

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0062**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 14, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 150723). Claimant filed a timely request for hearing. On December 31, 2019, ALJ Frank conducted a hearing, and on January 8, 2020 issued Order No. 20-UI-142297, affirming the Department's decision. On January 27, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Tom Tom Deli & Market employed claimant from August 17, 2018 until October 11, 2019 as a gas attendant. Claimant worked the graveyard shift.

(2) The employer expected employees to be respectful to coworkers. Claimant understood this expectation as a matter of common sense. The employer also had a policy requiring gas attendants to wash customers' windshields unless there were many cars present at once. Failure to wash windshields resulted in "automatic termination." Transcript at 8. The employer informed claimant of its windshield washing policy at hire and again at the employer's annual employee meeting. Claimant understood that the employer expected him to wash windshields when he was not too busy with other cars to do so.

(3) On October 4, 2019, the general manager reviewed some surveillance video and saw that claimant was not washing customers' windshields during his shift although he was not busy with cars. The general manager, who did not work during claimant's shift, left claimant a note stating, "[W]e had to observe some graveyard film for the police today and we noticed you are not doing windshields. You must be doing all windshields on your vehicles." Transcript at 7-8. The owner later reviewed the video and noted that claimant did not wash cars' windshields even though the cars arrived one at a time.

(4) Claimant's next shift was from the night of October 7 until October 8, 2019. During his shift, he found the general manager's note. Claimant was upset by the note because he considered it to be a warning, and thought it was "ridiculously unreasonable" to clean all windows. Transcript at 17.

(5) Shortly after his shift ended, claimant called the general manager, and left her a telephone message when she did not answer his call. Claimant stated in his message that he was upset about the written warning and felt like the general manager should have spoken with him first. Claimant stated that he wanted to speak with the general manager and the owner about the note at an upcoming meeting, but “don’t bother to call me back,” and “I’ve had a few beers and I’m going to bed shortly.” Transcript at 23.

(6) The general manager heard the message and returned claimant’s call within 41 minutes. Claimant “answered very aggressively and started talking over [the general manager].” Transcript at 6. The general manager told claimant that they were on speakerphone, and allowed the store manager to listen to the call. Claimant told the general manager, “It’s about time. You only had a couple more minutes. I do work graveyard you know.” Transcript at 6. Claimant told the general manager that he wanted to speak with her and the owner at the same time. The general manager explained that the owner was out of town. Although claimant did not use foul language, he spoke to the general manager in a “loud, rude and disrespectful” manner. Transcript at 7. The general manager tried to speak, but claimant was “talking over” her repeatedly, and told her she could not talk. Transcript at 6, 7. Claimant told the manager that she should have asked him to do windshields rather than leaving him a note. Claimant stated that he did not wash windshields because it made the windows dirtier and interfered with his other work. While he was talking, the general manager asked claimant when she could respond. Claimant responded that she could talk “when he was done,” and did not let the general manager speak. Transcript at 7. After “about five minutes,” the general manager told claimant she would not “be treated this way,” and hung up the telephone. Transcript at 29, 7.

(7) Claimant immediately called the general manager back and spoke to her in the same “aggressive and loud” manner, without letting the general manager speak. Transcript at 29. The general manager hung up the telephone again. After the October 8 incident, the general manager was “pretty shook up” about the incident and feared that claimant would treat another employee or a customer in the same manner. Transcript at 7.

(8) On October 11, 2019, the employer’s owner discharged claimant because of his conduct toward the general manager during his telephone calls with her on October 8, 2019. The owner told claimant that he was being discharged because of those telephone calls, and claimant “acknowledged” the calls. Transcript at 33. Claimant did not tell the owner that he did not remember the calls, or state that he had been asleep or intoxicated during the calls.

**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).

Claimant knew or should have known as a matter of common sense that repeatedly “talking over” his general manager, telling her he did not wash windshields because it made them dirtier and interfered with his other work, and using a loud voice and telling the manager she could not talk until he finished talking, was insubordinate and a willful violation of the employer’s expectation that claimant treat his coworkers in a respectful manner. Claimant testified that he was “pretty sure” he was not intoxicated during the telephone calls, but speculated that he may have been “sleep talking.” Transcript at 19. However, the record does not show by a preponderance of the evidence that claimant was unaware of his conduct during the telephone calls. Claimant testified that he had “been told” that he “go[es] off” while sleeping, but did not show that he had been diagnosed with a sleep-related disorder or that his assertion that he may have been “sleep talking” was more than speculation. Transcript at 19. It is also implausible that a sleeping person would have called the general manager back after she hung up the first time. Claimant also acknowledged the telephone call with the general manager when the owner discharged him on October 11, and did not tell the owner he could not remember the calls. Claimant’s conduct during the telephone calls with his general manager on October 8 was a willful violation of the employer’s reasonable expectation that he refrain from acting in an insubordinate, disrespectful manner toward another employee.

It is necessary to determine if claimant’s conduct can be excused as an isolated instance of poor judgment. The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer’s reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer’s reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, 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).

OAR 471-030-0038(1)(d).

Claimant's conduct on October 8 cannot be excused as an isolated instance of poor judgment because it was not "isolated" as defined by OAR 471030-0038(1)(d)(A). Claimant understood that the employer expected him to wash windshields when he was not too busy with other cars to do so. The record shows that claimant failed to wash windshields even though he was not busy with cars. Claimant's assertion to the general manager that he did not wash windshields because it made the windows dirtier and interfered with his other work showed that he chose not to wash windshields, and that he had not merely forgotten to do so. His refusal to wash windshields was insubordinate and a willful or wantonly negligent violation of the employer's reasonable expectation that he complete his assigned tasks. Claimant's refusal to wash all the windshields when he was not too busy with other cars shows that the final incident on October 8 was part of a pattern of willful or wantonly negligent behavior, and therefore was not isolated. Because it was not isolated, it was not excusable as an isolated instance of poor judgment.

Even assuming that claimant's failure to wash windshields was not misconduct, claimant's conduct in the final incident was not an isolated instance of poor judgment because it exceeded mere poor judgment. Some conduct, even if isolated, may not be excused if it exceeded mere poor judgment by causing an irreparable breach of trust or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant's insubordination during his October 8 calls with the general manager made a continued employment relationship impossible. In addition to stating that he would not wash all windshields, claimant told the general manager she could not talk during the call until claimant was finished speaking. Based on claimant's conduct in response to a mere reminder that he follow the employer's directive to wash windshields, the employer understandably lost confidence that claimant could be trusted to work the graveyard shift without responding in a similar outburst with other employees and customers, and that he would perform his duties or respond appropriately when given direction in the future. Because claimant's conduct exceeded mere poor judgment, it was not excusable as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectations regarding his workplace conduct. Claimant did not show he believed, or had a factual basis for believing, that the employer would condone his conduct during the October 8 telephone calls.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned four times his weekly benefit amount from work in subject employment.

**DECISION:** Order No. 20-UI-142297 is affirmed.

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

**DATE of Service:** March 4, 2020

**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 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 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 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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