EO: Intrastate
BYE: 23-Aug-2025

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

164
DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2025-EAB-0455

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On September 16, 2024, 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 August 11, 2024 (decision # L0006148754).[1] On October 1, 2024, claimant filed a timely request for hearing that the Department failed to recognize as a hearing request. On October 7, 2024, decision # L0006148754 became final without claimant having filed a recognized hearing request. On October 27, 2024, claimant filed a late request for hearing. On December 30, 2024, ALJ Christon conducted a hearing, and on January 6, 2025 issued Order No. 25-UI-278788, dismissing claimant's October 27, 2024 request for hearing as late without good cause and leaving decision # L0006148754 undisturbed.

On January 11, 2025, claimant filed an application for review of Order No. 25-UI-278788 with the Employment Appeals Board (EAB). On February 12, 2025, EAB issued EAB Decision 2025-EAB-0032, reversing Order No. 25-UI-278788 by allowing claimant's request for hearing as timely, and remanding the matter for a hearing on the merits of decision # L0006148754. On June 30, 2025, ALJ Christon conducted a hearing, and on July 7, 2025 issued Order No. 25-UI-296794, affirming decision # L0006148754. On July 27, 2025, claimant filed an application for review of Order No. 25-UI-296794 with EAB.

**FINDINGS OF FACT:** (1) Sleep Dentistry of Portland, LLC employed claimant as an office manager at one of their clinics from April 28, 2023 to August 13, 2024.

[1] Decision # L0006148754 stated that claimant was denied benefits from August 25, 2024 to August 23, 2025. However, because decision # L0006148754 concluded that claimant was discharged on August 13, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, August 11, 2024 and until she earned four times her weekly benefit amount. *See* ORS 657.176.

(2) The employer expected that employees who were not dentists would not engage in the practice of dentistry, including ordering radiographic imaging for patients. Claimant understood this expectation. The employer also expected that if a patient disagreed with a proposed course of treatment and sought a second opinion from another of the employer's dentists, the office staff would consult with the first treating dentist before scheduling an appointment with a different dentist.[2] Claimant generally understood this expectation but believed that if the first treating dentist was unavailable at the time the patient made the request for a second opinion, the situation could be explained to the second dentist, who could authorize scheduling an appointment with that patient.

(3) On August 2, 2024, the clinic's director, Dr. S, examined a patient with tooth pain and referred the patient to a specialist outside the clinic to potentially perform a root canal that Dr. S believed, if needed, would be too complex to be performed by the clinic. The patient contacted the specialist's office and determined that they could not afford to be seen by the specialist. The patient thereafter contacted the employer's clinic repeatedly and requested that the clinic treat their condition. Dr. S reiterated that the patient needed to be examined by the specialist, and that Dr. S would not provide further treatment for the patient's condition.

(4) At some point between August 2 and August 5, 2024, claimant assumed responsibility for communicating with the patient, who continued to seek treatment at the clinic. On that day, Dr. S was absent from work. A newly hired dentist, Dr. C, had availability to see patients at the clinic in the coming days. Claimant knew Dr. C from previous work experience and believed that she "really enjoyed" doing root canals. Transcript at 30. Claimant therefore explained the patient's treatment history to Dr. C, who agreed to examine the patient and provide a second opinion. Dr. C told claimant to schedule an appointment for the patient and said, "[I]f you can take [a] CBCT[3] scan, then I can look at it when I get back into the office." Transcript at 37.[4] At claimant's direction, an employee scheduled the patient for the CBCT scan and appointment with Dr. C for August 6, 2025. Claimant believed that consulting Dr. S was unnecessary in this instance because Dr. S made clear to claimant she would not treat the patient further for the present condition, and because Dr. S was absent the day claimant realized Dr. C could potentially resolve the issue.

(5) On August 6, 2024, the patient underwent the CBCT scan. Dr. S learned of this and believed that the scan "was ordered and completed at the direction of [claimant] and not by a clinician," and that claimant "went against [Dr. S's] clinical decision and. . . made decisions pertaining to a patient's care." Exhibit 2 at 8. From approximately August 6 through 12, 2024, claimant was on leave, which was unrelated to these events.

(6) On August 13, 2024, claimant returned from leave. The employer immediately discharged claimant based on their belief that claimant's actions had violated their expectations regarding the unlicensed practice of dentistry and consulting the initial treating dentist when a patient requests a second opinion. The employer had not previously disciplined claimant or suspected her of any policy violation.

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[2] The record suggests that the approval of either the first treating dentist or the clinic director was needed. Regarding the events at issue, the first treating dentist also served as clinic director, as discussed below.

[3] A CBCT scan provides a three-dimensional radiographic image.

[4] All citations to the transcript refer to the June 30, 2025 hearing.

**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 she caused a CBCT scan and examination appointment with Dr. C to be scheduled for a patient that had been treated by Dr. S, contrary to Dr. S's treatment plan of the patient being treated by an outside specialist. The employer reasonably expected that their non-dentist employees would not engage in the practice of dentistry, such as by deciding on their own to order a radiograph for a patient. Claimant understood this expectation. The employer also reasonably expected that when a patient sought a second opinion from a clinic dentist, the first treating dentist would be consulted before any scheduling. Claimant understood this expectation generally, but did not

understand it to apply when the first treating dentist was not at work and the second dentist agreed to see the patient after being informed that the first dentist had not been notified of the request to see the second dentist. The order under review concluded that claimant violated these expectations with wanton negligence by "disregarding [Dr. S's] treatment plan and scheduling a diagnostic test without approval or direction from a licensed dentist." Order No. 25-UI-296794 at 5. The record does not support this conclusion.

As to the expectation that claimant not schedule radiographs except pursuant to a dentist's directive, the parties offered conflicting evidence regarding whether claimant violated the expectation. Claimant testified that Dr. C, after having been fully apprised of the patient's treatment history, including Dr. S's treatment plan, agreed to examine the patient and provide a second opinion, and told claimant, "[I]f you can take [a] CBCT scan, then I can look at it when I get back into the office." Transcript at 37-39. Claimant was asked, "[D]id [Dr. C] direct you to order that test?" and claimant replied, in relevant part, "I don't believe she directly ordered me to, but she told me that, you know, you know what I do essentially." Transcript at 38. To clarify this point, claimant was asked, "[W]hat did [Dr. C] say about the CBCT [scan] that made you understand you could order it?" and claimant replied, "Because she told me that she would need that in order to make her diagnosis and also to ensure whether or not she felt comfortable attacking a treatment that was so complex." Transcript at 38-39.

In contrast, Dr. S provided a written statement asserting that the scan "was ordered and completed at the direction of [claimant] and not by a clinician." Exhibit 2 at 8. However, the statement did not assert that Dr. S discussed with Dr. C whether Dr. C had directed claimant to order the scan, and did not explain why Dr. S implicitly concluded that Dr. C had not ordered the scan. *See* Exhibit 2 at 8. Similarly, the employer's two witnesses at hearing, both employed by the employer in administrative roles, asserted that claimant ordered the scan on her own and not at the direction of a clinician. Transcript at 5, 17. However, the first of these witnesses was asked if she knew whether claimant consulted "anyone" before scheduling the scan, and she replied that she "didn't know that." Transcript at 13. This witness was also asked, "Did either of you [employer witnesses] have a conversation with [Dr. C] about the issue" of whether Dr. C directed claimant to order the scan, and she replied, "No, it didn't need to happen because [Dr. S] is the clinical director and that patient was her patient." Transcript at 43. The second witness was asked if she knew whether claimant had asked either Dr. S or Dr. C "about the need for the CBCT," and the witness replied that Dr. S "said that she did not," but did not answer regarding Dr. C. Transcript at 17.

In weighing this evidence, claimant's first-hand testimony that Dr. C told claimant that she needed the scan to be done in order to diagnose the patient is entitled to greater weight than the hearsay statement of Dr. S that claimant did not order the scan at the direction of a clinician. Moreover, the assertions of the employer's witnesses and Dr. S appear to be based only on speculation, as none of them asked Dr. C whether she directed claimant to schedule the scan. Therefore, the employer has not shown by a preponderance of the evidence that claimant ordered the CBCT scan on her own, rather than pursuant to Dr. C's directive. Accordingly, the employer has not shown that claimant violated their expectation that she not engage in the practice of dentistry.

As for the expectation that employees consult the first treating dentist before scheduling an appointment for a second opinion with another dentist, the record shows that claimant generally understood this expectation, but did not understand it to apply when the first dentist was absent and the second dentist

consented to giving the second opinion, knowing the first dentist had not been consulted. The employer disputed both that this exception to the expectation existed, and that Dr. S was absent and could not be consulted before claimant spoke with Dr. C about giving the second opinion.

The record contains conflicting information regarding the precise timeline of events. Dr. S wrote in her statement that on August 2, 2024, she spoke with claimant about the patient repeatedly contacting claimant to complain about the specialist referral and requesting further treatment at the clinic, and that on August 6, 2024, claimant scheduled the patient for a same-day scan and appointment with Dr. C without having notified Dr. S. Exhibit 2 at 8. The employee whom claimant directed to schedule the scan and appointment wrote in a statement that claimant began communicating with the patient about refusing the referral and wanting further treatment on August 2, 2024, and "[a]fter speaking with the patient, [claimant] instructed me to schedule a CBCT scan and appointment [with Dr. C]." Exhibit 4 at 2. However, that employee also wrote, "On August 5, 2024, after scheduling the appointment for the same day," the employer's regional manager raised questions about the appointment, and the employee therefore "scheduled for the next day, August 6, 2024, when [claimant] would be present to address the situation directly." Exhibit 4 at 2-3. An administrative employee of the employer testified that records showed Dr. S worked in the office on August 5 and 6, 2024, and did not work from August 7-11, 2024. Transcript at 41. The employer's witnesses at hearing provided no other details regarding the timeline of events.

Claimant testified that Dr. S last examined the patient on "maybe August 4th," and claimant spoke with the patient about wanting to return to the clinic for treatment "probably the day after, so maybe August 5." Transcript at 29-30. Claimant further testified that she consulted Dr. C about potentially providing a second opinion "the same day that the patient had called. . . which would've been approximately August 4th or 5th." Transcript at 33. Claimant maintained that the reason she did not consult Dr. S before asking Dr. C if Dr. C would provide a second opinion was that Dr. S "was on vacation." Transcript at 34. Claimant stated that her last day in the office before taking a period of leave was August 6, 2024.

In considering this evidence, claimant's account, though based on first-hand observations, was tempered with admitted uncertainty as to the preciseness of the dates. However, in weighing it against the employer's hearsay accounts regarding the timeline of events, the employer failed to rebut, by a preponderance of the evidence, claimant's assertions that she spoke with the patient and consulted Dr. C on the same day, which occurred at some point between August 2 and 5, 2024, and that Dr. S was absent from work that day. The facts have been found accordingly.

Claimant believed that, given Dr. S's absence from work on the day the key events took place, the employer did not expect her to consult Dr. S before speaking to Dr. C about the patient. Claimant explained that for matters requiring Dr. S's approval when Dr. S was absent, she would generally wait for Dr. S to return or contact the director of another of the employer's clinics. Transcript at 34. Claimant did not pursue either course of action here because she believed that the matter was "pretty routine" and she did not "think that would be necessary." Transcript at 35. The employer's regional director testified that claimant was expected to obtain Dr. S's approval in this situation "whether [Dr. S was] in or out of the office." Transcript at 42. The regional director explained that while Dr. S was occasionally contacted by the clinic while out of the office, this only occurred in emergency situations. Transcript at 42.

The record suggests that there was no written policy regarding the procedure for when a patient rejects a referral to an outside specialist and instead requests a second opinion from a clinic dentist, though this situation occurred occasionally. More likely than not, claimant generally understood through experience how the employer expected her to handle the situation, including consulting with the first treating dentist. However, the record does not show that claimant was told, or learned through experience, what to do if the first treating dentist was also the clinic director, and was not immediately available to consult. The situation did not objectively appear to be an emergency that would warrant contacting Dr. S while was out of the office, and claimant did not violate policy by failing to call her while out of the office. Claimant assumed that waiting for Dr. S to return to handle such a "routine" matter was not expected. While claimant was incorrect in this assumption, the weight of the evidence fails to show that claimant should have known that her course of action in response to Dr. S being absent would probably result in a violation of the employer's expectations. Accordingly, the employer has not shown by a preponderance of the evidence that claimant willfully or with wanton negligence violated the employer's expectation regarding seeking approval for second opinions.

Furthermore, even if claimant had acted with wanton negligence in failing to obtain Dr. S's approval before involving Dr. C in the patient's care, her actions would have constituted an isolated instance of poor judgment, which is not misconduct. Claimant had no prior disciplinary history, and the incident was therefore isolated. If claimant acted with wanton negligence in failing to consult Dr. S, her actions would have involved poor judgment. The analysis would therefore turn on whether claimant's actions exceeded mere poor judgment. The order under review concluded that claimant's conduct exceeded mere poor judgment because it was "tantamount to unlawful conduct under ORS 679.025 and 679.140." Order No. 25-UI-296794 at 5. The record does not support this conclusion.

ORS 679.025 prohibits the practice of dentistry without a valid license, and ORS 679.140 lists causes for which a licensee may be disciplined by the Oregon Board of Dentistry. *See* ORS 679.025(1); ORS 679.140(1). As discussed previously, the employer failed to rebut by a preponderance of the evidence claimant's testimony that Dr. C told claimant that the CBCT scan was needed and authorized claimant to schedule the scan and an appointment for Dr. C to examine the patient. Moreover, an office manager asking a dentist whether they are willing to provide a second opinion for a patient, without consulting the dentist providing the first opinion, does not appear to violate ORS 679.025, 679.140, or any other statute. Claimant's actions were therefore not illegal or tantamount to illegal. While the actions may have violated the employer's expectations, such a violation would not create an irreparable breach of trust or make a continuing employment relationship impossible, such as through theft or dishonesty. Accordingly, even if claimant had, with wanton negligence, violated the employer's expectation regarding consulting the first treating dentist when a patient seeks a second opinion, it would have constituted 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 discharge.

**DECISION:** Order No. 25-UI-296794 is set aside, as outlined above.

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

**DATE of Service: September 5, 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.

**Employment Appeals Board** - 875 Union Street NE | Salem, OR 97311
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