

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0436**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 28, 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 January 19, 2020 (decision # 113623). Claimant filed a timely request for hearing. On April 1, 2020, ALJ Murdock conducted a hearing, and on April 3, 2020, issued Order No. 20-UI-147461, concluding the employer discharged claimant, but not for misconduct. On April 10, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Artector Inc. employed claimant as a plasterer from July 8, 2019 until January 22, 2020.

(2) The employer's chief operating officer (COO) expected claimant to refrain from yelling at him, using foul language toward him, and stating to him that he would report the employer to government agencies for alleged wage and safety violations. Claimant knew as a matter of common sense not to yell or use foul language toward the COO.

(3) On multiple occasions prior to January 21, 2020, claimant had not clocked in and out within the immediate vicinity of his jobsite when he used the employer's timekeeping application on his telephone. The employer suspected that on some of those occasions, claimant was not working all the hours for which he was paid. Conversely, claimant believed that the employer did not always pay him for all the hours he worked. Claimant also believed that the employer did not always follow state health and safety rules on the jobsite.

(4) On January 21, 2020, the work crew at the jobsite where claimant was working ate pizza for lunch to celebrate an employee's birthday. Claimant finished his lunch within 30 thirty minutes and returned to work. While claimant was working, the onsite supervisor told claimant and other workers to take the leftover pizza. Claimant got down from the scaffolding where he was working, took some pizza and put it in his vehicle, which was parked one block from the work site. The employer's project manager drove by claimant while he was near his vehicle, and asked claimant why he was not working. Claimant

responded, “I’m just getting the pizza and putting it in my car and going back.” Transcript at 32. The project manager told claimant that he would have to start using the foreman’s telephone instead of his own telephone to clock in and out for work. Claimant did not get angry, yell, or use foul language toward the project manager. Claimant returned to work. The project manager reported to the COO that claimant had taken a two-hour lunch break.

(5) The morning of January 22, 2020, the COO called claimant. The COO had no plans to discharge claimant at that time. The COO asked claimant why he was away from the jobsite during work hours on January 21. Claimant explained that he took leftover pizza to his car so he could bring it home for his children. The COO told claimant he had to clock in and out using the employer’s iPad or telephone at the jobsite. The COO told claimant that he thought claimant had taken a two-hour lunch break although he was only permitted to take a 30-minute lunch break. Claimant did not yell at the COO or use foul language.

(6) The COO attempted to call claimant several more times before 10:00 a.m., and claimant did not answer the telephone. Claimant was working on a scaffold at the jobsite. The COO sent claimant a text message stating, “[Y]ou are fired. You’re not picking up the phone, therefore I am informing you, via this text message, that [your] clock for today has stopped at 10 a.m. You no long [sic] have a job, go home.” Transcript at 19-20. While claimant was working, another employee claimant did not know approached him and told him that the COO had called and told him to tell claimant, “[G]rab your stuff, grab your tools and go home.” Transcript at 35.

(7) On January 22, 2020, the employer’s COO discharged claimant because claimant allegedly yelled and used foul language toward the COO, and told him he would report the employer to the state for violating the law during a telephone call on January 22, and because claimant did not apologize or respond to the COO’s subsequent telephone calls.

**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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer’s witness, the COO, asserted at hearing that the employer discharged claimant for “multiple falsification of time records.” Transcript at 5. However, the COO also testified that he “had no intentions of firing [claimant]” until claimant “blew off” at him on the telephone on January 22 and did not return the COO’s subsequent telephone calls to claimant. Transcript at 20, 46. Although there was evidence at hearing regarding claimant’s timekeeping practices, the initial focus of the discharge analysis is on the final incident that prompted the employer to discharge claimant. *See e.g. Appeals*

*Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). Here, because the final incident that prompted the COO to discharge claimant was claimant's alleged conduct on January 22, that incident is the initial focus of the misconduct analysis. Because this decision concludes that the preponderance of the evidence does not show claimant engaged in misconduct during the final incident, this decision will not address the employer's allegations that claimant falsified his time records.

In a discharge case, the employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). As a second preliminary matter, because the employer had the burden of proof to show misconduct in this case, where the testimony conflicted between the parties, this decision based its findings on claimant's testimony. The testimony conflicted between the parties regarding claimant's conduct during his telephone call with the COO on January 22. The COO asserted that claimant yelled, used foul language, and "threatened" to report the employer to government agencies for violating the law. Transcript at 18-19. Claimant, however, denied becoming angry, yelling, or using foul language. Transcript at 32, 36. Viewed objectively, the evidence on those issues was no more than equally balanced between the parties. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. Consequently, on those disputed facts, this decision based its findings on claimant's evidence.

The employer had a reasonable expectation that claimant would refrain from yelling at the COO or using foul language toward him. With respect to claimant's conduct during the January 22 telephone call with the COO, the evidence that claimant yelled and used foul language was equally balanced with the evidence that claimant did not get angry, yell or use foul language. Therefore, because the evidence is (no more than) equally balanced as to whether claimant willfully, or with wanton negligence, violated the standards of workplace behavior that an employer has the right to expect of an employee, the employer failed to meet its burden establish misconduct by a preponderance of evidence. Nor does the record show that claimant consciously ignored the COO's telephone calls. The record shows that claimant was working on a scaffold, and does not show he knew the COO had called until another employee reported to him that the COO had discharged him. To the extent claimant stated he would report the employer to government agencies for violating the law, the record does not show that claimant violated a reasonable employer expectation because the record is persuasive that claimant believed in good faith that the employer had violated the law.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 20-UI-147461 is affirmed.

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

**DATE of Service:** June 9, 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**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.

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