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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0579

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 12, 2025, 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 discharge (decision # L0011174878). The employer filed a timely request for hearing. On September 15, 2025, ALJ Monroe conducted a hearing, and on September 23, 2025, issued Order No. 25-UI-304738, affirming decision # L0011174878. On October 3, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ron Tonkin Toyota employed claimant at their auto dealership from June 13, 2024 through April 23, 2025, most recently as a service advisor.

(2) The employer had a written policy prohibiting "harassment," defined as "unwelcome or offensive conduct directed toward a person because of their inclusion in [a listed] legally protected status[.]" Exhibit 1 at 4. Examples of prohibited conduct stated in the policy included "[v]erbal or written comments related to any of [the listed protected characteristics] including. . . jokes" and "visual images, in hard copy or electronic form, relating to any of the [listed protected characteristics] (for examples, cartoons, drawings, photos or videos)." Exhibit 1 at 5. The listed "protected characteristics" included sex, gender, and gender identity. Exhibit 1 at 4. Claimant received a copy of the policy at hire.

(3) The employer also had a policy requiring their employees to promptly notify the employer when they would be tardy or absent, and which prohibited "excessive absenteeism," but did not define what the employer considered "excessive." Transcript at 18. Claimant was provided a copy of this policy at hire. During claimant's employment, he was late for work "at least three to four times" without having notified the employer in advance, and was absent from work an unknown number of times with appropriate notice. Transcript at 19. The employer issued claimant a written warning for his tardiness, and a separate written warning for "excessive absence[s]. . . due to vehicle related issues[.]" Transcript at 19.

(4) From November 2024 through February 2025, claimant received three written warnings related to his work performance. In one incident leading to a warning, claimant was working as a "service concierge" and had been directed not to check in customers' vehicles unless a service advisor was present. Transcript at 14. Claimant checked in a customer's vehicle without a service advisor present, leading to the customer not receiving updates about the vehicle. Claimant did not explain to the employer why he did this.

(5) In another incident for which he received a warning, claimant had been directed not to leave vehicles in the service driveway overnight. Claimant checked in a customer's vehicle, and it was left in the service driveway with the engine running overnight.

(6) In another incident for which he received a warning, claimant had been directed to check each customer's vehicle into the computer system before providing any diagnosis or repair of the vehicle. Claimant personally repaired a vehicle, without checking it in, that had been brought in because a lightbulb was malfunctioning. Claimant did not explain to the employer why he did this. The employer did not charge the customer for the repair due to claimant's failure to check the vehicle in.

(7) On April 23, 2025, claimant posted a brief video he created using artificial intelligence to a group chat used by the employer for business communications. Claimant's coworkers and a shop foreman were participants in the chat. The video began with a photo of a male coworker's face, zooming out to reveal the face superimposed on the body of a female dancer. *See* Exhibit 2. Claimant intended the video as a joke. The shop foreman showed the video to the dealership's general manager, who believed that it violated the employer's harassment policy, and the general manager directed that claimant be discharged.

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). To be isolated, an instance of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, acts that violate the law, that are tantamount to unlawful conduct, or 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)(D).

The employer discharged claimant because they believed that he violated their harassment policy. Although claimant had been disciplined for several other reasons in the months preceding his discharge, the events of April 23, 2025 are the initial focus of the misconduct analysis. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The employer reasonably expected that their employees would not engage in harassment, examples of which included making jokes or videos relating to another person's sex, gender, or gender identity. Claimant was aware of this policy through having received a written copy of it. On April 23, 2025, claimant posted a video he had created to a group chat with other employees, which he later told the employer he had intended as a joke. The brief video initially focused on a photo of a male coworker's face, zooming out to reveal the face superimposed on a female dancer's body. As the apparent point of claimant's "joke" was to make light of the idea of a male having a body with traditionally female attributes and clothing, he knew or should have known that it related to another person's sex, gender, or gender identity. Claimant also knew or should have known that it could be viewed by the coworker depicted or others in the group chat as unwelcome or offensive, and that posting it probably violated the employer's policy. It can reasonably be inferred that claimant acted consciously in making and posting the video, and did so with indifference to the consequences of his actions. Therefore, claimant was discharged for violating a reasonable employer policy with wanton negligence.

However, isolated instances of poor judgment are not misconduct. Claimant's conduct on April 23, 2025 did not exceed mere poor judgment. The conduct did not violate the law, nor was it tantamount to unlawful conduct. Claimant's conduct did not create an irreparable breach of trust in the employment relationship, as it did not involve, for example, dishonesty, cheating, theft, self-dealing, or abuse of official position. Nor did claimant's conduct otherwise make a continued employment relationship impossible, as it was not likely to reoccur, did not impede any essential aspect of the relationship, threaten its continued existence, or expose the employer to risk of on-going legal jeopardy or non-compliance with a regulatory duty. Therefore, the issue is whether claimant's conduct was isolated.

Claimant received several warnings regarding attendance and performance issues during his employment. The employer asserted that claimant was late for work without advance notice on three to four occasions for unknown reasons, and otherwise had "excessive" absences due to transportation difficulties. The employer considered these violations of their attendance policy, which called for advance notice of an absence or instance of tardiness, and prohibited "excessive absenteeism." The record does not show how the policy defined "excessive absenteeism," nor does it show how many times claimant was absent or whether the absences continued after claimant was warned that they were excessive. Therefore, with respect to claimant's absences, the employer has not shown that claimant willfully or with wanton negligence violated a reasonable policy. Similarly, because the reasons for claimant's tardiness and failure to notify the employer that he would be late are unclear, the employer has not met their burden to show that his actions were willful or involved wanton negligence.

Claimant also received three warnings from November 2024 through February 2025 regarding his performance, specifically failing to follow the employer's procedures. On one occasion, when claimant was working as a "service concierge", claimant checked in a customer's vehicle without a service

advisor present, after having been directed only to check in vehicles when a service advisor was present. Claimant did not explain to the employer why he violated this policy. It is therefore more likely than not that claimant acted consciously and knew that his actions probably violated a reasonable policy, but was indifferent to the consequences of his actions. Claimant therefore violated the policy with wanton negligence.

On another occasion, a customer's vehicle that claimant had checked in was left in the service driveway with the engine running overnight, after claimant had been directed not to leave vehicles in the driveway. The employer's witness could not recall whether claimant gave an explanation for this situation. Transcript at 17. However, it stands to reason that an employee would not consciously decide to leave a customer's vehicle running overnight in a driveway, suggesting it is as likely as not that claimant became distracted and forgot that the vehicle was there after checking it in, or thought it had been removed and turned off by someone else. On this evidence, while claimant was likely negligent, the employer has not met their burden to show by a preponderance of the evidence that his conduct was *wantonly* negligent.

On a third occasion, claimant diagnosed and personally repaired a customer's vehicle that was brought in for service due to a malfunctioning lightbulb. Claimant had previously been directed to check in every customer vehicle so that the employer could charge the customer for the work performed, among other reasons. Claimant did not explain to the employer why he violated this policy. It is therefore more likely than not that claimant acted consciously and knew that his actions probably violated a reasonable policy, but was indifferent to the consequences of his actions. Claimant therefore violated the policy with wanton negligence.

Although the employer has shown that claimant violated a reasonable policy with wanton negligence on two occasions prior to the April 23, 2025 incident for which he was discharged, both prior incidents involved failing to follow vehicle check-in procedures. Claimant's errors in judgment regarding the April 23, 2025 incident involved anticipating how his "joke" video would be received by the employer and his coworkers, and whether it would probably violate the employer's harassment policy. These errors differ significantly in nature from the incidents where claimant failed to follow work procedures for unknown reasons, such that the final incident can be considered an infrequent occurrence, and not part of a pattern of willful or wantonly negligent conduct. Accordingly, claimant's actions on April 23, 2025 were isolated within the meaning of the rule, and as an isolated instance of poor judgment, were not misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the discharge.

DECISION: Order No. 25-UI-304738 is affirmed.

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

DATE of Service: <u>October 30, 2025</u>

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
Email: *appealsboard@employ.oregon.gov*
Website: *www.Oregon.gov/employ/pages/employment-appeals-board.aspx*