EO: Intrastate
BYE: 30-May-2026

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

833
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0150

Reversed & Remanded

PROCEDURAL HISTORY: On August 5, 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 # L0012185699). The employer filed a timely request for hearing. On January 21, 2026, ALJ Krueger conducted a hearing, and on January 23, 2026 issued Order No. 26-UI-317880, reversing decision # L0012185699 by concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving benefits effective June 1, 2025. On February 12, 2026, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing. EAB considered any parts of claimant's argument that were based on the hearing record.

The parties may offer new information, such as that contained in claimant's written argument or documents relating to the employer's sexual harassment investigation, into evidence at the remand hearing. At that time, the ALJ will determine if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing about documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties before the hearing at their addresses on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Genuine Parts Company employed claimant as a delivery driver from April 24, 2024 through June 3, 2025.

(2) The employer maintained a policy regarding sexual harassment which stated, "Under no circumstances while working in any capacity for [the employer] should you engage in any type of sexual

comment, even if they are a joke or anything of that sort, there is just no room for that while working for [*sic*] any capacity for us." Transcript at 6. This policy was contained in the employer's handbook, which was provided to employees upon hire. Claimant was aware of and understood the policy, and was last trained on it on June 30, 2024.

(3) On March 25, 2025, the employer issued claimant a written warning relating to incidents occurring on or around March 3, 2025. These incidents involved claimant collecting bottles for deposit returns while out on route, and taking or accepting food or drink from customers while making deliveries. The warning indicated that claimant should not "dumpster dive in any customers'… dumpsters," and that claimant should "ask, if anything" before taking food or beverages from a customer, but that the employer "prefer[red] him not to ask a customer for any food or beverage while… working." Transcript at 12. After claimant's supervisor discussed these matters with claimant, he stopped collecting bottles for his coworker, and did not take any food or beverages from customers without permission.

(4) On or around May 6, 2025, claimant was making a delivery to one of the employer's customers. Claimant had visited the shop as a customer himself on several occasions, and was acquainted with some of the staff. While making the delivery, claimant began speaking with a female employee, "L," whom claimant had previously known as a customer to the shop, and who had recently started working there. In the course of speaking to L, claimant made sexually-suggestive comments to her such as, "I've been thinking about you all night. I bet you like it hot." and "You can sneak past me anytime." Transcript at 32. These statements made L uncomfortable. Claimant also tried to give L a hug, at which point L "backed up and seemed very standoffish." Transcript at 10.

(5) The shop's manager reported the May 2025 incident to the employer, who subsequently referred the matter for an investigation by their central human resources (HR) department. In the course of that investigation, the employer interviewed both L and the shop's manager, who was present during the incident. The customer also provided a written statement by L. Both reported that claimant had made the above-described comments to L on that date, and asked L for a hug. L also reported that claimant "showed [her] pictures of women taken without consent, likely from other shops." Transcript at 33. The shop manager reported that he also "heard [claimant] make an inappropriate weather related comment"; that he had told claimant to "keep it professional… [and] not to be a 'creep'"; and that after stating this to claimant there were "no further incidents." Transcript at 33.

(6) When the employer interviewed claimant, he "denied any sexual intent or physical misconduct… [and] suggested [that L] misunderstood the humor and believed her discomfort was due to being new and unfamiliar with the joking style of the shop." Transcript at 33. Claimant also variously suggested during the investigation that the described behavior had actually been perpetrated by the shop's manager, rather than himself, and "denied it ever happened." Transcript at 32.

(7) When the employer concluded the investigation, they determined that the allegations against claimant were substantiated. On June 3, 2025, the employer discharged claimant due to his having violated their sexual harassment policy during the May 2025 incident.

CONCLUSIONS AND REASONS: Order No. 26-UI-317880 is set aside and this matter remanded for further development of the record.

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 he violated their sexual harassment policy during the May 2025 incident. As a preliminary matter, claimant denied the allegations against him at hearing, instead asserting that the shop's manager had been the one to engage in the described conduct. Transcript at 20. During the employer's investigation, claimant suggested the same, but also told the employer that the described incident did not occur; and that L had misunderstood the humor and believed her discomfort was due to being new and unfamiliar with the "joking" style of the shop. Claimant also testified at hearing that while he had not made the alleged statements to L during the incident in question, he might have made similar comments elsewhere, "on [his] own personal time[.]" Transcript at 20.

The employer's witness, an HR manager, did not indicate that he was present during the May 2025 incident, and the record suggests that most, if not all, of the investigation into the incident was conducted by persons other than himself. As such, the employer's evidence regarding the incident is hearsay. Hearsay evidence is admissible in unemployment insurance hearings. A firsthand account, such as claimant's testimony at hearing, is typically entitled to more weight than hearsay. However, in some cases, such as where hearsay statements are numerous, detailed, and consistent, the weight of the evidence may favor them over a firsthand account. That is the case here. The record shows that the employer obtained statements from both of the witnesses at their customer's shop, and that the reports between the two were consistent and detailed. By contrast, claimant's statements during the investigation were not consistent, as he variously suggested that either the incident did not occur, that it did occur but that the statements were taken out of context, or that it did occur but that he personally did not make the alleged statements. As such, the weight of the evidence favors the employer's account of the May 2025 incident, and the facts have been found accordingly.

Claimant was aware of the employer's policy prohibiting him from "engag[ing] in any type of sexual comment." By extension, claimant also likely knew, or at least had reason to know, that engaging in other acts which could reasonably be construed as sexual harassment would also violate the employer's

expectations regarding sexual harassment. Therefore, claimant's conduct during the May 2025 incident was at least wantonly negligent. However, the record as developed is insufficient to determine whether claimant's conduct that day was an isolated instance of poor judgment.

On remand, the inquiry should focus on two areas. First, the ALJ should further develop the record so as to determine whether claimant's conduct during the May 2025 incident was isolated, or whether it was instead part of a pattern of other willful or wantonly negligent behavior. In particular, the order under review concluded that claimant's conduct as described in the March 25, 2025 written warning constituted willful or wantonly negligent violations of the employer's standards of behavior because "[c]laimant's collection of bottles while on duty at a customer worksite amounted to a willful act of poor judgment in violation of a standard of professionalism that an employer has a right to expect from one of its on-duty delivery drivers." Order No. 26-UI-317880 at 4. The record as developed does not support this conclusion.

For conduct to be considered a *wantonly* negligent violation of the employer's standards of behavior, the individual acting or failing to act must be conscious of their conduct and know or have reason to know that their conduct would probably result in a violation of those standards. Thus, a finding of wanton negligence requires more than a violation of the employer's standard of behavior; the individual must also have been on notice that their conduct would likely violate those standards. However, the record as developed does not make clear whether, prior to the incidents described in the March 25, 2025 warning, claimant either knew or had reason to know of the employer's expectations relating to his March 2025 conduct. At hearing, the employer's witness testified regarding the written warning, "[I]t was just alleged that… our store manager had already spoken with [claimant] about… not dumpster diving in customers' dumpsters. So we informed him while you are at work and working [for the employer]… you should not dumpster dive in any customers'… dumpsters." Transcript at 12. This suggests that claimant may have engaged in similar conduct *prior* to March 3, 2025, and that the employer had warned him about it prior to the March 25, 2025 written warning. However, the wording of the quoted testimony is ambiguous, and the employer did not offer any further evidence to show that claimant had either engaged in similar conduct previously or been warned about it previously.

On remand, the ALJ should develop the record to show whether claimant had ever, prior to March 3, 2025, engaged in conduct similar to that described in the March 25, 2025 written warning; whether the employer had ever given claimant any warnings (whether written or verbal) about such conduct prior to March 25, 2025; if so, when these occurrences took place; what specific policy or expectation was violated in each instance; and how, prior to any such occurrences, claimant would have had reason to know of the policies or expectations that he violated. Inquiry should focus on the details of each specific incident, including where they took place and what specific actions claimant engaged in. The ALJ should also inquire as to whether claimant had ever violated the employer's policies or expectations in other ways; if so, what those violations consisted of; and how claimant would have known or had reason to know that he was violating any of the employer's expectations.

Second, the ALJ should further develop the record so as to determine whether claimant's conduct during the May 2025 incident exceeded mere poor judgment. The order under review concluded that claimant's conduct that day exceeded mere poor judgment because it "was an irreparable breach of employer's trust caused by claimant's poor representation of employer to the customer." Order No. 26-UI-317880 at 4. However, an irreparable breach of trust typically relates to conduct involving dishonesty, cheating, theft,

self-dealing, or abuse of official position, though additional possibilities exist and the foregoing list is not exhaustive.[1] Although it is possible, it is unlikely that an irreparable breach of trust would result from an individual's willful or wantonly negligent violation that reflects negatively on an employer's reputation or casts them in an undesirable light with a customer. On remand, the record should be developed regarding whether claimant's conduct exceeded mere poor judgment per any of the other provisions of OAR 471-030-0038(1)(d)(D) or was an irreparable breach of trust under a different theory.[2] In particular, in addition to the comments and the request for a hug that claimant made to L, the witnesses to the incident reported that claimant had shown to L "pictures of women taken without consent, likely from other shops"; and that the shop manager "heard [claimant] make an inappropriate weather related comment[.]" These allegations were not explored further at hearing. On remand, the ALJ should inquire as to the details of these allegations, so as to ascertain the full scope of claimant's conduct during the May 2025 incident, and to determine whether claimant had engaged in similar on-the-job conduct on previous occasions, as such inquiry is necessary to determine whether the conduct was isolated, was illegal or tantamount to illegal conduct, or otherwise may have exceeded mere poor judgment.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary to consider all the issues before the ALJ. ORS 657.270(3); *see accord Dennis v. Employment Division,* 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary to decide whether claimant was discharged for misconduct, Order No. 26-UI-317880 is reversed and this matter remanded to the Office of Administrative Hearings for another hearing and order.

DECISION: Order No. 26-UI-317880 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>March 30, 2026</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 26-UI-317880 or return this matter to EAB. Only a timely application for review of the order mailed to the parties after the remand hearing will return this matter to EAB.

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[1] *See also Callaway v. Employment Dept.*, 225 Or App 650, 202 P3d 196 (2009) (a determination of whether a claimant's conduct caused a breach of trust is objective, not subjective, and the employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not); *see accord Isayeva v. Employment Dept*., 266 Or App 806, 340 P3d 82 (2014).

[2] *See Double K Kleaning Service, Inc. v. Employment Dept.,* 191 Or App 374, 379, 82 P3d 642 (2004) (in determining whether conduct exceeds mere poor judgment, mitigating circumstances include remorse, the relative mildness of the profanity used, the lack of intent to harass or annoy, and an exemplary work history, while 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) (internal citations omitted).

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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.

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