

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0425**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On April 15, 2020, 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 March 8, 2020 (decision # 92447). Claimant filed a timely request for hearing. On May 12, 2020, ALJ J. Williams conducted a hearing, and on May 15, 2020, issued Order No. 20-UI-149865, affirming the Department's decision. On May 26, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision. Claimant asserted that the hearing proceedings were unfair because she did not receive Exhibit 1 until shortly before the hearing and because the ALJ did not take testimony from her witnesses. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

**FINDINGS OF FACT:** (1) Department of Revenue employed claimant as a revenue agent from December 12, 2011 until March 12, 2020.

(2) The employer had a "zero tolerance" access and use of confidential information policy that prohibited its revenue agents from accessing a taxpayer's account unless the revenue agent had a business reason to access the account. Transcript at 7, 9. The employer expected revenue agents to document the reason for accessing a taxpayer account any time a revenue agent accessed a taxpayer account. Claimant understood the employer's policies and received annual training regarding them.

(3) On October 31, 2016, claimant accessed the accounts of two taxpayers, "taxpayer 2" and "taxpayer 3," without a business reason for doing so. Transcript at 12. There was nothing in the accounts that would indicate claimant had a business need to access the accounts. Exhibit 1 at 5. Claimant did not make any notes or otherwise document the taxpayers' accounts to show her reason for having accessed

the taxpayers' information. Taxpayer 2 later became claimant's husband, and taxpayer 3 was the wife of taxpayer 2 at the time claimant accessed her account.

(4) On January 29, 2020, claimant accessed information of a taxpayer, "taxpayer 1" without a business reason for doing so. Transcript at 12. Claimant did not document a reason why she accessed taxpayer 1's information. Claimant attended a training for part of the day on January 29. There was no problem with the computer system on January 29 that would have prevented claimant from being able to log notes about why she accessed taxpayer 1's information. Exhibit 1 at 40. Claimant's telephone report for January 29, 2020 showed claimant had no incoming calls to her telephone that day. Exhibit 1 at 14. All telephone calls, including transfers to claimant's desk telephone, would have shown on claimant's telephone report. Exhibit 1 at 6. Taxpayer 1 was the ex-husband of claimant's coworker.

(5) On January 30, 2020, the employer's disclosure office detected claimant's access of taxpayer 1's account. The employer began an investigation into claimant's access of taxpayer accounts, and identified the two October 31, 2016 incidents as other potential violations. Exhibit 1 at 3.

(6) In February 2020, the employer investigated the three incidents when claimant accessed taxpayer information without an apparent business reason for doing so. Claimant told the employer she recognized that taxpayer 1 was a coworker's ex-husband when she spoke with him but that she did not report the incident to a manager. Exhibit 1 at 14. Claimant did not provide the employer with any reason for having accessed the two taxpayers' accounts on October 31, 2016. Exhibit 1 at 6. As a result of the investigation, the employer concluded that claimant accessed the accounts of taxpayers 1, 2, and 3 without a business reason in violation of its access and use of confidential information policy.

(7) On March 12, 2020, the employer discharged claimant for violating its access and use of confidential information policy by accessing taxpayer accounts without a business reason for accessing the accounts.

**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). Isolated instances of poor judgment and good faith errors do not constitute misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its access and use of confidential information policy by accessing taxpayer information on January 29, 2020 without a business reason for doing so. Claimant's explanations for her conduct on January 29 were outweighed by the employer's evidence that claimant accessed taxpayer 1's information without a business reason. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish

misconduct by a preponderance of evidence). Claimant alleged that she spoke with taxpayer 1, her coworker's ex-husband, on January 29, 2020 because she received a call from him at her desk. Transcript at 20. Claimant's testimony is outweighed by the employer's evidence that claimant received no incoming calls that day, either directly to her or transferred to her, and by claimant's failure to report the incident to a manager even though claimant told the employer during its investigation that she recognized the caller as being her coworker's ex-spouse. Had claimant received a call from a coworker's ex-husband, it is more likely than not that claimant would have reported that contact to a manager. Moreover, although claimant alleged that she spoke with taxpayer 1 about a collections matter with another agency, claimant made no notes to taxpayer 1's account. Transcript at 23. Claimant asserted that she did not log notes to the account because she was busy in training and because the computer system was "down" and she was unable to log notes. Transcript at 19. However, claimant was in training for only part of the day, and the employer's records show that there was no problem with the computer system that day that would have prevented claimant from logging her reason for accessing a taxpayer's account. In sum, the weight of the evidence shows that claimant willfully violated the employer's access and use of confidential information policy on January 29, 2020.

The next issue is whether claimant's January 29, 2020 conduct was an isolated instance of poor judgment, and not misconduct. See OAR 471-030-0038(3)(b). 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 January 29, 2020 cannot be excused as an isolated instance of poor judgment because it was not isolated. The preponderance of the evidence shows that claimant accessed her ex-husband's and his former wife's information on October 31, 2016 without a business reason. Considering claimant's apparent personal relationship to the taxpayers, it is implausible that absent any reason apparent in the taxpayers' accounts, or any notes logged by claimant in those accounts, that claimant would have accessed both of their accounts for a valid business reason. More

likely than not, claimant's accessing those accounts was a willful violation of the employer's confidential use policy, and claimant's January 29 conduct was therefore a repeated act and part of a pattern of willful conduct on claimant's part.

Claimant's conduct on January 29, 2020 also cannot be excused as an isolated instance of poor judgment because it exceeded mere poor judgment. The record is insufficient to determine if claimant's conduct violated the law or was tantamount to unlawful conduct. However, viewed objectively, claimant's conduct on January 29, 2020 was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible, because claimant repeatedly accessed taxpayers' private information without a business reason, the employer could no longer trust claimant to continue having access to taxpayers' information. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3)(b).

Claimant's decision to access a taxpayer's information on January 29 without a business reason was not the result of a good faith error. Claimant understood the employer had a zero tolerance policy that could result in immediate discharge if she were to access taxpayer information without a valid business reason. She had annual training regarding the policy. The record contains no evidence to show that claimant could have reasonably believed the employer would permit her to access taxpayer information without a business reason.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 20-UI-149865 is affirmed.

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

**DATE of Service:** July 2, 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 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 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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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