

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0536**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 13, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and disqualifying claimant from receiving unemployment insurance benefits effective March 15, 2020 (decision # 111137). Claimant filed a timely request for hearing. On June 29, 2020, ALJ J. Williams conducted a hearing, and on July 1, 2020 issued Order No. 20-UI-151722, affirming the Department's decision. On July 17, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring 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).

**FINDINGS OF FACT:** (1) TC Home Furnishings employed claimant from February 5, 2020 until March 15, 2020 as a delivery driver.

(2) The employer expected claimant to follow delivery instructions from its owners and to refrain from engaging in insubordinate conduct toward the owners. Claimant understood the employer's expectations as a matter of common sense.

(3) On March 15, 2020, one of the employer's owners prepared a detailed, numbered list of delivery instructions for claimant and his delivery partner to follow and complete that day. The owner expected claimant to complete the items on the list in the order provided on the list. The owner reviewed the list with claimant and his delivery partner before they began their deliveries on March 15. The owner expected claimant or his partner to text her when they arrived at and left each delivery site on the list.

(4) Later on March 15, 2020, the employer received two customer calls. One customer stated that their delivery arrived early that day, and the other customer stated their delivery arrived late. Claimant and his partner completed their assigned deliveries that day, but the owner believed that

claimant and his partner failed to follow the delivery instructions in the order indicated on the list and that completing the deliveries out of order was inefficient.

(5) Later on March 15, 2020, the owner, claimant, and his delivery partner met and discussed the March 15 deliveries and the employer's delivery procedures. The owner and claimant disagreed about how deliveries should be completed. One of the delivery drivers was coughing frequently, and claimant wanted the employer to change how the employer completed its deliveries to reduce claimant's potential exposure to COVID-19. The owner wanted the deliveries completed in the same manner as she had instructed on the list and did not like claimant asserting otherwise. The owner told claimant to leave the store. Claimant left the store.

(6) The employer's other owner went outside and spoke with claimant, and told him he would speak with the owner who had told claimant to leave, and would let claimant know if the employer would permit him to return to work.

(7) Claimant did not report to work on March 16, 2020 because neither owner, nor any other employer representative, contacted him to tell him he should return to work. Late in the afternoon on March 16, claimant sent text messages to the owner with whom he had the disagreement on March 15, asking to return to work and apologizing for the negative interaction between him and the owner on March 15. The owner told claimant the employer would not permit him to return to work.

(8) The employer discharged claimant on March 15, 2020 for allegedly yelling at an owner and behaving in an insubordinate manner toward her when discussing claimant's delivery practices on March 15.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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 a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 20-UI-151722 concluded that the employer discharged claimant for misconduct, finding that claimant consciously engaged in conduct that he knew would violate the employer's reasonable expectations when he "yelled and cursed" at one of the owners when she met with claimant and another delivery driver on March 15, 2020.<sup>1</sup> The order recognized that the parties' testimony conflicted about what occurred on March 15, but based its findings of fact on the owner's testimony, explaining that it

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<sup>1</sup> Order No. 20-UI-151722 at 3.

found the owner's testimony more persuasive because claimant sent text messages to the owner that did not refer to claimant's health concerns and "supported [the owner's] testimony."<sup>2</sup> The order also concluded that claimant's conduct on March 15 was not a good faith error, and was not an isolated instance of poor judgment because his insubordinate conduct created an irreparable breach of trust in the employment relationship and exceeded mere poor judgment.<sup>3</sup> However, on this record, the employer failed to meet its burden to establish that claimant engaged in misconduct during the final incident on March 15.

The employer had a reasonable expectation that claimant would follow the employer's reasonable instructions and refrain from yelling or using foul language when conversing with an employer owner. With respect to claimant's interaction with the owner when discussing the employer's delivery practices on March 15, that owner's testimony was that claimant did not follow the owner's delivery list in the proper order and did not send the owner text messages about his deliveries throughout the day. Transcript at 8. The owner also testified that when she met to discuss this issue with claimant, he became "very upset," and told her he "didn't know what [she] was doing," and he would not follow her instructions. Transcript at 8, 11. The owner alleged that claimant used "a very loud voice and nearly threatening voice," and told her he "doesn't know what the 'f' [her] problem is." Transcript at 8. The owner testified that claimant continued to get louder, and she told him to leave the premises. Transcript at 9. The owner also testified that claimant had received two prior verbal warnings for failing to do tasks in the store when he was not completing deliveries, and for speaking in a disrespectful manner to other delivery drivers. Transcript at 12-13.

However, claimant's testimony differed substantially from that of the owner. Claimant testified that he followed the owner's instructions on March 15, and that he himself initiated the conversation with the owner on March 15 to discuss potential health issues related to COVID-19 while working with a coworker who had a cough, and transferring unsanitary used furniture in the employer's delivery trucks. Transcript at 18-19. Claimant denied having failed to follow the owner's instructions, and denied yelling at the owner. Transcript at 21, 23. Instead, claimant's testimony was that the owner discharged him because she was "angry" and "tired of hearing it" when claimant made safety-related suggestions to avoid getting sick such as sterilizing the trucks between deliveries. Transcript at 22-23. Claimant denied ever having received a warning before March 15. Transcript at 28.

The evidence is no more than equally balanced as to whether claimant failed to follow the owner's instructions, yelled at the owner, or used foul language. The employer's testimony was rebutted by the claimant's testimony. A second employer witness, the employer's delivery manager, provided no firsthand testimony about the final incident because he was not at work on that day. Transcript at 36-38. The order under review found that claimant's text messages were "persuasive evidence" that claimant engaged in insubordinate behavior during his March 15 meeting with the owner.<sup>4</sup> However, claimant's testimony that his messages were merely an attempt to "let [the owner] be the boss and let her be right," and to apologize for having a "negative interaction" with the owner, are equally persuasive evidence that

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<sup>2</sup> Order No. 20-UI-151722 at 3.

<sup>3</sup> Order No. 20-UI-151722 at 3.

<sup>4</sup> Order No. 20-UI-151722 at 3.

his text messages were not an admission that he consciously engaged in insubordinate behavior, but rather, that he disagreed with the owner about the health and safety of the employer's delivery practices and did not want to lose his job due to the disagreement. The record does not show that claimant's text messages contained an admission that he yelled or used foul language. Transcript at 29-30. In sum, the record does not show by a preponderance of the evidence that in disagreeing with the owner about health and safety issues, claimant engaged in insubordinate conduct.

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 to establish misconduct by a preponderance of evidence. 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-151722 is set aside, as outlined above.

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

**DATE of Service:** August 17, 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](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 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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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