

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0022

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 29, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective August 3, 2025 (decision # L0013208172).¹ Claimant filed a timely request for hearing. On December 16, 2025, ALJ Andersen conducted a hearing, and on December 17, 2025 issued Order No. 25-UI-314672, affirming decision # L0013208172. On January 2, 2026, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Jacksons Food Stores employed claimant at one of their convenience stores from November 26, 2024 through August 5, 2025.

(2) The employer had a written policy prohibiting “discrimination and harassment . . . based on [another’s] actual or perceived . . . sexual orientation,” including “epithets, derogatory comments or slurs based on an individual’s protected classification.” Exhibit 1 at 4, 7. The employer also had a written policy prohibiting the use of “abusive . . . or vulgar language at any time during working hours or while on premises owned or occupied by the [employer].” Exhibit 1 at 10. Claimant was given access to a copy of these policies at hire.

¹ Decision # L0013208172 stated that claimant was denied benefits from August 3, 2025 to August 1, 2026. However, decision # L0013208172 should have stated that claimant was disqualified from receiving benefits beginning Sunday, August 3, 2025, and until he earned four times his weekly benefit amount. See ORS 657.176.

(3) At some point during the last week of July 2025, claimant's supervisor overheard claimant say the word "fuck" while no customers were in the store. Transcript at 26. Claimant's supervisor warned claimant verbally against using such language in the store, explaining that a customer might unexpectedly enter and overhear it.

(4) On August 3, 2025, claimant was initially scheduled to have the day off but volunteered to work a swing shift that ended shortly after midnight on August 4, 2025. Claimant had previously been scheduled to work at 4:30 a.m. on August 4, 2025, but since he had worked late the night of August 3, 2025, claimant's supervisor told him to come in at noon.

(5) On August 4, 2025, claimant arrived at work at 11:00 a.m. and was told that he could not start working until noon. Claimant asked his supervisor if he could instead have the day off, the supervisor agreed, and claimant left the store.

(6) Later on August 4, 2025, claimant and his supervisor had the following text exchange:

Claimant: I get paid on Wednesday²
Claimant: I quit
Supervisor: No
Claimant: I can run that store so that the beer man never bitches
Claimant: o Love you [supervisor's name]
Claimant: fag

Exhibit 1 at 9.

(7) Claimant resided in a structure that did not have electricity, and therefore typically charged his cell phone overnight using a power bank that he charged while working. During the night of August 4, 2025, the power bank failed to charge the cell phone and, with the battery depleted, the phone's alarm failed to wake claimant for his 4:30 a.m. shift on August 5, 2025.

(8) On August 5, 2025, shortly before 5:45 a.m., claimant awoke and was able to charge his cell phone enough to learn the time and to call his supervisor, who had already gone to the store to begin his own shift, to explain why he would be late. At 5:45 a.m., claimant texted his supervisor that he was sick and would bring a doctor's note. Claimant's supervisor replied that this was "unacceptable" and that claimant "should have called" before the start of his shift if he was going to be late or absent. Transcript at 24. Claimant did not go to work that day.

(9) Later on August 5, 2025, claimant's supervisor showed the August 4, 2025 text exchange to his manager, who decided to discharge claimant for violating the employer's discrimination and harassment policy. Claimant's supervisor then called claimant and told him that he had been discharged. Claimant believed that his supervisor had pushed for his discharge due to his having been absent from work without notice that morning, and that his supervisor understood he had not texted the word "fag" to him

² In the screenshot provided by the employer, the timestamp "Yesterday 4:55 PM" appears after this message, and the series of messages concludes before the timestamp "Today 5:45 AM." Exhibit 1 at 9.

maliciously. Claimant had no disciplinary history with the employer other than the July 2025 verbal warning for using foul language.

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 due to an offensive text his supervisor received from him on August 4, 2025. While claimant was also absent from work without advance notice to the employer on the day he was discharged, the employer maintained, and the record shows, that the employer discharged claimant due to the text message alone.³ See Transcript at 17-20. The employer had a written policy prohibiting “discrimination and harassment . . . based on [another’s] actual or perceived . . . sexual orientation,” including “epithets, derogatory comments or slurs based on an individual’s protected classification.” Exhibit 1 at 4, 7. Claimant understood this policy. Claimant did not dispute that his supervisor received the text at issue, or that claimant knew the term it contained was derogatory, but claimant gave varying explanations at hearing regarding the circumstances under which the text was sent.

Claimant initially testified that after he came to work on August 4, 2025, and his supervisor allowed him to have the day off, he was “on the way back [home] on the bus, that’s when [he] was texting [the supervisor].” Transcript at 8. Claimant continued, “And that’s when my autocorrect or something, just text him a wrong three-letter word that I never meant to text him.” Transcript at 8. Later, claimant testified, “I sent . . . [the text] ‘I love you, [supervisor’s name]’ . . . because [the supervisor] always helped me out. He was a good boss. But when I put my phone away or, like, something underneath it, I

³ Even if claimant’s failure to notify the employer that he would not be at work on time on August 5, 2025 also factored into the employer’s decision to discharge claimant, this circumstance resulted from no more than ordinary negligence, given claimant’s reliance on his cell phone as an alarm and means of communication with the employer, and his limited ability to reliably keep it charged without home electricity. As such, this incident did not amount to misconduct.

must have put, I must have hit the wrong button . . . That’s all I could say because I didn’t even know that that word came on there.” Transcript at 11. Later in the hearing, claimant was asked, “Was the word, the derogatory word that you texted, was that meant for someone else?” and claimant testified, “Yes, it was.” Transcript at 39. Claimant then explained that he intended to text a friend whose name started with the same letter as the supervisor’s name who was “supposed to pick [claimant] up.” Transcript at 40. Claimant testified, “That’s the only reason I could think why that word got sent to [supervisor], because I talked to [the friend] like that. Like, that’s how we just, you know, joking around because he’s my friend. But it wasn’t meant for [supervisor] if I was texting him.” Transcript at 40.

Claimant failed to explain or apologize to his supervisor for the message which, if sent accidentally, claimant should have seen no later than 5:45 a.m. the next day when texting his supervisor about his absence. Considering this, and claimant’s conflicting and largely implausible explanations at hearing regarding how the text was sent, it is more likely than not that claimant consciously sent the text to his supervisor. As claimant knew or should have known that sending it would likely result in a violation of the employer’s policies, and it can reasonably be inferred that he was indifferent to the consequences of doing so, he acted with wanton negligence.

However, isolated instances of poor judgment are not misconduct. The record shows that claimant had no disciplinary history with the employer, aside from a verbal warning for using foul language approximately a week before his discharge. Claimant’s supervisor testified regarding that incident that claimant said the word “fuck” when no customers were present in the store, but could not recall other details of what had occurred. Transcript at 26. Claimant did not directly rebut either having said that word or having been warned for doing so, but also did not recall details of the incident. Transcript at 34-35. On this record, the employer has not shown that, more likely than not, claimant consciously used foul language knowing, in the absence of any customers, that it was likely to result in a violation of the employer’s policies. As such, claimant did not act willfully or with wanton negligence on that occasion, and his wantonly negligent conduct with respect to the August 4, 2025 text message was isolated.

Claimant’s conduct was not illegal or tantamount to illegal, and did not create a breach of trust, such as through theft or dishonesty. Whether claimant’s conduct exceeded mere poor judgment, and can be excused as an isolated instance of poor judgment, therefore turns on whether it made a continuing employment relationship impossible. In determining whether conduct exceeds mere poor judgment, mitigating circumstances include remorse, the relative mildness of the foul language used, the lack of intent to harass or annoy, and an exemplary work history. Aggravating factors include anger that is disproportional to the provocation, verbal threats of physical harm, persistence in pursuing the argument beyond a brief period, obscenity or vulgarity that is not “mild,” and repeated use of insulting vulgarity after an explicit warning to stop. *Double K Kleaning Service, Inc. v. Employment Dept.*, 191 Or App 374, 379, 82 P3d 642 (2004) (internal citations omitted).

While use of the derogatory term at issue could exceed mere poor judgment when considering these factors, the unusual context in which claimant used the term is a substantial mitigating factor. The record does not suggest that any animosity existed between claimant and his supervisor at or before the time the text was sent, and, to the contrary, suggests that claimant liked and respected him personally and as his supervisor. *See, e.g.*, Transcript at 6. The day of the text, claimant asked his supervisor for the day off and the supervisor allowed it, then they texted, apparently jokingly, about pay day and a beer delivery driver’s tendency to complain. The next text from claimant was “Love you [supervisor’s name],”

followed by the text with the derogatory term. No further context is discernable from the record that would suggest that claimant sent the text in anger, or with intent to taunt, bully, harass, intimidate, or threaten his supervisor. In the absence of evidence indicating that claimant's motive in sending the text was malicious, beyond any malice inherent in the term itself, the mitigating factors outweigh those in aggravation. Therefore, claimant's actions did not make a continuing employment relationship objectively impossible, and did not exceed mere poor judgment. Accordingly, claimant texting the derogatory term to his supervisor was an isolated instance of poor judgment within the meaning of the rule, 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-314672 is affirmed.

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

DATE of Service: February 11, 2026

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。

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية محكمة الاستئناف 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 دستور العمل 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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.