

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0639**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 29, 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 May 17, 2020 (decision # 154349). Claimant filed a timely request for hearing. On September 3, 2020, ALJ Messecar conducted a hearing, and on September 10, 2020 issued Order No. 20-UI-153803, affirming the Department's decision. On September 29, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered both claimant's and the employer's written arguments in reaching this decision.

**FINDINGS OF FACT:** (1) Fairview Trucking Company employed claimant as a truck driver from May 19, 2017 to May 19, 2020.

(2) The employer was owned and managed by RO. RO's son, KO, worked as a driver and assistant manager for the employer. Claimant drove an employer truck to make both local and long-distance deliveries and was paid a monthly salary, rather than on an hourly basis.

(3) The employer expected claimant to follow reasonable management directives regarding attending requested meetings and communicating with the employer regarding work matters. Claimant was aware of the employer's expectations as a matter of common sense.

(4) Claimant had several dogs that he considered "family." Transcript at 42. Two of his dogs had heart conditions that required the administration of medication on a strict schedule. When claimant worked a

local delivery route, claimant was home in time to administer the required medication in a timely manner. When claimant worked a long-distance delivery route and was away from home, claimant arranged in advance for someone to come to his house and administer the required medication to his dogs. KO understood that claimant's dogs had health issues and were extremely important to claimant. KO also understood that claimant was "very OCD [obsessive] about his scheduling." Transcript at 19.

(5) On Wednesday, May 13, 2020, claimant was on the employer's premises, and RO and KO asked claimant to meet with them and the employer's dispatcher at that time to discuss work performance issues. Claimant agreed to meet. During the meeting, RO told claimant that they were dissatisfied with two costly mistakes claimant had recently made, his tendency to report for work late, and what they perceived as his poor communication regarding past work matters. RO then told claimant that the employer was switching claimant from a monthly salary to an hourly rate, with claimant paid only for hours worked while driving. Transcript at 52, 58-59. RO and KO asked claimant to decide whether he would continue his employment under those terms. Claimant responded that he needed to consider the health and well-being of himself and his dogs, that "his dogs come first," and that he "would go home and think about the pay reduction." Transcript at 31-32, 37. Claimant believed that the employer had changed his compensation from a monthly salary to an hourly rate at the meeting, although the employer had not yet done so.

(6) On May 14, 2020, claimant did not report for work. However, he sent separate text messages to KO and the employer's dispatcher. The text message to KO stated that he had felt "humiliated" and publicly shamed" in front of other coworkers during the meeting on May 13, and did not feel that the work environment was "safe" for him. Transcript at 25, 47-48. KO did not understand if claimant's reference to a work environment that was unsafe pertained to claimant's concern about being humiliated, his health, or "something in the company," but believed that it was not so urgent that the employer needed to address it immediately. Transcript at 26-28. Claimant's text message to the dispatcher stated, "I told [RO] and [KO] that I would give an answer by Monday on what I will be doing. Changing my pay and my schedule in the midst of COVID-19 is a challenge. I will be talking to you guys by Monday, . . . May 18<sup>th</sup>." Transcript at 81. However, a meeting on May 18 was never scheduled.

(7) On Friday, May 15, 2020, claimant accepted a route and worked for the employer. Also on May 15, 2020, the employer prepared a letter to claimant about work conditions going forward, and claimant's decision about continuing to work for the employer under the terms outlined during the May 13 meeting. The letter was never given to claimant to review and consider.

(8) On Monday, May 18, 2020, claimant worked all day for the employer, but ended the day in North Plains, Oregon, because he ran out of allowable drive time under U.S. Department of Transportation (DOT) regulations. Claimant spent the night in North Plains, Oregon, away from his home.

(9) On May 19, 2020, claimant began his workday in North Plains, Oregon, and worked 9 to 10 hours before returning to the employer's work yard around 3:30 p.m. After returning, claimant cleaned the inside of his truck and clocked out on his telephone. When claimant exited his truck, he saw KO standing next to the truck. KO requested an immediate meeting with claimant to go over the letter the employer had prepared on May 15, 2020, even though the employer had not given claimant the letter or notice that the employer expected to meet with claimant. Claimant told KO that he had logged out of his electronic log, was "off the clock," had no prior notice of a required meeting, had "prior engagements,"

and was going home. Transcript at 46-47. He also told KO that if KO scheduled a meeting for May 20, claimant would attend because he was working a local route for the employer. Transcript at 47. Claimant then walked toward his vehicle to go home. KO told claimant, “[I]f you walk away from me you’re fired.” Transcript at 47. Although KO gave claimant that ultimatum, KO and RO understood there was no business urgency for the meeting to occur that evening. Transcript at 27-28, 83.

(10) The “prior engagements” claimant referred to on May 19, 2020 were his need to return home to administer medication to his dogs on time. Claimant did not explain that to KO at the time. Claimant told KO, “You have the right to do whatever you gotta do. But like I told you, [KO], I’m already off the clock. And I’m sorry, but I’ve already got prior engagements, and I’m going home.” Transcript at 47. KO then terminated claimant’s employment by stating, “[I]t’s no longer a good fit having [you] work here and please clean out your truck.” Transcript at 8.

**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) (September 22, 2020). “[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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). A conscious decision not to comply with an unreasonable employer expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

As a preliminary matter, to the extent the testimony of the parties differed on whether claimant told KO that he had prior engagements that precluded him from attending the requested meeting on May 19 and whether claimant suggested a meeting the following day, the evidence on those issues was no more than equally balanced. Claimant testified that he made both statements, KO testified that he did not recall whether claimant stated that he had a “prior engagement,” and RO testified that he did not hear claimant make that statement. Transcript at 46-47, 70, 72. KO testified that he recalled that claimant suggested that KO schedule a meeting to discuss KO’s concerns, and RO did not testify on that issue. Transcript at 20. Although RO testified that he listened to the conversation between KO and claimant from around a building, he testified that he did not hear all of the conversation, and the record is silent as to how far away he was from the conversation. Transcript at 72. On this record, each witness was equally credible. Accordingly, the evidence as to whether claimant told KO that he had prior engagements that precluded him from attending the requested meeting on May 19 and suggested a meeting the following day was no more than equally balanced. 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. Therefore, facts were found on those issues in accordance with claimant’s testimony.

Order No. 20-UI-153803 concluded that the employer discharged claimant for misconduct, reasoning that claimant's refusal to meet with the employer on May 19 after raising a safety issue was insubordinate, and at least a wantonly negligent violation of the employer's expectation that claimant follow the employer's reasonable instructions. Order No. 20-UI-153803 at 1, 3. The order further reasoned that claimant's refusal to meet also constituted an irreparable breach of trust that could not be excused as an isolated instance of poor judgment. Order No. 20-UI-153803 at 4. However, the record does not support the order's conclusions.

It was undisputed that the final incident on which the employer based its decision to discharge claimant was claimant's refusal to meet with KO after claimant exited his truck on May 19, 2020. However, the record fails to show that the employer's expectation and insistence that claimant meet at that time to discuss the employer's May 15 letter, claimant's decision on whether he intended to continue his employment under the terms previously outlined, and his allegation that he believed the work environment was not "safe" for him was reasonable under the circumstances. KO knew that claimant was "very OCD [obsessive] about his scheduling," that a meeting was not prescheduled with claimant at that time, that claimant had not yet been given the employer's May 15 letter, and that claimant had apparently decided to continue to work for the employer for the time being because he had worked on May 15, 18, and 19, and was scheduled to work a local route the next day. KO also knew that even though he wanted to discuss claimant's previous statement that the work environment was not "safe" for him, there was no business urgency to discuss that issue the evening of May 19 rather than on May 20 as claimant had suggested. In addition, KO knew that claimant had just worked all day, had been out of town for two days, that his "family" of dogs had health issues and were important to claimant, and that claimant had just told him that he had "previous engagements" that conflicted with an immediate meeting of unknown length. Finally, even though KO knew that claimant believed that he had already been switched to an hourly employee and was "off the clock," a belief that RO admitted "probably" resulted from their May 13 meeting, KO did not clarify to claimant that he was still a salaried employee that would be paid for the time spent at the meeting. Transcript at 36.

For the reasons stated, the preponderance of the evidence shows that the employer's expectation that claimant meet with KO immediately after he returned to the yard on May 19, 2020 was unreasonable under the circumstances, or at least that claimant sincerely believed, and had a rational basis for believing, that it was unreasonable under the circumstances. For those reasons, claimant's conscious decision to go home and administer necessary medication to his dogs rather than meet with KO immediately after he returned to the yard on May 19, 2020 was not misconduct under OAR 471-030-0038(1)(d)(C), or was, at worst, a good faith error under OAR 471-030-0038(3)(b), and not misconduct.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Order No. 20-UI-153803 is set aside, as outlined above.

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

**DATE of Service:** November 6, 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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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