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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0551

Order No. 25-UI-302001 Affirmed ~ Request to Reopen Denied
Order No. 25-UI-292982 Reversed ~ No Disqualification

PROCEDURAL HISTORY: On March 13, 2025, 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 # L0009729840). The employer filed a timely request for hearing. On May 14, 2025, ALJ Chiller conducted a hearing at which claimant failed to appear, and on May 22, 2025, issued Order No. 25-UI-292982, reversing decision # L0009729840 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective February 2, 2025. On June 6, 2025, claimant filed an application for review of Order No. 25-UI-292982 with the Employment Appeals Board (EAB), which was treated as a request to reopen the May 14, 2025 hearing and forwarded to the Office of Administrative Hearings (OAH).[1] ALJ Kangas considered the request, and on September 2, 2025, issued Order No. 25-UI-302001, denying claimant's request to reopen the hearing and leaving Order No. 25-UI-292982 undisturbed. Pursuant to OAR 471-040-0040(6), the matter was returned to EAB for consideration of claimant's June 6, 2025 application for review of Order No. 25-UI-292982. On September 21, 2025, claimant filed an application for review of Order No. 25-UI-302001 with EAB. These matters come before EAB based upon claimant's applications for review of Orders No. 25-UI-292982 and 25-UI-302001.

EAB combined its review of Orders No. 25-UI-292982 and 25-UI-302001 under OAR 471-041-0095 (October 29, 2006). For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2025-EAB-0546 and 2025-EAB-0551).

WRITTEN ARGUMENT: EAB did not consider claimant's September 21, 2025 written argument because he did not state that he provided a copy of his argument to the employer as required by OAR 471-041-0080(2)(a) (May 13, 2019).

[1] *See* OAR 471-040-0040(6) (February 10, 2012).

ADOPTION OF ORDER NO. 25-UI-302001: EAB considered the entire consolidated hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with Order No. 25-UI-302001's findings of fact, reasoning, and conclusion that claimant's request to reopen the May 14, 2025 hearing should be denied. Order No. 25-UI-302001 is **adopted**. *See* ORS 657.275(2). The rest of this decision addresses the work separation at issue in Order No. 25-UI-292982.

FINDINGS OF FACT: (1) Outside In employed claimant as a maintenance specialist at their medical and social services clinic from June 21, 2022 through February 7, 2025.

(2) The employer had a written policy prohibiting "harassment" based on factors including race or disability, as well as by making "sexually suggestive conduct or statements." Exhibit 2 at 1.[2] Claimant understood this policy.

(3) On July 14, 2023, claimant received a "final" warning for having used what claimant described as a "black voice" accent in speaking to a coworker on or shortly before May 24, 2023, which claimant himself reported to the employer's human resources department after coming to believe that using the accent may have unintentionally offended the coworker. Exhibit 4 at 1. While discussing the matter with human resources, claimant referred to another employee, who was not present, as "spectrum-y," in reference to the autism spectrum. Exhibit 4 at 1. The employer considered each of these incidents to be violations of their harassment policy. Claimant felt at the time of the warning that it was "unjustly" issued because he did not intend his words or actions to be offensive. Exhibit 4 at 2. Claimant had previously been warned on August 19, 2022 and December 2, 2022 for alleged violations of the harassment policy regarding "inappropriate" conversation topics and humor. Exhibit 4 at 1.

(4) On January 3, 2025, claimant entered an office where two female coworkers were attempting to fix an adjustable-height office chair, while a third stood nearby. One coworker was pulling the adjustment lever under the chair, while another was kneeling in the seat and bouncing on it. Claimant "stared" as they attempted to fix the chair, then said something to the effect of, "I feel like I shouldn't be watching this. You understand that I can see you, right?" Audio Record at 19:17. Claimant then approached one of the coworkers and told her that if she had a problem with a chair, she could report it to maintenance. These actions made the coworkers uncomfortable, and one complained to the employer, who initiated an investigation.

(5) The employer interviewed the three coworkers involved, who each gave a similar account. The employer confronted claimant with the complaint, and claimant did not dispute the accuracy of the coworkers' accounts, but maintained that he did not "recall making any statements that were sexual in nature." Audio Record at 24:10.

(6) On February 7, 2025, the employer discharged claimant based on their belief that he had violated their harassment policy on January 3, 2025, after having previously received a "final" warning.

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

[2] All citations to exhibits refer to the numbering used for the May 14, 2025 hearing, which differs from the exhibit file used for the September 2, 2025 direct review order, Order No. 25-UI-302001.

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).

Claimant was discharged for comments he made to coworkers on January 3, 2025. The employer reasonably prohibited "sexually suggestive conduct or statements," and claimant understood this policy. The order under review concluded that claimant's comments constituted a wantonly negligent violation of the policy. Order No. 25-UI-292982 at 5. The record supports this conclusion; however, it was not misconduct because it was an isolated instance of poor judgment.

The employer's witness testified that three of claimant's female coworkers reported that claimant stared at them as they attempted to fix a chair, with one manipulating the chair's height lever while the other bounced on the seat in a kneeling position. The coworkers each told the employer that while staring at

them, claimant said something to the effect of, "I feel like I shouldn't be watching this. You understand that I can see you, right?" Audio Record at 19:17. During an investigation into this conduct, claimant did not deny making the statements, but said he did not "recall making any statements that were sexual in nature." Audio Record at 24:10. Claimant did not appear at the hearing and therefore did not rebut this testimony.

Considering the context in which they were made, it is more likely than not that claimant knew or should have known his statements would be interpreted as sexually suggestive and would therefore violate the employer's policy. It can reasonably be inferred that claimant made the statements with indifference to the consequences of his actions. Accordingly, claimant violated the employer's policy with wanton negligence on January 3, 2025.

However, isolated instances of poor judgment are not misconduct. Claimant's decision to make the statements involved judgment, and the content of the statements evinced poor judgment. The statements did not exceed mere poor judgment, as they were not illegal or tantamount to illegal, did not create an irreparable breach of trust in the employment relationship, such as through theft or dishonesty, or otherwise made a continued employment relationship impossible. Therefore, the analysis turns on whether claimant's conduct was "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior."

Claimant was disciplined for three alleged policy violations occurring within his first year of employment, the last of which was reported to the human resources department by claimant himself on May 24, 2023. The employer issued a warning for each alleged violation. There were no alleged policy violations for more than 19 months following the May 24, 2023 report that led to claimant's "final" warning. Under these circumstances, because of the passage of a long period of time without any alleged policy violations, claimant's January 3, 2025 policy violation can best be described as an infrequent occurrence, rather than a repeated act or part of a pattern, even if the prior alleged policy violations were found to be willful or wantonly negligent. Accordingly, the incident for which claimant was discharged was 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 work separation.

DECISION: Order No. 25-UI-302001 is affirmed. Order No. 25-UI-292982 is set aside, as outlined above.

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

DATE of Service: <u>September 26, 2025</u>

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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