

**EMPLOYMENT APPEALS BOARD DECISION**  
**2026-EAB-0029**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 16, 2025, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0012991467). The employer filed a timely request for hearing. On December 12, 2025, ALJ Janzen conducted a hearing, and on December 16, 2025 issued Order No. 25-UI-314476, reversing decision # L0012991467 by concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving benefits effective August 3, 2025. On January 5, 2026, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Albertina Kerr Centers, Inc. employed claimant as a direct support professional (DSP) at one of their adult residential facilities from July 3, 2023 through August 5, 2025.

(2) The employer maintained a policy regarding the possession or use of tobacco products by employees on its premises or while working which read, in relevant part, “For residential group homes, smoking and the use of tobacco product vape devices and other age-restricted products must adhere to the conditions below. Products must be securely stored in areas that are not accessible to clients. [Products] may not be used in common areas within the view of clients. Products should only be used during established work break periods off the premises. Products and their use must adhere to established state laws... Products must not violate the drug and alcohol-free workplace policy. Or otherwise impair... employees’ ability to safely and... competently perform their duties.” Transcript at 18. The employer provided claimant with a copy of this policy at the time of hire, and claimant was at least generally aware of its requirements.

(3) On July 26, 2025, claimant was in the facility’s office with another DSP (“J”), emptying his pockets to search for medication cups that he had misplaced that night. In the process, claimant placed on the office desk a vape pen that had been in his pocket, among other items. J, noticing this, picked up the vape pen and remarked to claimant that it smelled like cannabis. The vape pen actually contained

nicotine, however, and claimant told J that it could be used for either purpose. J reported the matter to management.

(4) On July 31, 2025, claimant was called into a meeting with two program managers to discuss the July 26, 2025 incident. During the meeting, one of the managers noted that J had reported that the vape pen smelled like cannabis. Claimant confirmed that J had said this, but told the manager that “it was a nicotine one.” Transcript at 38.

(5) During the meeting, one of the managers also asked claimant if he ever had a cannabis vape pen at work, and claimant confirmed that he kept one in his car, but never brought it into work. The manager also asked claimant if he had ever used a vape pen near a client. Claimant had done so on at least two occasions, while going for walks with clients around the neighborhood, and admitted this to the manager. Claimant was aware that the employer’s policy prohibited this, but did so anyway because he typically “straggle[d] back a little bit” behind the clients, who would typically not pay attention to him while on the walks; and because he did not “really have established breaks” at work in which he could vape, instead taking breaks only “during a down time.” Transcript at 40–41. Claimant was not on break while he took these walks.

(6) After the meeting, the manager who had been questioning claimant reported her findings to the employer’s human resources (HR) department. Between July 31 and August 5, 2025, the same manager attempted to contact claimant to discuss the matter further and advise him to contact the HR department. The HR department likewise attempted to contact claimant during that period to obtain claimant’s version of events. Claimant did not respond to any of these attempts to contact him.

(7) On August 5, 2025, after several days of claimant failing to respond to contact requests, the employer determined that claimant had violated their policies by having a vape pen “within view of clients... and... on [the employer’s] property.” Transcript at 31.

**CONCLUSIONS AND REASONS:** Claimant was discharged 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience 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(1)(d)(D).

A “good faith error” logically involves some sort of mistake made with the honest belief that one is acting rightly. *See Webster's Third New Int'l Dictionary 978* (Unabridged ed. 2002) (defining “good faith” as “a state of mind indicating honesty and lawfulness of purpose : belief in one’s legal title or right: belief that one’s conduct is not unconscionable or that known circumstances do not require further investigation : absence of fraud, deceit, collusion, or gross negligence”).

The employer discharged claimant because of his possession and use of a vape pen while working or on their premises. As a preliminary matter, the record suggests that the employer believed that the vape pen claimant was using while he walked with clients, or that he took out of his pocket on July 26, 2025, was for cannabis rather than nicotine. To the extent that the employer so believed, they have not met their burden on this point. To be clear, the record *does* suggest that claimant used cannabis, as, at the very least, he kept a cannabis vape pen in his car. However, the record contains conflicting accounts of what claimant told the managers during the July 31, 2025 meeting, regarding the contents of the vape pen he took from his pocket on July 26, 2025.

At hearing, one of the two managers testified that they had asked claimant if the vape pen had cannabis in it, and that “[A]t one point [he] said no. Then at one point said yes.” Transcript at 6. The other manager in the meeting, who had been the one to primarily question claimant, was asked by the ALJ if she “ask[ed] him specifically if it was marijuana.” Transcript at 13. In response, the manager testified, “I did. I asked [claimant]... I said so [J] said it smelt like [cannabis]. And... he did not admit that it was marijuana. But... he didn’t say it wasn’t... he just said yeah.” Transcript at 13–14. By contrast, claimant testified that when one of the managers asked him about the vape pen, he “let her know that it was a nicotine one.” Transcript at 38. Further, claimant testified at hearing that he believed that the vape pen he took from his pocket on July 26, 2025 may have smelled like cannabis because smoke or vapor from the latter can “stay on your clothes.” Transcript at 41.

Given the ambiguous testimony of the employer’s first two witnesses, above, compared with claimant’s unambiguous explanations, the record is no more than equally balanced as to whether the vape pen in question contained cannabis or nicotine. As such, the employer has not met their burden of proof to show that it was cannabis, and the facts on that point have been found in accordance with claimant’s account. Similarly, it can be reasonably inferred from the above findings that the vape pen claimant used while on walks with clients was the one containing nicotine. Therefore, it is appropriate to analyze claimant’s conduct under the misconduct analysis of OAR 471-030-0038(3)(a), rather than determining whether claimant was discharged for a disqualifying act under the Department’s drugs, cannabis, and alcohol adjudication policy.<sup>1</sup>

The record shows that the employer initially spoke to claimant on July 31, 2025 about the July 26, 2025 incident, and during that meeting also learned about his prior instances of having vaped while on walks

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<sup>1</sup> *See* ORS 657.176(8), (9); OAR 471-030-0125 (January 11, 2018).

with clients on at least two occasions. Given when the employer learned of the latter incidents, as well as the employer's HR coordinator's testimony that they discharged claimant because he had a vape pen "within view of clients... and... on [the employer's] property," the record shows that these incidents were the combined proximate cause of the employer's decision to discharge claimant.

Regarding claimant's possession of the vape pen on the employer's premises on July 26, 2025, the employer's policy required tobacco products to be "secured stored in areas that are not accessible to clients." Because the vape pen was on claimant's person, it was not securely stored, and claimant therefore violated that provision of the employer's policy. Claimant was aware of the policy, and did not offer any explanation to suggest that he had a good-faith reason for believing that it would have permitted him to carry tobacco products on his person while working at the employer's facility. As such, claimant more likely than not acted without regard for the consequences of his actions in keeping the vape pen on his person. Therefore, by doing so, claimant violated the employer's policy with at least wanton negligence.

Regarding claimant's use of the vape pen while out walking in the neighborhood with clients, this violated the provision of the employer's policy requiring such products to be used "only... during established work break periods off the premises." While claimant was apparently not on the employer's premises while he used his vape pen on these occasions, he also was not on break. At hearing, claimant explained that despite this provision of the policy, he felt it was acceptable to use his vape pen during these walks because he did not "really have established breaks," but could only take breaks "during a down time." Transcript at 40–41.

Thus, claimant essentially suggested that because he was not given formally-defined break periods, but could only take breaks as time permitted, he believed that the policy allowed him to use his vape pen while working. The record does not show that claimant had any reason to believe this, and a plain-language reading of the policy does not suggest that this might have been a reasonable, if mistaken, interpretation of its requirements. Thus, even if claimant mistakenly believed that the policy permitted him to use his vape pen while working, this was not a good faith error. Instead, because claimant at least had reason to know that the employer would not permit him to use his vape pen while working, but did so anyway without any apparent regard for the consequences of his actions, he violated the policy on at least two occasions with at least wanton negligence.

In sum, the employer discharged claimant for multiple willful or wantonly negligent violations of their policy. As such, claimant's conduct was not isolated, and claimant was not discharged for an isolated instance of poor judgment. The employer therefore discharged claimant for misconduct, and claimant is disqualified from receiving unemployment insurance benefits effective August 3, 2025.

**DECISION:** Order No. 25-UI-314476 is affirmed.

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

**DATE of Service:** February 23, 2026

**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 بمحكمة 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**  
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