

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0685**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 28, 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 June 28, 2021 (decision # 132758).<sup>1</sup> Claimant filed a timely request for hearing. On June 23, 2021, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 7, 2021 at 10:45 a.m., at which claimant failed to appear. On July 7, 2021, ALJ L. Lee issued Order No. 21-UI-169937, dismissing claimant's hearing request for failure to appear. On July 12, 2021, claimant filed a timely request to reopen the July 7, 2021 hearing.

On July 22, 2021, OAH mailed notice of a hearing scheduled for August 6, 2021 at 8:15 a.m. to consider claimant's request to reopen the July 7, 2021 hearing, and if allowed, the merits of decision # 132758. On August 6, 2021, ALJ Janzen conducted a hearing, and on August 10, 2021 issued Order No. 21-UI-172239, allowing claimant's request to reopen the July 7, 2021 hearing and affirming decision # 132758 by concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective June 28, 2020. On August 23, 2021, claimant filed an application for review of Order No. 21-UI-172239 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant's request to reopen the July 7, 2021 hearing is **adopted**. The remainder of this decision relates to the portion of the order under review that concluded that claimant was discharged for misconduct.

**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

<sup>1</sup> Decision # 132758 listed the effective date of claimant's disqualification as June 28, 2021. Because the administrative decision found that the date of claimant's discharge was June 30, 2020, however, the administrative decision is presumed to have intended the year of the disqualification to be 2020, and the reference to 2021 was a clerical error.

her 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) Jo-Ann Fabric and Craft Stores employed claimant as a supervisor from August 28, 2019 until June 30, 2020.

(2) The employer had a policy that required claimant to not approach or pursue suspected shoplifters. Violation of the policy could result in termination. The employer trained claimant on the policy and claimant received it in writing when she was hired. The employer also periodically reviewed the policy with claimant during meetings.

(3) On June 23, 2020, claimant was working when a customer approached her and a retail clerk. The customer placed an order for a particular cut of fabric and while claimant and the clerk were distracted cutting the fabric, the customer grabbed the contents of his shopping cart and ran out of the store. The clerk exited the store in pursuit of the customer, and claimant followed the clerk. Seconds after they exited the store, claimant told the clerk to go back inside the store, which the clerk did.

(4) Claimant then observed that the customer was 100 yards away, and saw that someone was driving a car in the customer's direction in an apparent effort to pick up the customer. Transcript at 19. Claimant wanted to protect the employer's property, so rather than go back inside the store, claimant shouted "stop, thief" to draw attention to the customer, walked 20 yards in the direction of the car to see its license plate, and wrote the license plate number down. Transcript at 22. Claimant then returned to the store.

(5) On June 30, 2020, the employer discharged claimant for violating their policy regarding approaching or pursuing suspected shoplifters.

**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) (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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant's June 23, 2020 conduct constituted misconduct because claimant violated the employer's expectation with wanton negligence and the conduct was not an isolated instance of poor judgment because it exceeded mere poor judgment. Order No. 21-UI-

172239 at 5. The record supports the conclusion of the order under review that claimant violated the employer's expectation with wanton negligence. The record does not support the conclusion of the order under review that claimant's conduct exceeded mere poor judgment and therefore was not an isolated instance of poor judgment.

The record shows that, on June 23, 2020, claimant violated the employer's policy that she not approach or pursue suspected shoplifters. Claimant knew and understood the employer's policy regarding pursuing suspected shoplifters because the employer trained her on it when she was hired and periodically reviewed it with her during meetings. However, the record indicates that on June 23, 2020, claimant, motivated by a desire to protect company property, exited the store after the customer did so, shouted "stop, thief" to draw attention to the fleeing customer, walked 20 yards in the direction of the car that was driving in the customer's direction, and wrote down the car's license plate number. This evidence is sufficient to conclude that claimant consciously approached or pursued a suspected shoplifter, which claimant knew or should have known would probably result in violation of the employer's policy. As such, claimant's conduct constituted a wantonly negligent violation of the standards of behavior the employer had a right to expect.

Nevertheless, claimant's conduct was not misconduct because the record indicates it was 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).

Applying these standards, the record shows that claimant's violation of the employer's policy regarding pursuing shoplifters was an isolated instance of poor judgment. Claimant's conduct was an isolated act. Other than the one instance on June 23, 2020, the record is devoid of evidence of claimant having

pursued suspected shoplifters or otherwise having engaged in any willful or wantonly negligent violation of an employer expectation. Claimant's pursuit of the customer was an act of poor judgment in that claimant's conduct was a conscious decision that resulted in a violation of the employer's standard of behavior. Claimant's conduct did not exceed mere poor judgment because it did not violate the law, given that claimant's actions of shouting "stop, thief" and approaching and writing the license plate number of the car were lawful. Nor, when viewed objectively, did claimant's conduct constitute an irreparable breach of trust or make a continued employment relationship impossible because claimant's conduct on June 23, 2020 was motivated by a desire to protect the employer's property, and so was well intentioned and not a breach of trust.

Accordingly, the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. For that reason, claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Order No. 21-UI-172239 is set aside, as outlined above.

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

**DATE of Service:** September 24, 2021

**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 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**  
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