

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0816**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90733). Claimant filed a timely request for hearing. On July 30, 2019, ALJ Seideman conducted a hearing, and on August 2, 2019 issued Order No. 19-UI-134479, affirming the Department's decision. On August 22, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

On August 27, 2019, EAB mailed the parties notice of receipt of claimant's application for review. On September 17, 2019, EAB received a written argument from claimant. However, EAB did not consider claimant's written argument for the following reasons.

First, as stated in the notice of receipt of claimant's application for review, under OAR 471-041-0080 (May 13, 2019), a party's written argument will not be considered unless it is *received* within 20 days of the date that EAB mails the notice.<sup>1</sup> Claimant's written argument was received 21 days after EAB mailed the notice, and therefore was late. In his argument, claimant apologized for not submitting it sooner, asserting that he had to gather pictures, recently changed residences unexpectedly, and had to deal with child custody issues with claimant's ex-wife. To the extent that can be construed as a request for an extension of the deadline for submitting written argument, however, the request is denied because claimant failed to show that he made the request promptly after becoming aware of the need for the extension, or that the described circumstances prevented him from submitting his written argument one day earlier, as required under OAR 471-041-0080(4).

Second, claimant's argument essentially was a request for EAB to consider additional evidence that was not part of the hearing record, photographs of job sites that, according to claimant, support his assertion that he complied with the employer's expectations when performing and coding the work for which he was discharged. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), however, EAB may allow a request for consideration of additional evidence only if the party offering it establishes that it is

<sup>1</sup> August 27, 2019 Notice of Receipt of Application for Review at 2.

material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering it into the hearing record.

In his argument, claimant asserted that he did not offer the photographs of the job sites into the hearing record because he did not know they would be needed, and he believed they were relevant to his case. However, decision # 90733 stated that the employer discharged claimant for failing to complete a work assignment as requested by a client without notifying a manager.<sup>2</sup> Claimant failed to show that it was beyond his reasonable control to understand from decision # 90733 that evidence supporting his assertion that he had complied with the employer's expectations when performing the work was relevant, and to offer the evidence into the hearing record. Claimant also failed to show that the photographs are material to EAB's determination because they do not show how claimant performed or coded his work at the job sites. Claimant's request for EAB to consider his additional evidence therefore is denied. EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Decibels of Oregon Inc. employed claimant as a bury drop technician from March 13, 2012 to May 10, 2019.

(2) The employer's employee handbook stated that if an employee falsified company records, the employee would be suspended without pay pending an investigation, and could be terminated without any previous disciplinary action having been taken. On March 13, 2019, claimant acknowledged that he received a copy of the employee handbook and was fully aware of all rules and requirements of his employment with the employer.

(3) The employer expected its bury drop technicians to perform their assigned tasks as instructed. If a bury drop technician was unable to perform an assigned task as instructed, the employer expected them to contact their supervisor for instructions on how to proceed. The employer expected its bury drop technicians to accurately report whether they completed an assigned task, in part, because the employer paid them on a "piece work" basis for different tasks. Exhibit 2. The employer communicated those expectations to its bury drop technicians on multiple occasions during claimant employment.

(4) On May 3, 2019, claimant was assigned to perform a 20 foot bore at a private residence for the employer's client, Charter Spectrum. A bore requires the technician to dig down 2 to 3 feet using a pneumatic tool to go under a driveway or road, creating a hole to pull a 3/4 inch cable conduit through, then pull the cable through the conduit from a pedestal location to a home. Claimant instead dug down approximately 4 feet to the client's main distribution conduit, pulled his cable through the conduit, under the driveway, and then out of the conduit. Claimant did not contact his supervisor for authorization to proceed in that manner. Claimant then completed and turned in a daily log and a drop burial form falsely indicating that he performed the 20 foot bore. Based on those reports, the employer paid claimant \$100 for performing a 20 foot bore, which claimant had not performed.

(5) The employer's client discovered that claimant had used its main distribution conduit instead of performing the 20 foot bore, reported it to the employer, and threatened to cancel its contract with the employer. On May 8, 2019, the employer suspended claimant pending an investigation. On May 10,

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<sup>2</sup> Decision # 90733 at 1.

2019, the employer discharged claimant for failing to perform a 20 foot bore he was assigned to perform on May 3, 2019, and reporting in his daily log and a drop burial form that he had performed the bore.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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) (December 23, 2018). “[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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In the present case, the employer discharged claimant for failing to perform a 20 foot bore he was assigned to perform on May 3, 2019, and reporting in his daily log and a drop burial form that he had performed the bore. The issue is whether claimant performed and reported the work he performed on May 3, 2019 in compliance with the employer’s expectations as he understood them.

At hearing, claimant’s supervisor testified that claimant understood the employer expected him to perform the 20 foot bore as assigned or contact his supervisor if he was unable to do so, and not to report that he had performed the bore after failing to do so. Audio Record at 29:00 to 35:45. The record contains written statements from claimant’s supervisor that are consistent with his testimony. Exhibits 2, 9, 10. However, claimant testified that it was his understanding that it was within his discretion to use the client’s main distribution conduit if he had difficulty performing the 20 foot bore, and that he was allowed to report that he had performed the bore despite not having done so. Audio Record at 36:00 to 44:00. The record also contains written statements from claimant that are consistent with his testimony. Exhibits 2 and 3

However, the supervisor’s testimony and written statements were corroborated by written statements from the employer’s director of operations and three of the employer’s bury drop technicians. The director of operations stated the following:

I will start by saying every year during our contract negotiations with Charter I would make a visit to the Oregon market to talk to the employee’s about any changes from previous contracts. This happens around the February or March. As of 2018 Charter no longer paid Decibels of Oregon to do bore footage in their new contracts and the same for 2019, but since our company pays piece work our management team decided to continue to pay the employee \$5.00 a foot for every driveway or road hard surface bore. My statement to ALL employee’s was “if you falsify claim a bore or mark down more footage then you actually did it would be grounds for automatic termination.” It was also

stated if there were any question or doubts call you supervisor, if you can't get ahold of him call you manager.

Exhibit 8. The three bury drop technicians all stated that at no time had they or any member of their crew been authorized to intercept a main line distribution conduit for the purposes of running cable in it. Exhibits 11, 12, 13. All three technicians stated that they had been informed by management that there would be consequences if they claimed a bore and took money for a bore they never performed. Exhibits 11, 12, 13. One of the technicians stated that, "as informed multiple times been told that you would be terminated onsite, zero tolerance policy," and that, "I have been notified verbally more than once by all supervisors that it is a termination and . . . is considered theft of company funds." Exhibit 11. Another technician stated that he was informed in January 2017 and February 2018 in company meetings "that for any reason we did this it would be instant termination." Exhibit 12.

The testimony and written statements from claimant's supervisor, corroborated by the written statements of the employer's director of operations and three bury drop technicians, outweighs claimant's testimony and written statements to the contrary. The record therefore shows that, more likely than not, claimant understood that the employer expected him to perform the 20 foot bore as assigned or contact his supervisor if was unable to do so, and not to report that he had performed the bore after failing to do so. Thus, in using the client's main distribution conduit instead of performing the 20 foot bore or contacting his supervisor, and reporting that he had performed the bore, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore violated the employer's expectations willfully, which cannot be excused as a good faith error.

The remaining issue is whether claimant's conduct is excusable as an isolated instance of poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. OAR 471-030-0038(1)(d)(C). An instance of poor judgment is isolated if the exercise of poor judgment is 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 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).

Here, claimant's conduct exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant's failure to perform the bore or contact his supervisor if he was unable to do so jeopardized the employer's relationship with its client. Claimant then falsely reported performing the bore, knowing that he would be paid for work that he not performed. Viewed objectively, claimant's conduct was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible.

Claimant's discharge was for misconduct. Claimant is disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Order No. 19-UI-134479 is affirmed.

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

**DATE of Service: September 27, 2019**

**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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# 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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

**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 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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