

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0024**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective February 21, 2021 (decision # 133213). On April 19, 2021, decision # 133213 became final without claimant having filed a request for hearing. On April 27, 2021, claimant filed a late request for hearing. ALJ Kangas considered claimant's request, and on May 24, 2021 issued Order No. 21-UI-167322, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by June 7, 2021. On June 4, 2021, claimant filed a timely response to the appellant questionnaire. On August 9, 2021, the Office of Administrative Hearings (OAH) mailed a letter to the parties stating that Order No. 21-UI-167322 was vacated. On September 9, 2021, OAH mailed notice of a hearing scheduled for September 24, 2021 to consider whether claimant's late request for hearing should be allowed and, if so, the merits of decision # 133213. On September 24, 2021, ALJ Mott conducted a hearing and issued Order No. 21-UI-175597, re-dismissing claimant's request for hearing as late without good cause, leaving decision # 133213 undisturbed. On October 12, 2021, claimant filed an application for review of Order No. 21-UI-175597 with the Employment Appeals Board (EAB).

On November 16, 2021, EAB issued Appeals Board Decision 2021-EAB-0824, reversing Order No. 21-UI-175597 by allowing claimant's late request for hearing and remanding the matter to OAH for a hearing on the merits of decision # 133213. On December 14, 2021, ALJ Mott conducted a hearing on remand, and on December 15, 2021 issued Order No. 21-UI-181921, affirming decision # 133213. On December 28, 2021, claimant filed a timely application for review of Order No. 21-UI-181921 with EAB.

**FINDINGS OF FACT:** (1) Integrated Transport, Inc. employed claimant as a delivery driver from March 2, 2020 until February 25, 2021. The employer delivered packages exclusively for Federal Express.

(2) The employer expected their employees to refrain from smoking of any kind in their Federal Express trucks, both in the cab where the driver operated the truck and the back of the truck where packages were stored. Claimant was aware of the employer's expectations.

(3) On February 3, 2021, the employer held a staff meeting with their employees during which they reaffirmed their expectation that employees refrain from smoking in their trucks. Claimant arrived at work shortly after the meeting ended and the employer's operations manager spoke with claimant "one on one" at that time about what was discussed at the meeting. Exhibit 2; December 14, 2021 Transcript at 16. She told claimant that smoking of any kind in the employer's trucks was not allowed and that the expectation would be enforced, which claimant acknowledged that he understood. Approximately fifteen minutes after their conversation, the operations manager went to claimant's assigned truck to ask him a question and saw him smoking in the back of the truck. She reaffirmed to claimant that the employer did not permit smoking in the trucks. Claimant responded that he understood and would not smoke in the employer's trucks again. December 14, 2021 Transcript at 16.

(4) On February 4, 2021, the operations manager gave claimant a verbal warning for his conduct on February 3, 2021 when claimant violated the employer's expectation that employees not smoke in their trucks. Exhibit 2.

(5) On February 11, 2021, claimant smoked in the cab of his truck while driving. Claimant's conduct was recorded on the truck's video system. Between February 11, 2021 and February 24, 2021, the employer reviewed the video, became aware of claimant's conduct, and took screenshots of claimant smoking in the cab of his truck. Exhibit 2.

(6) On February 24, 2021, the employer held a staff meeting with their employees during which the employees were informed that their contractor, Federal Express, had recently advised them that smoking in a Federal Express truck was considered "distracted driving" and was not allowed. December 14, 2021 Transcript at 13. The employer reiterated to their employees that any smoking in their trucks was prohibited. Claimant arrived at work shortly after the meeting. At that time, the employer's operations manager again spoke with claimant "one on one" about what was discussed at the meeting. December 14, 2021 Transcript at 13. Claimant acknowledged to the operations manager that he understood that it was against both Federal Express and employer policy to smoke in the employer's trucks and stated that he "[would] not smoke in the trucks anymore." Exhibit 2.

(7) On February 25, 2021, an employee for another company that delivered for Federal Express told the employer's operations manager that he had just observed one of the employer's drivers smoking in the back of his truck. He identified the truck, and the operations manager went to the truck and observed claimant smoking in the back of the truck. Claimant acknowledged that he had been smoking and understood that smoking in the truck violated the employer's policy. He told the operations manager that he "would quit smoking in the trucks when [the employer] gave him a brand new truck" to drive. December 14, 2021 Transcript at 8. The operations manager told claimant that the employer prohibited smoking in their trucks, whether they were new or old, and asked claimant if he would comply with that

expectation. Claimant shrugged his shoulders and continued to smoke in the truck. The operations manager consulted with the employer's president, and they both agreed that claimant's employment should be terminated.

(8) On February 25, 2021, the employer discharged claimant for smoking in the employer's truck on that day.

**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 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 employer discharged claimant for smoking in the employer's truck on February 25, 2021. The employer had the right to expect claimant to refrain from smoking in the employer's trucks. Their operations manager discussed that expectation with claimant on February 3, 2021 and February 24, 2021. Claimant acknowledged on both dates and at hearing that he understood that expectation as of those dates, and told the operations manager that he would not smoke in the trucks going forward. Exhibit 2; December 14, 2021 Transcript at 55-56.

The record shows that claimant violated the employer's no smoking expectation on February 25, 2021. The operations manager testified that when she arrived at the Federal Express terminal that day, a driver for another company told her that he had seen an employer driver smoking in the back of his truck and identified the truck to her. December 14, 2021 at 7-8. She further testified that when she approached the truck, she observed claimant smoking in the back of the truck where packages were loaded, which claimant admitted to in addition to admitting that he recalled their previous discussions that smoking in employer trucks violated both Federal Express and employer policy. December 14, 2021 at 8. She testified that claimant then told her that he "would quit smoking in the trucks when [the employer] gave him a brand new truck," refused to agree to comply with the employer's expectation after being told that the age of the truck did not matter, and continued to smoke in the back of the truck. December 14, 2021 at 8. She then consulted with the employer's president and after they agreed that claimant's employment should be terminated, she drafted the discharge paperwork on her laptop at the terminal and presented it to claimant, who refused to sign it.

At hearing, claimant suggested that the employer's February 25, 2021 discharge paperwork, the "Termination" report, appeared to be fabricated. December 14, 2021 Transcript at 41; Exhibit 2. Claimant asserted, "I don't believe I ever saw [the operations manager] that day," and "nothing happened that day." December 14, 2021 Transcript at 51. However, he also testified that he recalled an incident where the operations manager came up to him and told him that a supervisor had witnessed him smoking in an employer truck. December 14, 2021 Transcript at 53. Such an incident was described in the February 25, 2021 "Termination" report in question. Exhibit 2. And, when specifically asked if he smoked in a work vehicle on that day, claimant responded that he did not recall how he had smoked that day, but did not dispute that he had. December 14, 2021 Transcript at 52. He asserted, "On the 25th? I don't remember if I actually smoked in the vehicle on that day, smoked or vaped." December 14, 2021 Transcript at 52. Claimant's inconsistent testimony shows that claimant was not a credible witness. Claimant also suggested that because the "Termination" report stated in printed form that claimant had refused to sign it, and also had been initialed "RTS" on the same form, the report showed that the form was a pre-printed document that had never been presented to claimant for review and signature on February 25, 2021. December 14, 2021 Transcript at 37, 41-42. However, the employer's president plausibly explained that the operations manager had a laptop with her when she discussed the matter with claimant on February 25, 2021, had prepared and printed the form in question *after* claimant previously refused to sign an initial form, and then initialed "RTS" on the final updated form. December 14, 2021 Transcript at 33-35, 43. More likely than not, the employer presented the report to claimant to review on February 25, 2021, and claimant refused to sign it.

Based on employer's contemporaneous report and claimant inconsistent testimony regarding the events on February 25, 2021, the employer's evidence was more probative than claimant's evidence, and findings of fact were based on the employer's evidence. Viewing the record as a whole, the credible evidence shows that on February 25, 2021, claimant admitted to the operations manager that he had been smoking in the truck that day, and understood that smoking in the truck violated the employer's policy.

By also telling her that that he “would quit smoking in the trucks when [the employer] gave him a brand new truck” to drive, and continuing to smoke in the truck after she told him that the age of the truck did not matter, claimant demonstrated that he willfully violated the employer’s expectations that day.

Claimant’s conduct on February 25, 2021 is not excusable as an isolated instance of poor judgment. To qualify as an isolated instance of poor judgment, an act must be “isolated,” as defined by OAR 471-030-0038(1)(d)(A). The record contains evidence of other instances of claimant’s willful or wantonly negligent violations of the employer’s reasonable expectation that employees not smoke in the trucks. On February 3, 2021, fifteen minutes after the operations manager told claimant that smoking in the employer’s trucks was not allowed, the operations manager went to claimant’s assigned truck to ask him a question and saw him smoking in the back of the truck. More likely than not, claimant’s act of smoking the truck just fifteen minutes after being told that such conduct was prohibited demonstrated conscious indifference to the consequences of his conduct where he knew or should have known it violated a standard of behavior the employer had the right to expect, and was at least wantonly negligent.

On February 11, 2021, claimant smoked in the cab of his truck while driving, which conduct was recorded on the truck’s video system, with screen shots of claimant’s conduct taken by the employer. Claimant initially denied at hearing that he had seen the screenshot photographs but then stated, “I remember what they look like, if that helps.” December 14, 2021 Transcript at 57-58. Claimant did not dispute that he had smoked in the employer’s truck that day, but stated that he could not remember whether it was “vaping or smoking” a cigarette. December 14, 2021 Transcript at 58. More likely than not, claimant’s act of smoking in the truck, whether by vaping or smoking a cigarette just eight days after discussing the employer’s expectation with the operations manager, demonstrated conscious indifference to a standard of behavior the employer had the right to expect, and was at least wantonly negligent. Based on the two other wantonly negligent violations of the employer’s smoking prohibition, the record shows that claimant’s February 25, 2021 willful violation of that expectation was a repeated act, and not a single or infrequent occurrence. Because claimant’s February 25, 2021 violation of the employer’s expectation was not isolated, it was not excusable as an isolated instance of poor judgment.

Nor can claimant’s February 25, 2021 conduct be excused as the result of a good faith error in his understanding of the employer’s expectation that he refrain from smoking in the employer’s trucks. The record fails to show that claimant truly believed, or had a factual basis for believing, the employer would condone such conduct. Although claimant asserted at hearing that he believed the employer’s prohibition applied to him only after he was assigned a new truck, the employer’s president testified that he never promised a new truck to any driver, and the record shows that the operations manager never limited her description of the prohibition to new trucks. December 14, 2021 Transcript at 35, 55; Exhibit 2.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits effective February 21, 2021 based on his work separation.

**DECISION:** Order No. 21-UI-181921 is affirmed.

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

**DATE of Service: February 10, 2022**

**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 desisyong ito.

## 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

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.