

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0168**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On December 16, 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 August 9, 2020 (decision # 101534). Claimant filed a timely request for hearing. On February 10, 2021, ALJ Toth conducted a hearing, and on February 17, 2021 issued Order No. 21-UI-161108, affirming decision # 101534. On March 8, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wright Tree Service, Inc. employed claimant as a crew “foreman,” from October 22, 2018 until August 13, 2020. Transcript at 27.

(2) The employer had a contract with Pacific Power, a public utility, to maintain its 20-foot-wide power line right-of-way by trimming or removing trees within that right-of-way which crossed the private property of landowners. The employer employed a “permittee” to notify the property owner that the employer would be on their premises during a specified time with the permission of Pacific Power to trim or remove problematic trees. Transcript at 58-59.

(3) The employer expected its employees to avoid confrontations with property owners or damaging their property while performing their jobs. The employer expected its employees, when working on private property, to obtain express permission from the property owner before driving its machinery onto any portion of the property not already authorized by the property owner. The employer also expected their employees, in situations where the property owner could not be contacted for such permission, to place an "orange door card" on the owner's door notifying the owner that additional contact was needed. Transcript at 49. The employer would then wait to be contacted by the property owner to obtain the required permission before proceeding with any work or entry, which had not already been expressly authorized. The employer also expected its employees to contact the employer's general foreman immediately when an incident occurred, whether it involved an accident, injury, property damage or an altercation. On October 22, 2018, claimant acknowledged by his signature that he

reviewed and understood the employer's written handbook, which contained all of the employer's written policies and expectations.

(4) On August 11, 2020, the employer sent claimant to manage a crew to trim or remove trees within the Pacific Power right-of-way on a large, wooded, private property. The employer's permitter had notified the property owner that an employer crew would be on his property at that time, trimming trees on behalf of Pacific Power. The employer had not obtained the owner's permission to drive their heavy equipment over the owner's property. After claimant arrived, and against the recommendations of his crewmembers, he drove a heavy truck with a crane apparatus onto the right-of-way by crossing the employer's property. Claimant did so because he believed, based on his knowledge and experience, that it would be unsafe to perform the work without use of the truck. Near the end of the day, claimant decided that it would be easiest and most efficient to drive the truck across a separate, wooded portion of the property to get to a driveway in order to exit. Before doing so, claimant directed a crewmember to knock on the door of the property owner's residence and request permission from the owner to drive the truck through that section of the property. After the crewmember returned and informed claimant that no one had answered the door, claimant neither directed that an orange door card be attached to the door nor contacted the general foreman for guidance. Instead, he drove the truck through that section of the property without the owner's express permission.

(5) The property owner came out of the residence and demanded that claimant stop driving the truck across his property because he feared that the truck would damage the septic unit under the ground claimant was approaching. Claimant and the property owner then engaged in a heated verbal exchange, in which claimant insisted that he could safely continue to drive ahead over that portion of the property without damaging the septic unit, while the property owner insisted that claimant instead retrace the path he had already made through the property. During the exchange, claimant stated to the property owner, "This is fucking bullshit." Transcript at 23. Claimant also directed a "finger gesture" toward the owner, the owner and his wife "cussed [claimant] out," and claimant then walked toward the owner in a manner which the owner and his wife interpreted as a physical threat. Transcript at 11, 39-40. The owner told claimant he would get his gun, although he did not do so, and the owner's wife called the local sheriff's office. Transcript at 18. Another foreman then called the general foreman to advise him of the circumstances. Eventually, claimant backed up the employer's truck as the owner insisted. When the general foreman arrived, the owner was so upset that it took 15 minutes for him to calm down enough to speak with him about correcting the situation. The general foreman sent claimant back to the employer's yard.

(6) The employer conducted an investigation regarding claimant's August 11, 2020 conduct. Claimant's actions in driving the employer's heavy machinery over the property in question, without permission, caused \$1,500 to \$2,000 in property damage to foliage and a wooden footbridge. On August 13, 2020, the employer discharged claimant for engaging in a verbal altercation with the property owner that day and causing damage to his property in violation of the employer's 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) (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).

The employer discharged claimant for engaging in a verbal altercation with a property owner and causing damage to the owner’s property on August 11, 2020. Claimant’s conduct violated the employer’s written policies, which claimant acknowledged having read and understood at hire. Claimant engaged in a heated verbal exchange with a property owner during which he used foul language, a “finger gesture,” and angrily approached the property owner on foot, which led to a law enforcement officer being called, all of which occurred after he consciously drove heavy machinery over the property without the owner’s permission, causing damage to the property. More likely than not, claimant willfully, or at least with indifference to the consequences of his actions, violated the employer’s expectations in question.

Claimant’s conduct on August 11, 2020 is not excusable as an isolated instance of poor judgment. 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). Although the record shows the employer had given claimant “write-ups” for violations of other employer policies in the past, the record contains no information regarding the dates or factual basis for claimant’s prior “write-ups.” Transcript at 9. However, claimant’s exercise of poor

judgment on August 11, 2020 occurred multiple times and was not isolated. First, at the start of the day, although the employer had not obtained permission from the property owner to drive their heavy equipment onto his property, and claimant's crew recommended against doing so, claimant decided to drive a heavy truck with a crane apparatus onto the right-of-way by crossing over the employer's property causing some property damage. Next, near the end of the day, after unsuccessfully attempting to obtain the owner's permission to drive across a separate section of property and choosing not to follow the employer's "orange door card" procedure for proceeding in such situations, claimant drove the same equipment across a different section of the owner's property, which caused the owner to exit his residence and demand that claimant stop to minimize property damage. Finally, after the owner demanded that claimant stop and retrace his path, claimant engaged in a heated exchange with the owner during which he used foul language, a "finger gesture," and angrily approached the property owner on foot, which led to a law enforcement officer being called. Each of claimant's exercises of poor judgment that day were the result of conscious decisions to either take or not take certain actions. Accordingly, claimant's conduct on August 11, 2020 is not excusable as an isolated instance of poor judgment.

Claimant's August 11, 2020 conduct is not excusable as the result of a good faith error in his understanding of the employer's expectations under OAR 471-030-0038(3)(b). Claimant likely knew that the employer might discharge him for his conduct, as evidenced by his apology to his general foreman, an agent of Pacific Power and by expressing his desire to apologize to the property owner in question, which was not allowed. Transcript at 43. Claimant also understood the employer's policies and, as a matter of common sense, that he engage in professional conduct and avoid decisions that result in damaging property when working with property owners.

For these reasons, the employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits effective August 9, 2020.

**DECISION:** Order No. 21-UI-161108 is affirmed.

S. Alba and D. P. Hettle.

**DATE of Service:** April 15, 2021

**NOTE:** This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the "Contact Us" form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

**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](https://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 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 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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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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.