

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0304**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 18, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 131659). The employer filed a timely request for hearing. On March 31, 2020, ALJ Snyder conducted a hearing, and on April 3, 2020 issued Order No. 20-UI-147495, concluding the employer discharged claimant for misconduct. On April 14, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Garten Services, Inc., employed claimant from February 14, 2018 to January 21, 2020. The employer initially employed claimant as a custodial operations supervisor; however, on or about July 1, 2019, claimant transitioned to a position as transportation coordinator for the employer. As a transportation coordinator, claimant was responsible for scheduling and managing the employer's mobile shredding and recycling services, as well as managing the staff who performed those services.

(2) The employer performed those services for its customers using two trucks that would travel on a daily basis to the location of the employer's customers and perform the requested "pick-ups." Transcript at 30. Claimant was responsible for ensuring that the trucks went to their scheduled locations, and timely provided the shredding or recycling services to the employer's customers.

(3) The employer used a “mobile ticket” system to track customers and their account numbers, as well as whether customers used regularly scheduled services or call in services. The mobile ticket system was a tool that was relevant to the employer’s ability to bill for its services. Transcript at 21.

(4) When claimant became the transportation coordinator in the Summer of 2019, his predecessor in the position had left “a whole year prior worth of complaints” from one of the employer’s customers that were the result of missed pick-ups and the employer’s lack of communication with its customers regarding the reasons for these missed pick-ups. Transcript at 27. At all relevant times, claimant would routinely receive multiple emails, voicemails, and telephone calls from customers who were unhappy with recurring missed pick-ups. Claimant was unable to respond to all of the complaints due to their volume.

(5) Beginning in claimant’s second month as transportation coordinator, the employer began receiving an increasing number of complaints from its customers due to scheduled pick-ups that did not occur. The complaints routinely included customers expressing frustration over the employer’s failure to respond to customer complaints in a timely manner. The employer’s ability to make the scheduled pick-ups was hampered by recurring maintenance issues with the two trucks, including a fire that occurred in one of the trucks, causing it to be out of service for an extensive portion of claimant’s seven months as transportation coordinator.

(6) In August 2019, the employer noticed that claimant was not entering his mobile tickets into order processing in a timely manner. In early August 2019, the employer provided claimant training on how to use the mobile ticket system and ensured that claimant understood the system’s importance with respect to the employer’s ability to bill for its services. Although claimant’s difficulties with the system continued, and although the employer ultimately built mobile ticket system “boxes” for the claimant to help facilitate his usage of the system, by January 1, 2020 claimant was attempting, but still not able, to use the mobile ticket system correctly. Transcript at 19-21.

(7) On November 18, 2019, the employer received a complaint from a customer who had not had their shred barrels picked up in “weeks” despite the fact that the customer had called the employer the previous week and received assurances from the employer that the barrels would be picked up. Exhibit 1, E-10. The employer told the customer at the time that the delay in pick-up was due to “a shortage of trucks.” Exhibit 1 at E-10. The employer acknowledged the truck issues but viewed claimant’s lack of communication with the customer regarding the problems the employer was having with the trucks as a neglect of duty. The employer did not institute formal disciplinary action, but did designate a new supervisor for claimant and instructed him that returning communication to customers should be his priority. From that point on, claimant attempted to prioritize that customer to make sure its services were taken care of “first.” Transcript at 28.

(8) From November 2019 through December 2019, the employer continued to receive complaints from customers that pick-ups were not being made, and that the employer was not returning the customers’ calls. Claimant continued to struggle with the volume of complaints he was receiving and the employer’s expectation that he respond to each.

(9) In December 2019, the employer directed claimant to report to the front office in order to sit with his new manager “in an attempt to help him learn how to better organize his day.” Transcript at 10.

Claimant's new manager attempted to help claimant by going through claimant's backlog of voicemails and writing down the messages. The new manager felt that doing this would help claimant get caught up "because he felt like [claimant] just [had] gotten behind and never got caught up." Transcript at 36. The manager reviewed the voicemails and wrote down the messages, but left it to claimant to return the calls.

(10) Claimant contacted HR because he felt "overworked" and management agreed that between mechanical issues with the trucks, the volume of complaints claimant was supposed to respond to, managing his staff, and "whatever curve balls were thrown at [him] that day," claimant had "more work to do than one person could possibly do." Transcript at 26.

(11) On January 17, 2020, the employer received another complaint, from the same customer that complained on November 18, 2019, that the employer had not been consistently servicing the customer's new location. Claimant had made multiple contacts with this customer; however, the customer had "15 different sites" and "probably 30 different people [from those sites] trying to call [claimant]." Transcript 31. Claimant tried to contact those individuals but he had "so many calls coming in that [he] couldn't possibly answer all of them." Transcript at 31. The customer's complaint was elevated to the employer's executive level, and the employer decided to suspend claimant while it further investigated the situation.

(12) On January 21, 2020, the employer decided to discharge claimant for allegedly neglecting his duties.

**CONCLUSIONS AND REASONS:** The employer failed to establish that claimant's discharge was 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). Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that, despite evidence demonstrating that claimant "did not have adequate trucks to complete all of his job duties and pickups, and that he was unable to return phone calls promptly because he was receiving an extremely high number of voicemails," claimant failed to take advantage of the "multiple times" the employer had "offered . . . to assist Claimant." Order No. 20-UI-147495 at 4. More specifically, the order concluded that claimant "dismissed additional training and assistance in August 2019, and continued to refuse to make use of the mobile ticket system that the Employer had established for him and instructed him to use." Order No. 20-UI-147495 at 4. As a result,

the order concluded that claimant was wantonly negligent because he failed “to return voicemails after November 2019,” and he “knew or should have known that failing to return voicemails from customers, or communicate his inability to do so to his Employer, would probably result in a violation of the Employer’s reasonable expectations.” Order No. 20-UI-147495 at 4. The record does not support those conclusions.

The preponderance of the evidence demonstrates that, with respect to the mobile ticket system, claimant participated in the training provided by the employer. Although the record also shows that claimant had not perfected his use of the system prior to his termination on January 21, 2020, as of January 1, 2020, claimant had made positive progress in more regularly and effectively using the system. In any event, claimant’s inefficiencies with respect to the mobile ticketing system are not material because the preponderance of the evidence demonstrates that the mobile ticketing system was a tool used by the employer “to bill for [its] services,” and “ha[d] nothing to do with communication, [including] calling customers back,” which was the basis presented by the employer for claimant’s termination. Transcript at 21.

The employer recognized that the recurring maintenance issues with its two trucks were adversely impacting claimant’s ability to ensure that pick-ups were timely made. However, the employer concluded that these maintenance issues were no excuse for failing to keep proper communication with customers. While the record demonstrates that claimant struggled to respond to the multiple complaints the employer received based on the missed pick-ups that occurred, the evidence also supports the conclusion that claimant inherited numerous complaints when he took over as transportation coordinator; that the volume of complaints that claimant was required to address at any given time was substantial; and that claimant did make some efforts to reach out to customers. *See* Exhibit 1, E-16 (January 7, 2020 email from claimant to customer); Exhibit 1, E-9 (email from claimant to his manager addressing the contacts he made with a dissatisfied customer); Exhibit 1, E-19 (customer complaint referencing the “frequent” phone calls he had with claimant). The preponderance of the evidence supports the conclusion that claimant not only tried to improve his communication with dissatisfied customers, but that he also tried to explain to those customers the limitations that were occurring due to the employer’s truck shortage. Exhibit 1, E-19 (customer complaint where customer noted, “I do understand that over the summer there were issues with a truck, but these issues have begun since we opened an additional location...”); Exhibit 1, E-10 (customer complaint where customer noted that they were told there was a “shortage of trucks” and that “[t]his is the same excuse they’ve used for the past six months, and while it may be true, that doesn’t help us get our ... documents shredded”).

Under the totality of the circumstances, the record fails to show that claimant was different to the consequences of his actions or consciously disregarded the employer’s interests, and that his conduct was not mere inefficiency resulting from a lack of management skills or experience as a transportation coordinator. Mere inefficiency resulting from a lack of job skills or experience is not misconduct.

For those reasons, the employer failed to establish that claimant’s discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 20-UI-147495 is set aside, as outlined above.

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

**DATE of Service: May 11, 2020**

**NOTE:** This decision reverses 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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

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**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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