

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-1035**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73323). Claimant filed a timely request for hearing. On October 18, 2018, ALJ S. Lee conducted a hearing, and on October 26, 2018 issued Order No. 18-UI-118837, concluding that claimant's discharge was not for misconduct. On October 31, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) DoneRite Plumbing LLC employed claimant as a plumber from July 11, 2017 until August 4, 2018.

(2) The employer expected claimant to refrain from insubordination when communicating with supervisors. Claimant understood the employer's expectation as a matter of common sense.

(3) On several occasions during claimant's employment, the employer told claimant that he needed to tidy up, organize and clean his work truck because the state of the truck reflected poorly on the employer's business image and brand.

(4) On March 13, 2018, claimant dropped an iPad that the employer had provided for performing work-tasks and cracked its screen. The employer deducted the cost of repairing the iPad from claimant's wages. Later, claimant damaged the iPad again. On multiple occasions after March 13, the employer referred to claimant's damaging the iPad as an example of claimant's generally careless and neglectful behavior when performing work

(5) On May 1, 2018, the employer issued a warning to claimant for allegedly violating its non-solicitation policy by offering to install a faucet for a customer in his individual capacity and outside of his work for the employer. On July 19, 2018, when claimant left a work site, he forgot to remove and take with him a drain machine that he had been using at the site. Multiple contractors had access to the site, which was not secured. On July 31, claimant left his truck unlocked at a work site and the employer's iPad was stolen from the truck.

(6) On Thursday, August 2, 2018, the employer's co-owner, who was also its president, met with claimant to discuss various performance issues and have a "heart to heart." Transcript at 17. The president wanted to determine if claimant wished to continue working for the employer. During that conversation, the president made several references to claimant having previously damaged the iPad and stated that the events with the iPad appeared to exemplify claimant's often "neglectful" attitude toward the employer's property. Claimant did not think the president's characterization was appropriate since claimant had paid for the cost to repair the damage that he had caused to the iPad. The third or fourth time the president brought up the damage to the iPad, claimant stated to the president, "[M]ove on and get over it [the damage to the iPad] because I had paid for the [iPad] screen that was broke." Transcript at 27, 30. Claimant asked the president as the meeting concluded if "we're good," to which the president replied, "[Y]eah, we're good." Transcript at 32.

(7) On Saturday, August 4, 2018, the president went to claimant's house and told claimant that he was discharged. In response to claimant's questions about why he was being discharged, the president told claimant, "[Y]ou told me to get over it and so I'm getting over it." Transcript at 32.

**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. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer's witnesses brought up several alleged violations of the employer's expectations that claimant engaged in before August 2, both agreed that the final violation preceding claimant's discharge was his allegedly insubordinate behavior on August 2. Transcript at 5, 17, 32. EAB customarily focuses its misconduct analysis on the last incident of alleged misconduct occurring before the discharge since that is usually the incident without which the discharge would not have occurred. Here, since the employer was aware of all incidents of alleged misconduct before the alleged insubordination on August 2, and had not as of that date discharged claimant for them, it appears that the employer did not consider them sufficiently serious to merit discharge. Claimant's alleged insubordination of August 2 is the proper focus of the analysis to determine whether claimant engaged in misconduct for which the employer discharged him.

Claimant and the employer's president both provided testimony about what was said by each during the August 2 meeting. They were the only witnesses to that conversation. Their respective testimonies differed in some relevant particulars about the context in which claimant's allegedly insubordinate statement was made and the number of times the president referred to claimant having damaged the iPad. Because there is no reason to doubt either party's credibility or the accuracy of either party's testimony, the conflicting evidence is evenly balanced, and the uncertainty in the evidence therefore must be resolved against the employer since it is the party who carries the burden to persuasion in a discharge case. Claimant's testimony about the substance of the August 2 conversation is accepted as accurate for purposes of this decision.

“Insubordinate” behavior is commonly understood to mean behavior that is willfully disobedient to, defies or flouts the legitimate authority of another. Here, claimant commented one time to the president to “get over” the incident with the iPad in response to the president’s repeated references to the incident. Claimant made the comment since he thought the issue with the iPad was settled months earlier when the employer deducted the costs to repair the iPad from claimant’s paycheck. Transcript at 27, 30.<sup>1</sup> In that context, claimant’s comment was not reasonably construed as evidencing disobedience of or willfully undercutting the president’s workplace authority, but merely pointing out that claimant had made recompense for the iPad and, by doing so, the issue should have been resolved. Without more, that claimant told the president a single time to “get over it,” does not appear to be so egregious that claimant knew or should have known that the employer would disapprove of the statement or consider it to be insubordinate or to have violated any reasonable employer standard of which claimant was aware or reasonably aware. The employer did not meet its burden to show that claimant’s statement during the August 2 conversation was insubordinate, or willfully or with wanton negligence violated a reasonable employer standard.

Although the employer discharged claimant it failed to show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation from the employer.

**DECISION:** Order No. 18-UI-118837 is affirmed.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service: December 4, 2018**

**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 listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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<sup>1</sup> OAR 839-020-0020(6) (January 9, 2002), adopted to implement ORS 652.610, prohibits deductions from employees’ wages for breakage of tools or equipment and does not allow for an exception if the employee consents to the deduction. *See* ORS 652.610(3)(c). It may have been unlawful for the employer to have deducted the cost to repair the iPad from claimant’s paycheck, whether or not claimant agreed or acquiesced to it, unless the employer made the deduction pursuant to a judicially authorized garnishment. *See* ORS 18.602 *et seq.*



# 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 desisyong ito.

## 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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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 محكمة 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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