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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0205

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On August 30, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0005890129). The employer filed a timely request for hearing. On December 5, 2024, notice was mailed to the parties that a hearing had been scheduled for December 16, 2024. On December 16, 2024, ALJ Bender conducted a hearing at which claimant failed to appear, and on December 18, 2024, issued Order No. 24-UI-277209, reversing decision # L0005890129 by concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective March 10, 2024.

On January 7, 2025, claimant filed a timely request to reopen the December 18, 2024 hearing. On January 17, 2025, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 24-UI-2777209 was vacated and that a hearing would be scheduled to determine whether claimant's request to reopen should be allowed and, if so, the merits of decision # L0005890129. On March 19, 2025, ALJ Bender conducted a hearing, and on March 27, 2025, issued Order No. 25-UI-287570, allowing claimant's request to reopen and affirming decision # L0005890129 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits. On March 31, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Exhibit 4, consisting of a five-page document submitted by the employer, was incorrectly marked as "Exhibit 1." This exhibit has been re-marked as Exhibit 4 and a copy provided to the parties with this decision.

EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with the part of Order No. 25-UI-287570 allowing claimant's request to reopen the December 16, 2024 hearing. That part of Order No. 25-UI-287570 is **adopted.** *See* ORS 657.275(2). The rest of this decision addresses the work separation.

FINDINGS OF FACT: (1) Gee Automotive Portland II, LLC employed claimant as a service advisor at one of their vehicle dealerships from November 7, 2023 through March 11, 2024.

(2) The employer expected that their employees would not direct foul language at their supervisor and would not leave work prior to the end of their shift without permission. Claimant understood these expectations.

(3) On March 11, 2024, claimant assisted a customer who wanted the dealership to diagnose a minor problem with her vehicle. Claimant thought that the vehicle could be repaired while the customer waited, rather than having her leave the vehicle for the entire day or longer. However, claimant did not have the authority to prioritize the servicing of this vehicle over others. Claimant sought assistance from his direct supervisor, the service manager, who declined claimant's request for prioritization and directed claimant to advise the customer to leave the vehicle for possible diagnosis of the problem by the end of the day.

(4) Claimant replied to his supervisor that the customer would be upset by this answer and suggested that the supervisor speak with the customer himself. The supervisor replied, "If I have to do your job for you, then. . . why do I need you?" and "[G]o do your fucking job." December 16, 2024 Audio Record at 13:10; March 19, 2025 Transcript at 8. Claimant said, "You gotta be fucking kidding me," to which the supervisor responded, "If you're not gonna do your job then just go the fuck home." March 19, 2025 Transcript at 8. Claimant replied, "Go fuck yourself," went back to his desk for 30 minutes, then left work at approximately 10:30 a.m., prior to the scheduled end of his shift. March 19, 2025 Transcript at 8. Claimant did not believe that the employment relationship had ended at that point and expected to return to work the next day.

(5) After discovering that claimant had left the dealership, claimant's supervisor notified the employer's human resources department that claimant had used foul language toward him and left work without permission prior to the end of his shift. Based on these circumstances, the employer was unwilling to let claimant continue working for them and considered claimant's employment terminated that day due to "job abandonment." December 16, 2024 Audio Record at 19:20. The employer did not immediately notify claimant of these developments.

(6) On March 11, 2024, at 10:27 p.m., claimant sent a text message to his supervisor stating that he would "be a bit late tomorrow." Exhibit 5 at 7. The supervisor did not reply.

(7) Prior to the scheduled start of claimant's March 12, 2024 shift, claimant received by email from the employer a "letter of termination saying that [claimant] voluntarily walked off the job." March 19, 2025 Transcript at 9. Later on March 12, 2024, claimant went to the dealership to discuss the matter with the director of operations and request that he reconsider ending the employment relationship. The director of

operations refused to reconsider, and claimant returned his work keys and uniforms at that time. Claimant did not work for the employer thereafter.

(8) Claimant's supervisor was "shocked" by claimant's behavior on March 11, 2024 because he had never before acted that way in dealing with customers, other employees, or supervisors, or used "inappropriate language" in the workplace. December 16, 2024 Audio Record at 17:20. The employer had not previously disciplined claimant.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

Nature of the work separation. If an employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Claimant and the employer gave accounts of the March 11, 2024 exchange leading to the work separation that were largely similar but differed in some respects pertinent to this portion of the analysis. Claimant asserted that he did not intend to sever the employment relationship that day, testifying that he left work before the scheduled end of his shift approximately 30 minutes after a contentious exchange with his supervisor because the supervisor said, "If you're not gonna do your job then just go the fuck home." March 19, 2025 Transcript at 8, 14. Claimant also testified that he sent his supervisor a text message that evening at 10:27 p.m. to let him know that he would be late for work the following day. Exhibit 5 at 7. Additionally, claimant testified that he returned his work keys and uniforms on March 12, 2024, only after asking the dealership's operations director to allow him to continue working for the employer, and the employer did not rebut that testimony. Transcript at 9.

In contrast, claimant's supervisor omitted from his testimony any reference to suggesting that claimant leave the dealership, testified that claimant stated to a coworker that he was "walking out" shortly before he left, and denied having "interacted with" claimant in any way following the exchange. December 16, 2024 Audio Record at 13:09, 15:09. Because it is corroborated by a screenshot of the text message, claimant's testimony that he texted his supervisor that he would be late for work the following day outweighs the supervisor's testimony that he had no interaction with claimant following the exchange at issue, and the facts have been found accordingly.

In weighing this evidence, it is more likely than not that claimant did not intend to sever the employment relationship by leaving the dealership prior to the end of his shift. Claimant's testimony that when he left the dealership he intended to return to work the following day is supported by the fact that he texted his supervisor later that day about the following day's shift, and took his work keys home with him when he left. March 19, 2025 Transcript at 14. Furthermore, even if claimant's supervisor did not tell claimant to "go. . . home," and claimant told a coworker that he was "walking out" before he left the dealership, these factors are not necessarily inconsistent with claimant's testimony regarding his intent to return to work the following day at the time he left. Therefore, more likely than not, claimant was willing to continue working for the employer when he left the dealership on March 11, 2024.
Moreover, the employer was unwilling to allow claimant to continue working after he left the dealership on March 11, 2024. Later that day, claimant's supervisor sent the employer's human resources

department a "Personnel Action Form," requesting that claimant's employment status be changed to "terminated" for "[v]oluntary job abandonment" because he "told Manager 'F you' and left [mid-shift]." Exhibit 4 at 3.[1] The employer approved the request the following morning and emailed notice of this decision to claimant. Claimant then went to the dealership to plead with the director of operations to reconsider and allow him to continue working, to no avail. Therefore, more likely than not, the employer was unwilling to allow claimant to continue working for an additional period of time despite claimant's willingness to do so. Accordingly, the work separation was a discharge.

Discharge. 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). "'[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).
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> (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).

[1] The pages of Exhibit 4, a five-page document submitted by the employer, are erroneously marked "Exhibit 1."

The employer discharged claimant because he told his supervisor, "Go fuck yourself," and left work prior to the end of his shift. The employer reasonably expected that their employees would not direct foul language at their supervisors and would not leave work prior to the end of their shift without permission. Claimant understood these expectations. Claimant admitted making this statement to his supervisor, but asserted that his supervisor first used foul language in the exchange. March 19, 2025 Transcript at 8. Claimant's supervisor omitted from his account of the exchange having used any foul language himself, but did not otherwise rebut claimant's account, and the facts have therefore been found in accordance with claimant's account. *See* December 16, 2024 Audio Record at 12:12. Even though claimant's supervisor had first used foul language in speaking to claimant, such use could not reasonably be perceived as altering the employer's expectation that claimant not respond by directing such language toward his supervisor. Moreover, it can reasonably be inferred from the context that claimant's usage was specifically intended to insult his supervisor. Claimant therefore consciously made the statement and did so knowing that it was likely to result in a violation of the employer's reasonable expectation, thereby acting with wanton negligence.

With respect to claimant leaving work prior to the end of his shift, claimant testified that he left because his supervisor stated, "If you're not gonna do your job then just go the fuck home." March 19, 2025 Transcript at 8. Claimant's supervisor testified that he said, "If I have to do your job for you, then. . . why do I need you?" and implied that going home was solely claimant's idea. December 16, 2024 Audio Record at 13:09.[2] As the employer bears the burden of proof by a preponderance of the evidence, they failed to rebut claimant's testimony that his supervisor suggested that he "go. . . home." More likely than not, claimant left the dealership because he understood that to be his supervisor's directive, or that the supervisor had at least given him permission to do so. Therefore, claimant did not know or have reason to know that leaving prior to the end of his shift under these circumstances would violate the employer's expectation, and did not act willfully or with wanton negligence.

Though claimant acted with wanton negligence in directing foul language at his supervisor, isolated instances of poor judgment are not misconduct. Claimant's use of foul language in this regard involved poor judgment, and did not exceed mere poor judgment because it was not unlawful or tantamount to unlawful conduct, and did not create an irreparable breach of trust in the employment relationship (such as through theft) or otherwise make a continued employment relationship impossible. Claimant's supervisor denied that claimant had ever before used foul language or had acted inappropriately toward others. December 16, 2024 Audio Record at 13:55, 17:22. While the record suggests that the employer may have been dissatisfied with some other aspects of claimant's performance, they did not specifically assert that claimant had ever been disciplined, or had violated their policies prior to March 11, 2024.[3] Therefore, claimant's conduct that day was isolated and not part of a pattern of other willful or wantonly negligent conduct. Accordingly, claimant's use of foul language toward his supervisor, though wantonly negligent, was an isolated instance of poor judgment and not misconduct.

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[2] The record is unclear as to whether these were differing recollections of a single statement, or the witnesses were collectively asserting that the supervisor made both statements, but each witness only testified to one. As neither witness specifically rebutted the other on this issue, the facts have been found based on the supervisor having made both statements.

[3] *See* December 16, 2024 Audio Record at 17:55 (claimant's supervisor describing claimant as "relatively difficult" and "never really. . . 100 percent committed" to his work); Exhibit 4 at 4-5 (service manager and director of operations responding to claimant's "exit survey claims" against them with critiques of claimant's performance).

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-287570 is affirmed.

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

DATE of Service: May 7, 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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