

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0547

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 30, 2026, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0015803810). The employer filed a timely request for hearing.

On March 10, 2026, the Office of Administrative Hearings (OAH), mailed notice of a hearing on decision # L0015803810 scheduled for March 24, 2026. On March 24, 2026, the employer failed to appear for the hearing, and ALJ Franco issued Order No. 26-UI-324887, dismissing the employer's request for hearing based on their failure to appear. On April 13, 2026, the employer filed a timely request to reopen the March 24, 2026 hearing.

On May 5, 2026, ALJ Naylor conducted a hearing, and on May 7, 2026 issued Order No. 26-UI-329599, allowing the employer's request to reopen, cancelling Order No. 26-UI-324887, and reversing decision # L0015803810 by concluding that the employer discharged claimant for misconduct and claimant therefore was disqualified from receiving benefits effective October 19, 2025. On May 26, 2026, claimant filed an application for review of Order No. 26-UI-329599 with the Employment Appeals Board (EAB).

PARTIAL ADOPTION: EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with the part of Order No. 26-UI-329599 allowing the employer's request to reopen. That part of Order No. 26-UI-329599 is **adopted**. See ORS 657.275(2).

FINDINGS OF FACT: (1) ADP Total Source II Inc., in an apparent professional employer organization (PEO) relationship with Sunstone Way,¹ employed claimant as an overnight staff member in Sunstone Way's shelter for unhoused participants from July 25, 2022 until October 21, 2025. Claimant was a union member.

(2) On the evening of September 3, 2025, claimant and several coworkers underwent training at Sunstone Way's headquarters, which was a distance away from the shelter where claimant worked. When the training ended, one of claimant's coworkers, S, perceived claimant as having followed her to her car and then having stood by her car for several minutes in an apparent effort to receive a ride back to the shelter.² Thereafter, S made a complaint to the employer that claimant had created an uncomfortable work environment by allegedly following her and standing by her car for several minutes.

(3) On September 7, 2025, the employer placed claimant on paid administrative leave while they investigated claimant's conduct during the September 3, 2025 incident. From September 7, 2025 through September 10, 2025, the employer interviewed witnesses to the incident. One of the witnesses the employer interviewed was claimant's supervisor, SB. In addition to being claimant's supervisor, SB had a personal friendship with claimant. Another of the witnesses the employer interviewed was claimant's coworker, R.

(4) At some point during the period of September 7, 2025 through September 10, 2025, while claimant was on paid administrative leave, claimant called SB and asked her why he was on leave. SB told claimant that she did not really know why claimant was on leave.

(5) On September 11, 2025, the employer interviewed claimant regarding the September 3, 2025 incident. During the interview, the employer told claimant not to talk to witnesses while the investigation was ongoing, but did not specify that any expectation of confidentiality continued after the investigation concluded. The employer also told claimant that he was prohibited from retaliating against S or witnesses to the September 3, 2025 incident. They did not specify whether that expectation continued after the investigation ended. However, as a matter of common sense and ordinary workplace practice, claimant understood that he had a duty that would continue after the investigation ended to refrain from any retaliation against S or witnesses to the incident.

(6) On September 12, 2025, the employer presented claimant with a disciplinary letter based on their review of his conduct during the September 3, 2025 incident and some incidents preceding it. The letter gave claimant a warning in writing and outlined some expectations for claimant's conduct going forward. The letter did not mention the confidentiality and non-retaliation directives the employer had expressed to claimant orally during the September 11, 2025 interview. Upon presenting claimant with

¹ See Oregon House Bill 2236 (effective September 26, 2025) (Amending ORS Chapter 657, *inter alia*, to define "PEO relationship" as "an agreement between a PEO and a client employer under which certain employer responsibilities for some or all of the client employer's workers are allocated" and empowering PEOs to "elect to treat covered employees" as their own employees), available at <https://olis.oregonlegislature.gov/liz/2025R1/Measures/Analysis/HB2236>.

² Claimant testified that he believed that all employees had exited the headquarters at the same time and that he had merely been smoking a cigarette with a coworker near the front door of the headquarters where S's car happened to be parked at the time. See Transcript at 35.

the September 12, 2025 disciplinary letter, the employer considered their investigation of the September 3, 2025 incident to be concluded.

(7) On September 14, 2025, claimant returned to work from leave. Thereafter, claimant, through his union representative, used a union procedure to make a request for information regarding the statements the employer had taken from witnesses to the September 3, 2025 incident.

(8) In mid-September 2025, after making the request for information, claimant approached SB and asked her if the information obtained from the request would surprise him and if any of the information would differ from what SB had previously told him regarding that she did not really know why claimant was on leave.

(9) At some point after September 12, 2025 but before October 7, 2025, claimant submitted a union grievance regarding the discipline he had received for the September 3, 2025 incident. On October 7, 2025, after having filed the grievance, claimant approached R while at work. Claimant first told R, who tended to take naps in his car, that he should be careful about that practice because he could receive employer discipline for sleeping in his car. Claimant, with the intention of making inquiries that might assist with his union grievance, also asked R what he had observed the night of September 3, 2025. During their communications on October 7, 2025, claimant told R to be careful around S because she had made a complaint about claimant. At some point after claimant had these communications with R, claimant learned that his grievance was invalid because he had submitted it untimely.

(10) Thereafter, SB and R informed the employer of the communications claimant had had with them in mid-September 2025 and October 7, 2025, respectively. The employer considered claimant's communications with SB and R to have violated the directives they gave claimant during their September 11, 2025 interview with him regarding confidentiality and non-retaliation.

(11) On October 21, 2025, the employer discharged claimant based on their belief that he had violated the directives they gave him during the September 11, 2025 interview regarding confidentiality and non-retaliation.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

The order under review concluded that the employer discharged claimant for misconduct. Order No. 26-UI-329599 at 5-6. The record does not support this conclusion.

The employer discharged claimant because he had communications with SB and R about matters relating to the September 3, 2025 incident, the incident which had prompted the employer to give claimant the September 12, 2025 disciplinary letter. Transcript at 16, 19. The employer considered claimant's communications with SB and R to have violated the directives they gave claimant during their September 11, 2025 interview with him. The employer failed to establish that claimant's communications with SB and R were willful or wantonly negligent violations of those directives.

At hearing, the parties offered accounts that differed somewhat both as to the nature of the directives the employer gave claimant during the September 11, 2025 interview, and as to the specifics of the communications claimant had with SB and R.

As to the nature of the directives the employer gave claimant during the September 11, 2025 interview, the employer's witness, Sunstone Way's chief human resource officer, testified that during the interview, the employer told claimant to "[k]eep the investigation confidential" and "[d]o not engage in retaliation against anyone who's involved in the investigation, whether they're the witness or the person who made the complaint." Transcript at 16; *see also* Transcript at 19-20. The employer's witness stated many times that these directives were given during the interview on September 11, 2025. Transcript at 15-16, 19, 31. The employer's witness further testified that upon presenting claimant with the disciplinary letter the next day on September 12, 2025, the employer concluded their investigation. Transcript at 30, 31. When asked if the employer had told claimant not to talk about the matter after the investigation had concluded, the employer's witness stated that he "believe[d]" the September 12, 2025 disciplinary letter had done so, but for support, quoted passages from the letter that had nothing to do with the confidentiality and non-retaliation directives. Transcript at 31-32.

In contrast, claimant testified that he understood the employer to have told him that he was not to talk to witnesses while the investigation was ongoing, but that once it had concluded when he received the September 12, 2025 disciplinary letter, the expectation of confidentiality ended. Transcript at 23, 26-27. Claimant did not specifically mention the employer telling him about a non-retaliation directive in the September 11, 2025 interview.

This decision accepts claimant's version of events where the two above accounts conflict, given that the employer bears the burden of proof, and otherwise considers the evidence of the nature of the directives the employer gave claimant during the interview in its totality. Viewed in this light, the record shows that the employer told claimant during the September 11, 2025 interview not to talk to witnesses while the investigation was ongoing, but did not specify that an expectation of confidentiality continued after the investigation concluded upon claimant receiving the September 12, 2025 disciplinary letter. The employer also told claimant that he was prohibited from retaliating against the complainant or witnesses. While they did not specify whether that expectation continued after the investigation ended, as a matter of common sense and ordinary workplace practice, claimant understood that he had a continuing duty to refrain from any clear and unambiguous form of retaliation after the end of the investigation. Further, the confidentiality and non-retaliation directives the employer expressed orally during the September 11, 2025 meeting were not mentioned in the September 12, 2025 letter.

Next, as to the specifics of the communications claimant had with SB, the accounts of the parties were somewhat conflicting, with claimant adding context regarding his personal friendship with SB. The employer's witness testified that after claimant used the union procedure to make a request for information regarding the statements from witnesses to the September 3, 2025 incident, he approached SB and stated, "I just want to verify that . . . I'm not going to find anything different from what you've told me when we get all the documentation we've asked for" and "I really hope you've told the truth. If not it will break my trust in you." Transcript at 18. For his part, claimant testified that after he made the information request he merely asked SB "if there was going to be anything in there that would surprise [him]," and cast the inquiry as innocuous, explaining that SB was a personal friend whom he often confided in when he "got[] in trouble with the company." Transcript at 25-26. Viewing these accounts in combination, this decision accepts claimant's version of events where the two accounts conflict given that the employer bears the burden of proof.

Finally, as to the specifics of the communications claimant had with R, the accounts of the parties differed more significantly. The employer's witness testified that R had complained to the employer that claimant said to him that S had "snitched" on R about his habit of taking naps in his car and that R "needed to be careful with" S. Transcript at 16-17. The witness further testified that R had told the employer that claimant had told him to "watch out" for S because S was working with the program manager to "report[] everything to H.R." and "to get everyone fired." Transcript at 17. In contrast, claimant testified that he had merely stated to R to be careful about sleeping in his car, because he could receive employer discipline for taking naps there. Transcript at 23-24. Claimant further stated that at the time of his communications with R, he had filed his grievance for the discipline he had received based on the September 3, 2025 incident, and had simply asked R what he saw that night because he had been present. Transcript at 24. Claimant testified that he did not tell R that S and the program manager were trying to get people fired, although he did tell R to be careful around S because she had made a complaint about him. Transcript at 25. Given that the employer bears the burden of proof and that their account was based on hearsay, the weight of the evidence favors claimant's account on this point and the facts have been found in accordance with that account.

With the foregoing points in mind, the employer failed to meet their burden to prove that claimant's communications with SB and R were willful or wantonly negligent violations of the employer's directives regarding confidentiality and non-retaliation. As to confidentiality, the employer did not specify that any expectation of confidentiality continued after the investigation concluded. The investigation ended on September 12, 2025. Claimant's communications with SB and R, which occurred in mid-September 2025 (after claimant received the September 12, 2025 disciplinary letter) and October 7, 2025, respectively, both happened after the investigation had ended. Moreover, claimant engaged in the communications with SB and R in furtherance of union procedures that he had independently initiated, the request for information (in the case of SB) and the grievance (in the case of R), after the employer's investigation concluded. Accordingly, the employer did not prove that claimant intended to breach an employer expectation of confidentiality, as is required for any such violation to be willful. The employer also did not prove that claimant breached confidentiality with wanton negligence as they did not establish that claimant knew or should have known that, by making the communications after the investigation was over in connection with union procedures he initiated, that a violation of the employer's expectations probably would result.

As to non-retaliation, the employer likewise failed to show that any violation of the employer's expectations were willful or wantonly negligent. As a matter of common sense and ordinary workplace practice, claimant knew or should have known that he had a duty that continued after the investigation ended to refrain from retaliation against S or the witnesses to the incident. However, claimant's conduct in relation to SB and R did not rise to the level of clear retaliation such that it can be concluded that claimant willfully or with wanton negligence engaged in retaliatory conduct.

With respect to claimant's communications with SB, claimant's conduct of asking SB whether the information obtained from the information request would surprise him did not amount to retaliation against S. Though, when considered in isolation, it may be possible to view the question as a potential threat directed at SB, claimant credibly explained at hearing that SB was "a confidante of [his]" and that he had asked the question in the context of his personal friendship with SB. Transcript at 25-26. Further, that the question was a veiled threat against SB is undermined by the fact that SB was claimant's supervisor, and it is not evident how claimant might have harmed SB given that he was subordinate to her. Accordingly, the employer did not show by a preponderance of the evidence that, by asking whether the information obtained from the information request would surprise him, claimant intended to retaliate against SB or knew or should have known that retaliation would probably result. As such, the employer did not show that claimant's communications with SB were willful or wantonly negligent violations of their prohibition on retaliation.

With respect to claimant's communications with R, claimant's conduct of telling R that he should be careful about sleeping in his car because of the risk of employer discipline and his asking R what he had observed the night of September 3, 2025 did not amount to retaliation against S or R. Nor can it be concluded, on this record, that the fact that claimant told R to be careful around S because she had made a complaint about claimant amounted to a willful or wantonly negligent violation of the employer's prohibition on retaliation. When the employer expressed to claimant orally on September 11, 2025 that retaliation against S was prohibited, the record fails to show that they offered any examples of what would constitute retaliation against a complainant or specified how a statement made to a separate witness might rise to the level of retaliation against the complainant herself. Though some forms of workplace retaliation are clear and unmistakable, such as a retaliatory demotion or transfer to an undesirable work schedule, what constitutes retaliation between coworkers is murkier, particularly when the potential retaliatory act in question is not conveyed directly to the supposed target of the retaliation, S, but instead is conveyed to a third party, R. Given this inherent ambiguity and the fact that the employer did not provide more clarity as to what constitutes retaliation when they expressed the directive to claimant on September 11, 2025, the employer did not show by a preponderance of the evidence that, by telling R to be careful around S because she had made a complaint about him, claimant intended to retaliate against S or knew or should have known that retaliation against S would probably result by doing so. For these reasons, the employer did not meet their burden to prove that more likely than not claimant's communications with R were a willful or wantonly negligent violation of the employer's prohibition on retaliation.

Based on the reasons discussed above, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 26-UI-329599 is modified, as outlined above.

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

DATE of Service: July 9, 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 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 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

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.