EO: Intrastate
BYE: 17-Apr-2027

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

879
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0814

Reversed & Remanded

PROCEDURAL HISTORY: On June 11, 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 # L0018187162). The employer filed a timely request for hearing. On August 5, 2026, ALJ Bender conducted a hearing, and on August 13, 2026, issued Order No. 26-UI-337390, affirming decision # L0018187162. On September 2, 2026, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's argument in reaching this decision.

FINDINGS OF FACT: (1) Klamath Hospice Inc. employed claimant as a licensed practical nurse from March 20, 2017 until April 9, 2026. The employer provided hospice and palliative care to patients in both home and inpatient care settings, which included skilled nursing facilities.

(2) The employer had a continuity of care policy that called for employees to "effective[ly] coordinat[e] and communicat[e]" with their supervisors and members of a patient's inpatient care team. Exhibit 1 at 12. The employer also had a rule of conduct policy that prohibited employees from using "profane or abusive language" in the workplace. Exhibit 1 at 15. Claimant was aware of these expectations as they were listed in the employee handbook, which he received and signed at hire.

(3) The employer believed that in early to mid-January 2026, claimant requested from the employer's hospice physician an order for a fentanyl patch for a patient who had not before been prescribed that medication. The employer believed claimant placed the order for the new medication without consulting the nurse case manager, hospice physician, or the patient and their family. The employer believed that the hospice physician noticed that the request was unusual and did not fill it. The employer believed that if administered to the patient, the fentanyl patch could have caused serious harm to the patient.

(4) The employer believed that on January 20, 2026, claimant improperly inflated the balloon of a Foley catheter when inserting the catheter, causing a patient to experience leakage and discomfort. The

employer believed that a different nurse discovered and corrected the leaking catheter many days later, on January 29, 2026.

(5) The employer believed that on or about January 20, 2026, during a patient visit at a nursing facility, claimant drew morphine into syringes and left the syringes unattended in the facility's medication room without labeling the syringes or documenting them in the facility's log. The employer believed that on January 23, 2026, they met with claimant and gave him a verbal warning for the alleged morphine syringes incident.

(6) On January 30, 2026, the employer met with claimant and gave him a written warning for the alleged fentanyl patch and catheter incidents. In the written warning, the employer asserted that claimant appeared fatigued at work and had fallen asleep at his desk. The employer suspected that fatigue contributed to the incident in which claimant allegedly requested a fentanyl patch for a patient. On January 30, 2026, the employer placed claimant on a two-week paid administrative leave to rest.

(7) When visiting a patient who lived at a skilled nursing facility, the employer either expected or preferred that nurses complete and send their visit notes to the facility on the same day as the visit. In or around mid-February 2026, after claimant returned from the two-week leave period, the employer came to believe that on some occasions, claimant had not sent visit notes to the facilities on the same days as he had visited patients at those facilities. On February 24, 2025, the employer met with claimant and gave him a verbal warning for allegedly failing to send visit notes to facilities on the same day as the visit. The employer believed that they were required by state rule to document their notes in the facilities' medical records and that the facilities "get cited" if they do not get the employer's notes. Transcript at 15.

(8) April 8, 2026, claimant was the on-call nurse, meaning that he was expected to respond to patient calls that came into the employer's office from inpatient facilities from about 4:30 p.m. that afternoon until 8:00 a.m. the next morning. That day, at about 4:20 p.m., a receptionist answering the phones told claimant they had received a request to check on a patient who lived at a skilled nursing facility.

(9) When claimant arrived at the facility, the facility's supervising nurse was not present. The patient had had a fall and was lying under his bed in an agitated state. The patient had a cord wrapped around his neck and was threatening self-harm. Claimant worked with facility staff to get the patient out from under the bed. To calm the patient down, claimant and facility staff gave the patient medications he had been authorized to receive on an as-needed basis, but he remained combative.

(10) While addressing the patient's situation, the facility's nurse called facility staff numerous times and via speakerphone expressed to claimant a desire to send the patient to the hospital. During these calls, claimant was irritable toward facility staff and the nurse, made comments such as "it's not my job to talk to your nurse" and used the "F word" for emphasis. Transcript at 8, 19.

(11) At 5:39 p.m. that evening, claimant called the employer's clinical manager, who told him that he was not to send the patient to the hospital because it would be against the patient's wishes to do that, and that he was to keep the patient there and to medicate the patient. Transcript at 32. Claimant told the facility's nurse that his clinical manager opposed the idea of sending the patient to the hospital, and if she disagreed, she could call the employer and talk to the clinical manager. By the third or fourth call

from the facility nurse, claimant deliberately stopped taking the calls because he found them distracting and annoying.

(12) The patient kept trying to get out of bed and claimant feared he might fall and hurt himself. Claimant summoned the individual who held the patient's power of attorney to the facility to be present and have a calming effect on the patient. Claimant discovered that the patient's morphine prescription on file with the facility contained an error, and he called the employer's nurse practitioner to get a corrected dose for the patient. The nurse practitioner sent the prescription order to the employer's workplace and claimant left the facility, leaving the patient with a medical technician and the individual who held the patient's power of attorney, and went to the employer's workplace to get the signed prescription order.

(13) Claimant returned to the facility with the order, and the medical technician administered the corrected dose of morphine. Claimant asked the medical technician to continue with the new dose of morphine and to keep giving the patient as-needed medications to keep him calm. The technician said that she understood. Claimant remained for about 45 minutes after the patient received the first morphine dose, completing tasks such as charting, and then left the facility. When claimant left, the patient was calm and not threatening to harm himself, with his power of attorney by his bedside. At the facility's nurse's request, the facility's staff had asked claimant to call the nurse before he left, but claimant did not do so.

(14) At some point later that evening or possibly during the early morning hours of April 9, 2026, the facility decided to transfer the patient to the hospital. On April 9, 2026, at or around 4:30 a.m., the employer's clinical manager tried to call claimant, but claimant slept through the calls.

(15) On April 9, 2026, the facility's supervising nurse called the employer and spoke with the employer's executive director and informed her of the events of April 8, 2026, including that claimant had ignored some of her calls and had not called her after finishing with the patient.

(16) On April 9, 2026, the employer discharged claimant. The employer discharged claimant based on several aspects of his conduct on April 8, 2026, including that he had allegedly failed to communicate with the employer about the patient's situation, failed to create a safety plan for the patient, used harsh language with the facility's staff, and failed to communicate with the facility's nurse.

CONCLUSIONS AND REASONS: Order No. 26-UI-337390 is set aside, and this matter remanded for further proceedings consistent with this order.

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 order under review concluded that the employer discharged claimant, but not for misconduct. Order No. 26-UI-337390 at 4. The record as developed does not support this conclusion.

The record shows that claimant violated the employer's expectations with wanton negligence during the April 8, 2026 incident that led to his discharge. The employer asserted that claimant's actions on April 8, 2026 violated their expectations in several ways, including that claimant did not communicate with the employer about the patient's situation, failed to create a safety plan for the patient, used harsh language with the facility's staff, and failed to communicate with the facility's nurse. Except for the last of these, the employer failed to prove that claimant's conduct was a willful or wantonly negligent violation of their expectations.[1]

As to the assertion that claimant did not communicate with the employer about the patient's situation, in fact, claimant was in contact with two different agents of the employer that night. He called the employer's clinical manager and she told him that sending the patient to the hospital was against the patient's wishes and to keep the patient at the facility and medicate him; he also called the employer's nurse practitioner, and she authorized a correction to the patient's dosage of morphine. Next, the employer did not show by a preponderance of the evidence that claimant failed to establish a safety plan. Claimant took swift action, coaxing the patient out from under the bed, summoning the patient's power-of-attorney to calm the patient down, and facilitating correction of the patient's morphine dosage. Claimant was present when the medical technician administered the morphine, and directed her to monitor the patient's status and continue adminstering the morphine and other as-needed medications, if necessary. Those instructions would seem to form the basic contours of a safety plan, and the employer did not prove that claimant had a known duty to provide anything more detailed. As for directing harsh language at facility staff, it is correct that claimant made testy comments to staff and used the "F word" for emphasis.The comments did not rise to the level of abusive language, however, and, given the stressful situation, the profane word was likely uttered spontaneously and therefore was not a willful or wantonly negilgent violation of the employer's prohibition on using profane language.

[1] At hearing, evidence also came to light that claimant slept through calls the clinical manager made to him in the early morning hours of April 9, 2026. However, in their testimony, none of the employer's witnesses raised this aspect of claimant's conduct as a basis for *why* the employer discharged claimant, and it was not mentioned in the employer's documentary evidence. *See* Transcript at 13-14, 48, 27-28; Exhibit 1 at 1-2. As such, the record fails to show that claimant's having slept through the calls was a proximate cause of the discharge, and so whether that conduct was a willful or wantonly negligent violation need not be addressed. *See 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).

However, as to claimant's failure to communicate with the facility's supervising nurse, the record shows that claimant violated the employer's expectations with at least wanton negligence. Claimant knew or should have known based on the employer's continuity of care policy, that he had a duty to maintain reasonable coordination and communication with the supervising nurse. Although claimant informed the nurse that the clinical manager opposed the idea of sending the patient to the hospital, he eventually stopped taking her calls. He did so deliberately because he found the calls to be distracting and annoying. Then, after the patient had been calmed down and the exigencies of the situation had resolved, claimant declined to call the nurse, even though the facility's staff had relayed to him her request that he call her. Claimant had ample opportunity to call the nurse before he left because, after the patient received the first dose of morphine, claimant was present at the facility for about 45 mintues completing charting tasks. Claimant should have known he had a duty to call the nurse before leaving the facility, but he conciously failed to do so with indifference to the consequences of his inaction. As such, claimant violated the employer's expectations with wanton negligence on April 8, 2026.

However, to enable an assessment of whether claimant's conduct on April 8, 2026 was an isolated instance of poor judgment rather than misconduct, remand is necessary to develop the record as to whether claimant violated the employer's expectations wilfully or with wanton negligence on prior occasions. To this end, the ALJ should inquire about each of the prior alleged violations mentioned in the record: the alleged fentanyl patch incident, the alleged Foley catheter incident, the alleged morpine syringes incident, and the alleged failures to send notes to facilities on the same day as claimant visited the facilities. For each of these alleged violations, the ALJ should ask questions to develop what claimant consciously did or failed to do, and whether he knew or should have known that those actions or inactions would probably result in a violation of the employer's expectations.

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-337390 is reversed and this matter remanded to the Office of Administrative Hearings for another hearing and order.

DECISION: Order No. 26-UI-337390 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>October 20, 2026</u>

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 26-UI-337390 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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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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