

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

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0303**

*Modified*  
*Request to Reopen Allowed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 20, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective November 10, 2019 (decision # 151742). Claimant filed a timely request for hearing. On January 16, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 30, 2020 at 3:30 p.m. On January 30, 2020, claimant failed to appear at the hearing, and on January 31, 2020, ALJ Frank issued Order No. 20-UI-143614, dismissing claimant's request for hearing based on his failure to appear.

On February 7, 2020, claimant filed a timely request to reopen the January 30, 2020 hearing. On March 10, 2020, OAH mailed notice of a hearing scheduled for March 24, 2020 at 4:30 p.m. On March 24, 2020, ALJ Frank conducted a hearing, and on April 1, 2020, issued Order No. 20-UI-147277, allowing claimant's request to reopen and concluding the employer discharged claimant for misconduct. On April 15, 2020, claimant filed an application for review of Order No. 20-UI-147277 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's request to reopen is **adopted**. Accordingly, the remainder of this decision will focus solely on claimant's work separation.

**FINDINGS OF FACT:** (1) PS Trucking Inc. employed claimant as a driver from November 19, 2018 to November 11, 2019.

(2) The employer expected its employees to refrain from destroying employer property and being dishonest with management when discussing employment matters. Claimant was aware of and understood the employer's expectations as a matter of common sense.

(3) Around November 2019, while operating an employer truck, claimant experienced problems with the truck's electronic logging device (ELD), a unit in the truck's cab that was similar to a tablet computer and recorded truck and driver activity. He reported the problems to the employer and requested that the unit be fixed or replaced, neither of which occurred.

(4) On November 6, 2019, while in the process of making a time-sensitive delivery, claimant experienced a problem while attempting to change a computer icon on the truck's ELD unit. He began tapping hard on the unit's screen to change an icon and the screen broke. When that occurred, the unit stopped operating and a video camera within the cab automatically started. The camera then captured video of claimant appearing to strike the unit with his hand more than once. Exhibit 1.

(5) Claimant texted an employer manager and reported to him that he had broken the unit's screen when he tapped on it to change an icon. When the manager texted him about whether the screen could have broken with just a tap, claimant reacted angrily because he believed the manager had accused him of lying.

(6) Later, after the manager viewed the video footage, he concluded that claimant had intentionally broken the ELD screen by striking it and then lied about it. On November 11, 2019, the employer discharged claimant for those reasons.

**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. "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 the preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for breaking an ELD unit screen in one of its trucks and then lying about how he had broken it when he reported the issue. The employer had the right to expect claimant to refrain from destroying employer property and being dishonest with management when discussing employment matters as a matter of common sense. Although claimant admitted that he had broken the screen, he denied that he had done so intentionally or in the manner the employer believed and then lied about how the screen had been broken.

Order No. 20-UI-147277 concluded, in part, that the employer discharged claimant for misconduct because he willfully destroyed equipment belonging to the employer and then lied about how he had done so when discussing the matter with the employer.<sup>1</sup> The order reasoned:

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<sup>1</sup> Order No. 20-UI-147277 at 5.

At hearing, claimant counterintuitively maintained that he had inflicted the damage upon the screen by tapping it and had then hit it much harder as the video depicted, but only after the damage was done. This testimony lacks credibility...claimant offered no such explanation to the employer when questioned about the matter and simply stuck to his story about tapping the screen while increasingly losing his temper and composure...By destroying the employer's property, claimant willfully violated the standards of behavior that the employer had a reasonable right to expect from an employee. By offering a dishonest account of the matter, he did the same...The employer discharged claimant for misconduct.<sup>2</sup>

However, the employer's witness admitted that he only communicated with claimant about the incident through a few text messages with claimant when claimant reported that he had broken the screen by tapping on it, and that he never discussed the matter with claimant after he reviewed the video. Audio Record at 23:00 to 26:00. The employer did not offer the video footage into evidence and the still photos of parts of the video that were admitted into evidence do not show when the screen broke or that claimant struck the unit with excessive force. Exhibit 1. Claimant testified that the photos the employer offered only depicted his actions "halfway through whatever video he has" and "[do not] show the point where I'm tapping and the screen broke." Audio Record at 29:30 to 31:30. At hearing, when claimant attempted to testify about the photos in evidence, he was cut off by the ALJ and not allowed to continue. Audio Record at 34:25 to 34:45.

Viewed objectively, the parties' evidence on the issue of how and when claimant damaged the ELD screen is evenly balanced, because following a careful review of the exhibits, parties' testimony, and their manner of testifying on that issue, there is no reason in the record to find that one party is more credible than the other. In a discharge case, when the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer has the burden of proof. Accordingly, we find that the employer failed to establish by a preponderance of evidence that claimant willfully damaged the employer's ELD unit screen by striking it. On this record, it is just as likely that claimant broke the screen accidentally by tapping on it to change an icon without knowing that by doing so he would probably damage the employer's equipment. Because claimant maintained that explanation when texting with the employer about how the screen broke, and there was no contrary evidence in the record, for example, from a later discussion with claimant or through actual video footage, the employer also failed to establish that claimant was dishonest with the employer about how the equipment was damaged.

Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 20-UI-147277 is modified, as outlined above.

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

**DATE of Service:** May 8, 2020

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<sup>2</sup> Order No. 20-UI-147277 at 5.

**NOTE:** This decision reverses, in part, an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately 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 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](https://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 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 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 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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