EO: Intrastate
BYE: 27-Feb-2027

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

854
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2026-EAB-0864

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On June 1, 2026, 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 February 15, 2026 (decision # L0017863441). Claimant filed a timely request for hearing. On June 5, 2026, notice was mailed to the parties that a hearing was scheduled for June 17, 2026. On June 17, 2026, claimant failed to appear for the hearing, and ALJ Krueger issued Order No. 26-UI-333007, dismissing claimant's request for hearing due to his failure to appear. On June 26, 2026, claimant filed a timely request to reopen the June 17, 2026 hearing. On September 4, 2026, ALJ Krueger conducted a hearing, and on September 8, 2026 issued Order No. 26-UI-339283, canceling Order No. 26-UI-333007, allowing claimant's request to reopen, and affirming decision # L0017863441 on the merits. On September 12, 2026, claimant filed an application for review of Order No. 26-UI-339283 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 his 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.

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-339283 allowing claimant's request to reopen the June 17, 2026 hearing. That part of Order No. 26-UI-339283 is **adopted.** *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Walmart Associates Inc. employed claimant as a door host at one of their stores from August 11, 2021 through February 21, 2026.

(2) The employer had a written policy that prohibited employees from intervening in instances of suspected theft but permitted them to "act as a witness," with the limitation that "all associates are prohibited from going beyond the facility's sidewalk to engage with a customer or obtain additional information regarding the customer even if directed to do so by law enforcement." Transcript at 22. Claimant was provided training on this policy at hire, and periodically thereafter.

(3) On March 9, 2022, claimant observed someone leaving the store with a cart of stolen merchandise, leading claimant to stick a cane into the side of the cart to stop its movement. The employer warned claimant for violating their theft intervention policy and required him to retake training on the policy.

(4) On January 16, 2026, claimant observed someone stealing a scooter from the store, and claimant followed them out of the store. Within approximately two minutes of the person leaving the store, claimant walked through the parking lot to within ten feet of the rear of the vehicle the suspect had entered with the scooter and wrote its license plate number on his hand. Claimant did not take further action regarding the incident.

(5) Later in his shift, claimant reported the incident to an asset protection investigator and offered the license plate number, but, when asked, denied that he "went into the parking lot to obtain [the] license plate number." Transcript at 15-16. Video of the incident was later reviewed and depicted claimant walking through the parking lot to the rear of the vehicle and writing down the plate number.

(6) On February 21, 2026, the employer discharged claimant for having violated their theft intervention policy on January 16, 2026 by entering the parking lot to obtain information about the suspect.

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 for having violated their theft intervention policy on January 16, 2026. Claimant did not dispute at hearing having recorded the theft suspect's license plate number while standing in the store parking lot, but maintained that his actions did not violate a policy of which he knew or should have known. The employer had a reasonable written policy stating that their employees must not "[go] beyond the facility's sidewalk to engage with a customer or obtain additional information regarding the customer" in case of a suspected theft. A witness for the employer testified that the employer's personnel records showed that claimant had taken an electronic training regarding the theft intervention policy several times since his hire, including retaking it as part of the discipline he received for the March 9, 2022 incident. Transcript at 21-24.

In contrast to the employer's testimony, claimant testified that he had never received a copy of the policy or training on it, and had "never even heard of [the policy]" prior to being discharged. Transcript at 26-27. When asked what his understanding of the employer's expectation had been in the event he suspected someone of theft, claimant testified, "The only thing I knew about is what we weren't supposed to do and it's apprehend them which I did not." Transcript at 27. When asked what his understanding of the employer's expectation had been regarding "following [a theft suspect] into the parking lot," claimant testified, "I didn't really follow them. I walked out there and took the license plate off the thing and walked back in. That's all I did." Transcript at 28. Claimant further testified that he believed that the employer allowed him to take such action; that being in the parking lot was at times necessary for his work, such as for the purpose of collecting carts; and that collecting carts was his reason for being in the parking lot when he "just happened to get the license plate number." Transcript at 33. Claimant admitted to physically intervening in a theft incident on March 9, 2022, and to receiving a disciplinary action for his conduct during that incident. Claimant's witness at hearing, who had also worked for the employer at some point during claimant's tenure, testified that she had also "never heard of" the theft intervention policy; and that on January 16, 2026, claimant told her after his shift that he had gone into the parking lot to collect carts moments after the suspect exited the store and he "happened to get the license plate" while there. Transcript at 38.

In weighing this evidence, claimant's testimony that he had never been informed of the policy's existence or provisions, particularly in connection with the discipline he admitted to having received for the March 9, 2022 incident, is not plausible. That claimant falsely denied to the asset protection investigator having gone into the parking lot to obtain the license plate number suggests that claimant was aware at the time of the January 16, 2026 incident that the employer prohibited that conduct. Therefore, the weight of the evidence supports the employer's testimony regarding their training records on this point, and the facts have been found accordingly. Claimant therefore knew or should have known that the employer prohibited him from going into the parking lot to obtain information about the suspected shoplifter. More likely than not, given the timing of events, claimant's purpose in entering the parking lot was to obtain information about the suspect, instead of or in addition to collecting carts. Furthermore, it can be inferred that claimant acted consciously in this regard and that he was indifferent to the consequences of his actions, knowing that they would probably result in a violation of the employer's policy. Claimant therefore acted with at least wanton negligence.

The order under review concluded that claimant's actions in the January 16, 2026 incident could not be excused as an isolated instance of poor judgment because his wantonly negligent violation of the same policy on March 9, 2022 meant that the latter incident was not "isolated." Order No. 26-UI-339283 at 6. The record does not support that the January 16, 2026 incident was not "isolated." Claimant did not dispute that on March 9, 2022, he inserted a cane into a cart to intervene in a theft incident. The weight of the evidence supports that, at a minimum, claimant knew at that time that the employer expected employees not to physically intervene in instances of suspected theft. Like with the later incident, it can be inferred that claimant acted consciously in intervening and that he was indifferent to the consequences of his actions, knowing that they would probably result in a violation of the employer's expectation. Claimant's violation of the employer's expectation on March 9, 2022 was therefore at least wantonly negligent. However, that incident occurred almost four years before the final incident, and involved a physical intervention that was likely more dangerous than merely observing a suspect's vehicle. In considering the differences in severity of the violations and the time that elapsed between them, the later incident has not been shown to be part of a pattern of other willful or wantonly negligent conduct, and was instead an infrequent occurrence. The January 16, 2026 incident was therefore "isolated" within the meaning of the rule.

Moreover, claimant's conduct on January 16, 2026 did not exceed mere poor judgment. The conduct did not violate the law, nor was it tantamount to unlawful conduct. Claimant's conduct did not create an irreparable breach of trust in the employment relationship, as it did not involve, for example, dishonesty that would impact an essential aspect of the relationship, cheating, theft, self-dealing, or abuse of official position. Nor did claimant's conduct otherwise make a continued employment relationship impossible as it did not impede any essential aspect of the relationship or threaten its continued existence. Therefore, claimant's conduct during the final incident was an isolated instance of poor judgment, which is not misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is therefore not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 26-UI-339283 is set aside, as outlined above.

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

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

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.

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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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