

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0618**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 18, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective May 30, 2021 (decision # 95754). Claimant filed a timely request for hearing. On July 19, 2021, ALJ Ramey conducted a hearing, and on July 23, 2021 issued Order No. 21-UI-170978, affirming decision # 95754. On July 28, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him 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 claimant's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Gardner Landscape Maintenance Inc. employed claimant as a construction laborer from May 1, 2020 until June 4, 2021.

(2) The employer expected every employee at a jobsite to continue on the job until everyone at the site had finished, and expected employees not to use their personal phones while working. The employer advised claimant of these expectations, and claimant was aware of them.

(3) Between January 28, 2021 and May 25, 2021, the employer verbally warned claimant on four separate occasions about various issues relating to claimant's work performance.

(4) On June 1, 2021, claimant was working on a jobsite with another employee whom claimant considered his "superior," as the other employee had been working for the employer longer. Transcript at 17. When claimant finished his final task, the other employee still had one last task to complete. The other employee directed claimant to start the truck while the other employee finished the task, which claimant did. While claimant waited in the truck, claimant browsed messages on his phone and took a

phone call relating to medical issues a family member was having. Shortly thereafter, the owner of the company observed claimant sitting in the truck and browsing his phone.

(5) On June 4, 2021, the employer discharged claimant due to the June 1, 2021 incident in which claimant was sitting in the truck and browsing his phone instead of working.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant’s actions on June 1, 2021 constituted misconduct because claimant “was aware of the employer’s reasonable policies and expectations . . . and [had] been previously disciplined for similar policy violations,” and therefore in “demonstrat[ing] an indifference” to these policies and expectations was wantonly negligent. Order No. 21-UI-170978 at 3. The record does not support this conclusion.

It is not in dispute that claimant’s actions of sitting in the truck and browsing his phone while his coworker continued to work was a violation of the employer’s expectations. However, the record shows that claimant’s decision to do so was a good faith error. At hearing, the owner of the company testified that claimant’s coworker was not authorized to advise claimant to start the truck while the coworker continued working, and that it was neither common practice nor necessary to have the truck running while another employee was still working. Transcript at 24. However, the employer did not offer evidence to show that claimant had any reason to know that the senior employee was not authorized to direct him as he had done. Further, it is generally reasonable for an employee to follow directions given to them by an employee with more experience and seniority, and the directions for claimant to start the truck and wait for the other employee to finish were not objectively outrageous. Without some evidence to show that claimant either knew or had reason to know that he should not follow the directions his coworker gave to him, the record shows that it was reasonable for him to believe that he should and act accordingly. Therefore, while claimant’s belief that he should follow the coworker’s directions was erroneous, his decision to follow those directions was a good faith error, and therefore not misconduct.

To the extent that the employer discharged claimant for using his phone while waiting in the truck, the employer has not met their burden to show that claimant’s having done so was misconduct. The employer’s general expectation regarding phone use notwithstanding, claimant’s testimony indicated that he was browsing messages, and taking a phone call, related to his mother-in-law who had been

undergoing chemotherapy. Transcript at 18. While the employer's expectations regarding phone use were generally reasonable, it was not reasonable for the employer to expect claimant to ignore messages regarding a sick family member while he was already sitting idly at the direction of a coworker he believed in good faith to have authority over him. For that reason, claimant's phone use during the incident on June 1, 2021 was not a willful or wantonly negligent disregard of the standards of behavior that an employer has the right to expect of their employees, and was therefore not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 21-UI-170978 is set aside, as outlined above.

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

**DATE of Service: September 2, 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](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.

**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.

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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**

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**  
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