EO: Intrastate
BYE: 18-Oct-2025

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

483
DS 005.00
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EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0189

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On November 1, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0007005270). The employer filed a timely request for hearing. On January 8, 2025, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for January 15, 2025. On January 15, 2025, the employer failed to appear at the hearing, and on January 16, 2025, ALJ Schmidt issued Order No. 25-UI-280064, dismissing the employer's request for hearing due to their failure to appear. On January 19, 2025, the employer filed a timely request to reopen the hearing. On February 24, 2025, ALJ Goodrich conducted a hearing, and on March 5, 2025, issued Order No. 25-UI-285111, allowing the employer's request to reopen and reversing decision # L0007005270 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective October 6, 2024. On March 25, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both claimant and the employer filed written arguments. Both parties' arguments contained information that was not part of the hearing record and did not show that factors or circumstances beyond the respective parties' reasonable control prevented them 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. EAB considered any parts of the parties' arguments that were based on the hearing record.

EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with that part of Order No. 25-UI-285111 allowing the employer's request to reopen the hearing. That part of Order No. 25-UI-285111 is **adopted.** *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Heirloom Living Centers, LLC employed claimant as the administrator of one of their residential care facilities from September 5, 2023, through October 9, 2024.

(2) The employer expected their employees not to make "derogatory or offensive comments about coworkers… in the workplace." Transcript at 70. Claimant was generally aware of this expectation. Additionally, claimant's employment contract specified that if claimant "conduct[ed] herself in any manner which Employer, in its sole discretion determines to be significantly detrimental to its business or reputation," it would be considered "For Cause Termination." Exhibit 4 at 6.

(3) Prior to October 1, 2024, claimant grew frustrated with what she felt was a lack of support from the employer's upper management and similar issues that she felt affected her work, and that her efforts to address these concerns with the employer were not effective. As a result, claimant began to look for work at another facility. On October 1, 2024, claimant gave the employer notice that she intended to quit on October 31, 2024. Shortly after October 1, 2024, claimant was offered a job at another facility, which she accepted.

(4) On or around October 6, 2024, the employer's upper management informed claimant that she would be required to administer medications to the facility's residents. Claimant took issue with this directive, as she did not have experience with administering medications and felt that doing so without training could put the residents at risk.

(5) On October 8, 2024, at the employer's direction, claimant began administering medication to the facility's residents. A medication technician ("med tech") from another facility was assigned to train claimant how to do so, although she did not arrive to begin claimant's training until about two hours after claimant had started administering medications to the residents. Transcript at 36.

(6) Over the course of several hours working with the med tech, claimant verbalized some of her frustrations with upper management and the workings of the facility, making disparaging comments about several members of the employer's staff and upper management. These statements included claimant's saying that her supervisor was a "raging alcoholic" and a "liar," that her supervisor and the facility's licensed practical nurse (LPN) had not been providing claimant the help that she needed, and that the two had been "sabotaging [claimant's] progress" in a major effort on which claimant had been working. Transcript at 65–67. Claimant made these statements as a "show of frustration." Transcript at 66. Claimant made these statements in multiple areas of the facility, some in the presence of residents or their visiting family members. One of these family members later sought to move their resident to another facility, at least partially as a result of hearing what claimant said that day.

(7) Toward the end of the work day on October 8, 2024, the med tech who had been working with claimant contacted the owner and reported to him that claimant had made several disparaging comments about the owner and several employees. The med tech's report included the following statements that she attributed to claimant:

- [Claimant's supervisor] is a vampire who was not at all helpful to her. She attended [the supervisor's] wedding, and it was apparent that [the supervisor] had married an alcoholic, and she was likely an alcoholic as well.
- [The chief operations officer of the employer's sister company] was likable but knows not much about the business.
- [The company's owner] did "not have the balls to talk to me about my resignation."

- [The administrator of another of the employer's facilities] had a great building because [the] LPN… would only help [the other administrator] and not [claimant].
- [Claimant] was going to [another employer's facility] to work in Marketing and when she knew the staffing needs there she would facilitate [the employer's] employees moving there and give [the employer] a big shock.

Exhibit 4 at 3.

(8) On October 9, 2024, the owner and the COO of the sister company met with claimant to talk to her about what the med tech had reported on the previous day. After meeting with claimant about the allegations, the owner discharged claimant for having made statements on October 8, 2024, that were "unprofessional and detrimental to [their] business, and disrespectful to those of which she had spoken." Exhibit 4 at 4.

CONCLUSIONS AND REASONS: Claimant was discharged for an isolated instance of poor judgment, and not 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 of disparaging comments regarding the owner and other employees that she made, or allegedly made, on October 8, 2024. As a preliminary matter, there is some dispute in the record as to what claimant said that day. At hearing, the med tech with whom claimant worked that day testified that the account of what claimant had said, which she had given to the owner on the same day (as noted in Finding of Fact 7, above) was accurate. By contrast, claimant testified that while she *had* called her supervisor a "raging alcoholic" and a "liar," she did not, for instance, say that the owner "doesn't have the balls to give [claimant] a call[.]" Transcript at 65–66. It is not necessary to determine which account is more accurate, however, because claimant's conduct, even if it occurred exactly as the employer described, was an isolated instance of poor judgment, and not misconduct. As such, for purposes of this analysis, claimant's conduct as described by the employer will be considered the more accurate account.

The order under review concluded that claimant was discharged for misconduct, and that her actions were not an isolated instance of poor judgment because the owner viewed claimant's actions as "egregious," and testified that he "could not 'take the chance' of having claimant continue working for the employer under such circumstances,'" thereby creating an irreparable breach of trust in the employment relationship. Order No. 25-UI-285111 at 6. However, the record does not support the conclusion that claimant's conduct was not an isolated instance of poor judgment.

First, although the record was not well-developed as to the employer's specific expectations for their employees' conduct, claimant testified at hearing that she did not disagree with the idea that the employer should expect employees not to make "derogatory or offensive comments about coworkers… in the workplace." Transcript at 70. Further, claimant testified that she made those comments out of "frustration," and admitted that some of them were "unprofessional." Transcript at 66, 69. Therefore, it can be reasonably inferred that claimant generally understood that the employer would not permit employees to make derogatory comments of the sort she made on October 8, 2024.

Additionally, claimant's employment contract specified that the employer considered any conduct that was "significantly detrimental to its business or reputation" to be cause for termination. Because other people, including residents and their family members, were present for and could hear some of claimant's comments, claimant at least had reason to know that being overheard by people who were essentially the employer's customers could be detrimental to the employer's reputation, and thereby have a negative effect on the employer's business interests. Given that claimant made those comments despite having reason to know the above, but that she did so out of "frustration," it stands to reason that she acted as she did without considering the consequences of her actions. Therefore, claimant's conduct on October 8, 2024, was at least a wantonly negligent violation of the employer's expectations and a wantonly negligent disregard of their interests.

However, claimant's conduct was an isolated instance of poor judgment. The record does not show that claimant had previously engaged in willful or wantonly negligent conduct prior to October 8, 2024. Further, while claimant made the offending comments over the course of a day, those comments were all of a similar nature and motivated by similar frustrations, and should be considered part of one overarching incident.

In *Perez v. Employment Dept*., 164 Or.App. 356, 992 P.2d 460 (1999), for example, the Court of Appeals found that a claimant's multiple violations of the employer's expectations over two days was a single occurrence when considered within the context of a 13-year employment relationship. The Court also considered a claimant's three separate abusive answering machine messages to his supervisor during one evening, about a single subject matter, to be a single occurrence in the employment relationship. *Waters v. Employment Division, 125 Or. App. 61, 865 P2.d 368 (1993)*. Likewise, arguing with a supervisor for 15 to 20 minutes, despite the supervisor's instruction to "shut up," was also deemed a single occurrence in the employment relationship. *Goodwin v. Employment Division*, 35 Or. App. 299, 581 P.2d 115 (1978).

Here, given the closely-related motivations and similar natures of claimant's comments on October 8, 2024, and the fact that the record lacks any indication that she had behaved similarly in the past, claimant's conduct that day was, in essence, a single day-long venting of her frustrations rather than multiple distinct incidents. Therefore, because the record contains no other instances of willful or wantonly negligent behavior, claimant's conduct on October 8, 2024, was isolated.

Claimant's conduct also did not exceed mere poor judgment. Claimant did not engage in illegal behavior, and although some of her comments were insulting, none of them were violent or threatening, such that they could potentially be considered tantamount to unlawful conduct. As to the suggestion that her conduct created an irreparable breach of trust in the employment relationship, the order under review misapplies that provision of OAR 471-030-0038(1)(d)(D). OAR 471-030-0038(1)(d)(D) does not define what constitutes an irreparable breach of trust. However, the word "trust" in that context implicates the individual's trust*worthiness*—i.e., a likelihood that they would engage in untruthful practices such as deception, fraud, or theft. There is no indication in the record that claimant conducted herself in such a manner.

Further, 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. *See Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009). Therefore, even if an "irreparable breach of trust in the employment relationship" was construed to mean merely that the employer did not believe that the employee would refrain from engaging in similar conduct again, the employer would not have met their burden in this matter to show that any reasonable employer would so conclude. As noted above, the record does not show that claimant had previously engaged in such behavior. Furthermore, although the owner did speak to claimant about the comments she was reported to have made prior to discharging her, the record does not show that he gave claimant an opportunity to actually correct her behavior prior to discharging her, or that claimant had failed to adhere to corrective actions in the past. Therefore, to the extent that the employer believed claimant would continue to engage in similar behavior, such a belief was speculative, and lacked a reasonable basis. As such, because the record fails to show that any reasonable employer would have

concluded that claimant's conduct constituted an irreparable breach of trust in the employment relationship, it fails to establish that it exceeded mere poor judgment.

For the above reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 25-UI-285111 is modified, as outlined above.

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

DATE of Service: May 1, 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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