

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0509**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 4, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and she was disqualified from benefits effective January 26, 2020 (decision # 115352). Claimant filed a timely request for hearing. On April 30, 2020, ALJ Monroe conducted a hearing, and on May 4, 2020 issued Order No. 20-UI-149170, affirming the Department's decision. On May 8, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) ULTA employed claimant as a sales associate from October 16, 2018 to January 28, 2020.

(2) The employer had a policy prohibiting employees from creating and distributing samples of any skincare products, with the exception of Clinique and MAC products. The employer furnished small disposable containers for creating and dispensing Clinique and MAC samples. The policy explicitly prohibited the use of said containers for any other products. The employer inspected employees' belongings when they left the workplace as a matter of course. The employer also had a policy that required employees to behave honestly and with integrity. The employer provided claimant a copy of its written policies during her on-boarding and at bi-annual trainings.

(3) On January 21, 2020, claimant collected sample containers from the Clinique area of the store, then filled seven of those containers with Dermalogica products. Claimant did not label the sample containers with the brand names. Claimant placed two containers in her purse, and five containers in her bra. At the conclusion of her shift, the manager on duty conducted the employer's mandatory inspection and discovered the two samples in claimant's purse. Transcript at 6. The manager asked claimant about the samples, including how many she took and what brands she was sampling. Claimant responded that she had taken two samples. Claimant initially stated she wasn't sure what brands they were, then later asserted she thought they were from Clinique.

(4) On January 24, 2020, the employer suspended claimant pending an investigation of the January 21 incident. Upon reviewing the store's security camera footage, the employer confirmed that claimant prepared seven samples using Dermalogica products in Clinique containers, and placed two samples in her purse and five inside her bra. The employer construed claimant's decision to store five containers in her bra as an attempt to conceal them from the manager's inspection. Transcript at 7, 10, 11. The employer concluded that claimant's actions constituted theft and dishonestly, and terminated her employment on January 28, 2020 for violating its sampling and integrity policies.

**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 are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer had the right to expect claimant to comply with its policies and refrain from dishonesty and from taking samples of product brands not authorized by the employer for sampling. Claimant received copies of the employer's policies. The employer discharged claimant for taking samples of product brands she was not authorized to take and for being dishonest by concealing some of the samples in her bra and not disclosing the brand of the product she took.

There is no dispute in this record that on January 21, 2020, claimant prepared seven samples of products of which at least some were Dermalogica, a product the employer did not allowed sampling of, to take home to try. Transcript at 32, 33. At hearing, claimant testified that during her employment she was encouraged to try new products so that she could discuss and make recommendations to customers and to that effect, she frequently created product samples from various brands to take home with her to try. Transcript at 22. However, claimant did not label any of the samples with their brand names; without being able to connect the product brand to the product she was sampling, claimant logically could not discuss and recommend particular products to customers.

While claimant testified that she relied on her knowledge of skincare products to differentiate between products, when asked by the manager what products were in the two containers in her purse, she was initially unable to recall either the product type or what brand they were, but finally said they were both Clinique even though she had taken samples from Dermalogica, too. Claimant also alleged that she did not know what products or brands she had in her bag on January 21<sup>st</sup> because she "wasn't asked about it until like three, four weeks later." Transcript at 19. However, the employer actually asked claimant what was in her bag on January 21<sup>st</sup>, and then again only three days later. Based on these facts, it is unlikely

that claimant could have ascertained the specific brand name of the products she was sampling and relied upon her use of those samples to recommend specific products or brands to customers.

There is also no dispute that on January 21, 2020, claimant placed five of the samples in her bra. The employer's review of the store video showed claimant placing two samples in her purse and five in her bra. Claimant maintained at the hearing that while she had initially placed samples in her bra because her hands were full, she later took the samples from her bra and put them all in her purse. Transcript at 21-22. Yet, when claimant's manager checked her purse, the manager found only two samples in her purse. Transcript at 22. Claimant's position cannot be reconciled with the evidence that she prepared seven samples but only two were in her purse at the end of her shift.

Furthermore, if claimant sincerely believed that she could take samples of any brand she chose, then it is not logical that when asked what brand of product was in her purse, she did not disclose that at least some of it was Dermalogica, a prohibited brand. She had just filled the sample containers with Dermalogica that day, so it does not make sense that claimant would have forgotten that the containers contained something other than Clinique products. Instead, though, she claimed that the samples were from Clinique, a brand the employer authorized employees to sample. The record therefore shows, more likely than not, that claimant understood that she was prohibited from taking samples of Dermalogica products, and that concealing the samples and not disclosing the product brand was dishonest. Thus, in sampling Dermalogica and concealing it from the employer, claimant willfully engaged in conduct she knew violated the employer's expectations. Because claimant violated the employer's expectations willfully, she could not have sincerely believed that she was not violating the expectations, and the violation cannot be excused as a good faith error.

Claimant's conduct also cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is defined to include a single or infrequent exercise of willful or wantonly negligent poor judgment, and cannot exceed mere poor judgment by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d). As set forth in this decision, claimant admitted that she engaged in frequent willful sampling of brands other than Clinique and MAC, each of which involved claimant's exercise of poor judgment. Her conduct was therefore not a single or infrequent act, but rather involved repeated exercises of poor judgment over the course of her employment. Transcript at 32, 33. Claimant's conduct therefore was not isolated. Claimant's January 21, 2020, conduct also exceeded mere poor judgment. Claimant's failure to disclose that she took seven samples, failure to disclose that at least some of the samples were Dermalogica products, and her attempts to conceal the samples she was taking by hiding five in her bra, all violated the employer's honesty and integrity policy. No reasonable employer would continue to employ an individual who was dishonest with and tried to conceal her actions from the employer; her dishonesty therefore made a continued employment relationship impossible.

For the reasons stated above, the preponderance of the evidence in this record establishes that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Order No. 20-UI-149170 is affirmed.

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

**DATE of Service: July 15, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.