of a year were collectively viewed as meriting his discharge. Employer's Argument at 2. It is understandable that the employer and these individuals could have perceived claimant's actions, alone or in combination, as "harassing," as that term is commonly used. However, the initial focus of a misconduct analysis involves only the proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did. *See, e.g.*, *Appeals Board Decision* 09-AB-1767, June 29, 2009; *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).

More likely than not, claimant would not have been discharged but for his actions toward D. on December 15, 2024, and that incident therefore was the proximate cause of his discharge. Only if the employer meets their burden to show that the proximate cause of discharge was a willful or wantonly negligent violation of a reasonable employer policy does the analysis shift to determining whether claimant's actions on that occasion were part of a pattern of willful or wantonly negligent behavior. For reasons explained below, the employer has not met this burden with regard to the December 15, 2024, incident, and the preceding incidents therefore are not individually or collectively assessed for willful or wantonly negligent behavior under the misconduct analysis set forth in the rule.

The employer maintained a reasonable policy prohibiting "forms of harassment, including but not limited to sexual harassment, bullying, and other similar activities," and "creating an unsafe situation in the workplace or putting another person in harm's way." Transcript at 7. These policies were additionally clarified for claimant on May 15, 2024, to specify that he must "demonstrate appropriate boundaries with patients, staff and external vendors at all times [and] will conduct himself in a professional, work-appropriate manner, especially refraining from personal conversations with or about

co-workers and items of a sexual nature." Exhibit 1 at 7. Claimant acknowledged receipt of these expectations in writing.

The employer asserted that claimant violated these expectations on December 15, 2024, through his statements to D., and by temporarily withholding a set of keys from them. The employer's witness testified that D. told him that claimant had dispensed medication to a patient who was "talking poorly about D." and that claimant "did not stop" the patient from doing so. Transcript at 8. Claimant "afterwards came back to tell [D.] that nobody liked [them]." Transcript at 8. D. reported that they then requested the set of keys "multiple times" from claimant so that they could dispense medication to a patient, but claimant would not give them the keys. Transcript at 9. Eventually, claimant inserted a key into a door and D. grabbed the set and went to dispense the medication. D. reported that later, claimant asked D., "[D]id you call an Uber to leave yet?" which "made the situation uncomfortable enough that D. ended up leaving early." Transcript at 8.

The employer's witness spoke with claimant about the incident shortly before his discharge. The witness testified that at that time, claimant stated that he "ignored" the patient's comments about D., but later reported to D. "that the patient 'talked smack' about [them]," and told D. that D. just needed to "do what you gotta do until the patient is gone in 90 days." Exhibit 1 at 4. Claimant denied to the witness that he told D., "No one likes you, but I do," or included "language like that" in the conversation. Exhibit 1 at 4. The witness also asserted that claimant admitted to withholding the keys from D. while D. asked for them "a couple times," but that claimant "was joking with them." Exhibit 1 at 4. Claimant explained to the witness that he "felt [D. and claimant] had an established relationship" and "had the rapport to joke," and that claimant did not "get the impression that [D.] was not comfortable" until D. grabbed the keys from the office doorknob and claimant saw a "slight panic." Exhibit 1 at 4. Claimant further denied suggesting that D. call an Uber to leave, and explained to the witness that he thought he had seen D. entering an Uber through a window and mentioned that to D. when he saw D. again in the building. Exhibit 1 at 4.

Claimant testified that D. and a patient "had a little bit of back and forth," after which he gave D. what he thought was "helpful" advice about dealing with difficult patients. Transcript at 25, 34. Claimant denied telling D., "Nobody likes you," and did not intend to convey that sentiment in giving this advice. Transcript at 25-26. Claimant further testified that he withheld the keys from D. as D. claimed, but explained that he was unaware that D. wanted the keys to complete work tasks and thought, based on their "rapport" and "splendid relationship," that D. would understand that he was "teasing" and "joking around." Transcript at 27-28, 34. Claimant only realized when D. grabbed the keys out of the office doorknob, and he "saw the look in [D.'s] eye," that D. felt he "was messing with [D.] too much," and claimant immediately stopped what he was doing. Transcript at 28. Claimant also testified that he did not ask D. to call an Uber or leave, but that he thought he had seen D. leave in an Uber, and mentioned this when he was surprised to see D. in the building after that. Transcript at 33-34.

In weighing this evidence, claimant's first-hand testimony regarding his interactions with D. is entitled to greater weight than the employer's hearsay account. Further, claimant's testimony was largely consistent with his prior statements made at the time of discharge, as related by the employer's witness. Therefore, the facts have been found in accordance with claimant's testimony.

Despite claimant's advice to D. on how to deal with difficult patients being misinterpreted and poorly received, it did not objectively violate the employer's harassment policy, or their directive to claimant to "conduct himself in a professional, work-appropriate manner, especially refraining from personal conversations with or about co-workers." Exhibit 1 at 7. As to claimant's withholding of the keys from D., the employer understandably viewed this as claimant failing to conduct himself in a "professional, work-appropriate manner," and perceived it as potentially harassing or bullying. However, claimant denied that this was his intent, and felt that his attempt at "joking around" or playfully "teasing" D. by withholding the keys was not inappropriate in light of how he viewed his relationship with D.

To the extent claimant's actions in withholding the keys violated the employer's expectations, they have not shown that claimant did so willfully or with wanton negligence. Claimant considered his relationship and "rapport" with D. in deciding whether it was appropriate to engage in this conduct, and immediately ceased the conduct when he realized that D. did not view his actions as welcome or "joking." This did not show that claimant was indifferent to the consequences of his actions. Instead, it showed that claimant considered those consequences in thinking about how D. would perceive his actions, but misjudged those perceptions until it was clear to him his conduct was unwelcome. While the record contains other examples of claimant misjudging how others in the workplace would perceive his words or actions, and claimant being corrected after those instances, their circumstances are insufficiently similar to this incident to demonstrate that claimant knew or should have known from being corrected previously that withholding the keys probably violated the employer's expectations. Claimant's actions therefore amounted to, at worst, ordinary negligence. Accordingly, the employer has not shown that claimant's actions on December 15, 2024, constituted a willful or wantonly negligent violation of the employer's expectations, and therefore that claimant was discharged for 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-285232 is affirmed.

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

DATE of Service: <u>April 25, 2025</u>

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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