

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0482**

*Modified*  
*Disqualification*  
*No Wage Cancellation*

**PROCEDURAL HISTORY:** On April 7, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct or theft, was not disqualified from receiving unemployment insurance benefits due to the work separation, and that wages paid prior to the separation would not be canceled (decision # 102446). The employer filed a timely request for hearing. On June 4, 2021, ALJ Wyatt conducted a hearing, and on June 10, 2021 issued Order No. 21-UI-168452, affirming decision # 102446. On June 15, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Point Blank Distributing employed claimant from September 11, 2014 until February 24, 2021.

(2) The employer maintained policies, contained in their employee handbook, which prohibited employees from "stealing, misappropriating, or intentionally damaging property belonging to Point Blank or its customers or employees." Exhibit 1 at 5. On November 27, 2020, claimant signed an acknowledgment that he had received the handbook and the policies it contained.

(3) On February 19, 2021, claimant was working for the employer at the site of one of its customers, a grocery store. While on site, claimant took a bottle of hot sauce from a shelf and placed it in the pocket of his sweatshirt. Claimant also had a grocery cart with him, in which he had placed other items he intended to purchase. Claimant paid for the items in his grocery cart, and then left the store without either paying for the bottle of hot sauce or removing it from his sweatshirt and returning it to the store.

At the time, claimant was suffering from a “severe back injury,” and was taking muscle relaxers for the pain. Transcript at 17.

(4) The grocery store’s loss-prevention team subsequently contacted the employer to notify them of the incident, which had been captured by the store’s security camera.

(5) The employer investigated the matter, and on February 24, 2021, the employer’s human resources manager called claimant into a meeting regarding the February 19, 2021 incident. During the meeting, claimant apologized for what he had done, “said he knew he shouldn’t do it, but he only had \$10 on him, and he didn’t have enough to pay for everything he wanted to buy.” Transcript at 23. The employer discharged claimant during the meeting for admitting to theft of the customer’s property. On the same day, after the employer discharged him, claimant sent an email to the human resources manager in which he stated that he “made a really bad decision,” “would like to pay for what was stolen,” and took “full responsibility for what I did and just wish I listened to my instincts and heart because I knew what I was doing wasn’t right and that I shouldn’t be doing it.” Exhibit 1 at 4. Claimant also offered to repay the customer for the value of the item he had taken. During the interview and in the subsequent email he sent to the employer, claimant did not mention his use of muscle relaxers.

**CONCLUSIONS AND REASONS:** Claimant was discharged for misconduct. Claimant is not subject to cancellation of wages earned prior to the date of discharge.

**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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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).

The order under review concluded that while claimant had taken the bottle of hot sauce as alleged, the act was not misconduct because, as a result of the usage of pain medication, claimant was "really not aware of what he was doing" when he left the store without paying for the hot sauce and was therefore merely negligent in putting the hot sauce in his sweatshirt. Order No. 21-UI-168452 at 4. The record does not support this conclusion. At hearing, claimant testified that "when I was putting [the hot sauce] in my pocket, that made no sense to me whatsoever either, and I don't know why I did. I know that because of my back injury that I was taking muscle relaxers, so I know my state of mind wasn't in a clear state, and that's my only logic reasoning for it." Transcript at 17. This conflicted with claimant's earlier testimony, in which he stated that he "put it in my pocket fully realizing at the time that I was going to be taking it back, and I didn't, because I forgot about it in my shopping cart." Transcript at 15-16. Claimant also suggested in his testimony that he did not place the item in his cart with the other items because he did not want to forget that he had not planned to purchase the item. Transcript at 20.

Although none of the above scenarios are inherently implausible, they conflict with one another and with claimant's statements made during the interview with the employer and his subsequent email to them on February 24, 2021. At that time, claimant admitted that he knew that what he had done was wrong, stated that he hadn't had enough money on him to pay for everything he wanted to buy, and that he wished he had listened to his instincts not to take the bottle of hot sauce. At hearing, claimant attempted to reconcile his testimony with the statements he had made to the employer by explaining that "when I was going into that meeting I totally thought I was just going to be fired" and that "I just was stating the facts at that time." Transcript at 28. Claimant did not offer further explanation as to why he did not offer the potentially-mitigating information (such as the fact that he was on muscle relaxers at the time) when he initially discussed the incident with the employer, and his testimony that he had accidentally left the store without paying for the item cannot be reconciled with his statements that he had known that what he was doing was wrong. Because claimant's testimony at hearing was internally inconsistent, and because contemporaneous accounts of events are often more reliable than accounts given several months later, the weight of the evidence shows that claimant intentionally took the bottle of hot sauce from his employer's customer without paying for it. Therefore, claimant's actions on February 19, 2021 constituted an intentional violation of the employer's standards of behavior which the employer had the right to expect from their employees.

Further, claimant's actions cannot be excused as an isolated instance of poor judgment. By intentionally taking the bottle of hot sauce without paying for it, claimant's conduct was tantamount to the crime of theft.<sup>1</sup> Claimant's actions therefore violated the law or were tantamount to unlawful conduct. Because claimant's actions were not an isolated instance of poor judgment, claimant was discharged for misconduct on February 24, 2021.

**Wage Cancellation.** If an individual was discharged for misconduct because of the commission of theft, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if certain requirements are met, which include presentation of a written admission of theft signed by the individual to the Department. ORS 657.176(3).<sup>2</sup> A person commits theft when, with intent to deprive another of property or to appropriate property to the person or a third person,<sup>3</sup> the person takes, appropriates, obtains or withholds such property from an owner thereof. ORS 164.015.

In his email to the employer on February 24, 2021, claimant apologized for what he did, stated that he wanted to "pay for what was stolen," and stated that he "made a really bad decision." Exhibit 1 at 4. When read in concert with the rest of the record, it is clear that claimant is referring to his theft of the bottle of hot sauce on February 19, 2021. However, claimant did not specifically mention in the email what he had done, and the email by itself is insufficient to explain what actually happened. For that reason, claimant's email does not constitute a "written admission of theft," and claimant is therefore not subject to wage cancellation under ORS 657.176(3).

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving benefits effective February 21, 2021. Claimant's wages earned prior to the date of separation are not subject to cancellation.

**DECISION:** Order No. 21-UI-168452 is modified, as outlined above.

D. Hettle and A. Steger-Bentz;  
S. Alba, not participating.

**DATE of Service: July 22, 2021**

**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

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<sup>1</sup> *See* ORS 164.015 *et seq.*

<sup>2</sup> For purposes of satisfying ORS 657.176(3), any person, party or entity may present the Department with the written admission. OAR 471-030-0054 (January 11, 2018).

<sup>3</sup> "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract. ORS 164.005(5). "Deprive another of property" means to withhold property of another or cause property of another to be withheld from that person permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person; or to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property. ORS 164.005(2).

‘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.

**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.

**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 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  
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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.