EO: Intrastate
BYE: 21-Feb-2026

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

774
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0368

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 21, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore disqualified from receiving unemployment insurance benefits effective February 16, 2025 (decision # L0009891529).[1] Claimant filed a timely request for hearing. On May 28, 2025, ALJ Gutman conducted a hearing, and on June 6, 2025, issued Order No. 25-UI-294313, affirming decision # L0009891529. On June 14, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Love's Travel Stops & Country Stores, Inc. employed claimant as a restaurant assistant manager from March 29, 2024 through February 20, 2025.

(2) The employer expected that their employees would not engage in "harassment," including the use of racial epithets or slurs. Exhibit 1 at 3. Claimant knew of this policy, which was contained in an employee handbook claimant acknowledged receiving electronically on his first day of work. *See* Exhibit 1 at 5.

(3) On July 19, 2024, the employer issued claimant a verbal warning regarding his attendance after having allegedly missed work on eight occasions and having left work early on two occasions since May 29, 2024. The employer did not have concerns about claimant's attendance after this warning.

(4) Claimant's work tasks included checking the temperature of "different products and equipment" three to four times a day, cleaning "certain equipment" every four hours, and logging these activities. Transcript at 16-17. On October 4, 2024, the employer issued claimant a verbal warning for allegedly

[1] Decision # L0009891529 stated that claimant was denied benefits from February 16, 2025 to February 21, 2026. However, decision # L0009891529 should have stated that claimant was disqualified from receiving benefits beginning Sunday, February 16, 2025, and until he earned four times his weekly benefit amount. *See* ORS 657.176.

either having "missed" performing these tasks or failing to log that they had been performed during nine shifts over the preceding three weeks.[2] The employer did not have concerns about claimant completing or logging these tasks following the warning.

(5) In approximately mid-January 2025, one of claimant's co-workers complained to management that claimant had used the word "nigger" in front of him. Transcript at 13-14; Exhibit 1 at 9. The employer could not corroborate or disprove the complaint and no discipline resulting from it was documented in claimant's personnel file.

(6) On February 15, 2025, claimant and his coworkers, while at work, were engaged in a conversation unrelated to work about childhood games. Claimant was reluctant to offer his story about a childhood game he played because it was referred to by a name that he knew was "not politically correct." Transcript at 38. At the urging of his coworkers, claimant "apologized beforehand" that what he was about to say was "not politically correct, but it is what it is," then stated the name of the game as "nigger knocking." Transcript at 38; Exhibit 1 at 9. One of the coworkers present later complained to management, and their complaint was corroborated by another coworker.

(7) On February 20, 2025, the employer's managers met with claimant regarding the complaint. Claimant denied having said the "'n' word." Transcript at 48. The employer did not believe claimant's denial and discharged him for having violated their "harassment" policy.

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] Though the employer characterized this and the July 19, 2024 warnings as "verbal," they were documented in writing in claimant's personnel file in accordance with the employer's practices. Transcript at 17.

> (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 for his use of a racial epithet on February 15, 2025. The employer reasonably expected that their employees would not use racial epithets or slurs, as stated in the harassment policy contained in the employee handbook. Claimant disputed at hearing having received the employer's handbook or acknowledging receipt of it, but, following the hearing, the employer provided relevant portions of the handbook and an acknowledgement page purporting to contain claimant's electronic signature, which was dated March 29, 2024, claimant's first day of work. *See* Exhibit 1 at 2-5; Transcript at 35. Claimant did not object to the admission of this evidence. However, regardless of whether claimant was provided access to the written policy, claimant's testimony demonstrated he understood that using a racial epithet or slur at work was "wrong" at the time of the incident, as discussed in further detail below. Transcript at 38.

The order under review concluded that claimant acted with at least wanton negligence in using a racial epithet on February 15, 2025, and that this constituted misconduct that could not be excused as an isolated instance of poor judgment because claimant "engaged in the same conduct on more than one occasion," referring to the January 2025 allegation. Order No. 25-UI-294313 at 4. The record supports that claimant acted with wanton negligence in the final incident, but does not support that it was other than an isolated instance of poor judgment.

Claimant testified that on February 15, 2025, he was discussing with coworkers games they had played as children. Claimant admitted stating the name of a game whose title included a racial epithet, after first being hesitant to state it because he knew it was "politically incorrect," and warning his coworkers of this before stating it. Transcript at 38. Claimant further testified that he knew it was "wrong" and a "misjudgment" to use such language. Transcript at 38-39. Claimant's use of a racial epithet with coworkers violated the employer's harassment policy. Claimant's testimony demonstrated that he acted consciously, after deliberating the potential consequences of his actions, and knowing that his actions were likely to violate the employer's expectations. Therefore, claimant violated the employer's harassment policy with wanton negligence.

However, isolated instances of poor judgment are not misconduct. Claimant acted consciously and used poor judgment, but his actions did not exceed mere poor judgment by being unlawful or tantamount to unlawful, or by making a continuing employment relationship impossible through a breach of trust, such as by theft or dishonesty. Whether the final incident was an isolated instance of poor judgment therefore turns on whether it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

The employer asserted that claimant had used the same racial epithet in front of the same complainant coworker approximately a month earlier, and received a verbal warning at that time for having done so. The employer's witness at hearing testified that this assertion was based on information provided from another of the employer's managers who told him that he received the complaint from claimant's coworker, determined that it could not be corroborated or disproved, and issued the verbal warning to claimant. Transcript at 14. In contrast, claimant testified that he did not, prior to the final incident, use a racial epithet or receive a warning for having been accused of doing so. Transcript at 42. The employer documented verbal warnings in claimant's personnel file regarding a variety of performance issues, likely as a routine practice, but no contemporaneous documentation of this incident or warning was offered by the employer, tending to support claimant's testimony that no warning was issued. *See* Exhibit 1 at 6-10.

In weighing this conflicting evidence, claimant's first-hand account of the incident and recollection that he received no warning in January 2025 is entitled to greater weight than the employer's contrary hearsay accounts, and the facts have been found accordingly. Therefore, the employer has not shown by a preponderance of the evidence that claimant had engaged in conduct similar to the final incident, or that he had been previously warned about such conduct.

The employer additionally asserted that claimant committed other policy violations from May through July 2024 regarding attendance, and in late September and early October 2024 regarding temperature and cleaning logs, resulting in verbal warnings on July 19, 2024 and October 4, 2024, respectively. The record contains few details regarding these alleged violations. However, the employer's witness implied that following these verbal warnings, the behavior at issue did not continue, testifying, "[A]fter those [warnings] there wasn't really any issues for us to continue on with like a – a written warning." Transcript at 17. Under these circumstances, even if the behavior leading to the warnings involved willful or wantonly negligent policy violations, the underlying conduct differed between each alleged violation and the final incident such that claimant's conduct in the final incident could not be considered repetitious or part of a pattern. Therefore, claimant's policy violation on February 15, 2025 was, at most, an infrequent occurrence. As such, claimant was discharged for an isolated instance of poor judgment, which is 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-294313 is set aside, as outlined above.

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

DATE of Service: July 23, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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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