

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0464**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 17, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective January 30, 2022 (decision # 103816). Claimant filed a timely request for hearing. On March 23, 2022, ALJ Griffin conducted a hearing, and on March 24, 2022 issued Order No. 22-UI-189576, affirming decision # 103816. On April 12, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Ed Staub and Sons Petroleum employed claimant from October 12, 2020 until January 31, 2022. Claimant performed construction work for the employer.

(2) The employer required employees to seek prior authorization from the employer's operations manager before using company vehicles for personal purposes. This policy was contained within the employer's employee handbook. The employer provided a copy of the handbook to claimant when he was hired. Claimant signed an acknowledgement that he had received the handbook. However, claimant did not review the employer's policy regarding use of company vehicles because he was not assigned a company vehicle at the time, and therefore did not believe it pertained to him.

(3) Around December 2020, the employer assigned claimant a company truck for work use. Claimant primarily used the truck to drive between his home and work sites, which the employer permitted him to do.

(4) In or around January 2022, claimant was working at a job site in Dallas, Oregon. Claimant lived in Prineville, Oregon, and was staying with his brother in Salem, Oregon for the duration of the job. On January 27, 2022, the employer instructed claimant to go home because he was no longer needed on the job.

(5) On January 28, 2022, claimant borrowed a trailer from his brother in order to tow some personal items that he had been storing at his brother's house, and hitched the trailer to his work truck. Claimant

did not ask the employer permission to use his work truck to tow the trailer. However, claimant believed that the employer would allow him to do so because the employer had previously allowed claimant to arrive to work in his personal vehicle with a trailer attached to that vehicle, and because the employer had previously suggested that claimant attach his own trailer to the work truck for use when traveling between job sites.

(6) Claimant then headed home to Prineville in his work truck with the trailer attached. During the drive to Prineville, lug nuts on the trailer “snapped off,” causing one of the trailer’s wheels to come loose. Transcript at 11. The wheel veered into oncoming traffic, hit another vehicle, and caused that vehicle to incur significant damage.

(7) On January 31, 2022, the employer discharged claimant because he towed the personal trailer with his work truck without authorization, and because he had allegedly violated the employer’s safety rules. Prior to being discharged on January 31, 2022, claimant had never read the employer’s vehicle use policy, and the employer had never warned him not to tow a personal trailer without first obtaining permission.

**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). Isolated instances of poor judgment 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 using the employer's truck to tow a personal trailer, and for allegedly violating the employer's safety rules. At hearing, the employer's witness was unable to provide any information about how claimant violated their safety rules, and it is not otherwise contained in the record. Transcript at 7. Therefore, the employer has not met their burden to show that claimant's alleged violation of their safety rules constituted misconduct, and the remainder of this analysis concerns claimant's violation of their company vehicle use policy.

The order under review concluded that claimant "willfully violated" the employer's company vehicle use policy because the employer had previously provided the policy to claimant. Order No. 22-UI-189576 at 3. The order under review also concluded that claimant's violation of the policy was not an isolated instance of poor judgment, and was therefore misconduct, because it constituted a violation of the law. Order No. 22-UI-189576 at 3. The record does not support these conclusions.

First, the record does not show that claimant willfully violated the employer's vehicle use policy. Instead, the record shows that claimant's violation of the policy was wantonly negligent. Claimant explained in his testimony that he did not read the vehicle use policy when he was hired because he had not yet been assigned a company vehicle and thus believed that it didn't pertain to him. Transcript at 13. This testimony suggests that claimant either was, or had at some point been, aware of the existence of the policy, if not its terms, and that he consciously chose to ignore it. This may have been a reasonable action to take at the time of hire, if authorized by the employer, as the policy did not actually pertain to him at the time. However, once claimant was assigned a company vehicle, the policy *did* pertain to him. Given the level of responsibility that a person assumes when operating a motor vehicle, especially one that the person does not personally own, the employer had the right to expect claimant to familiarize himself with the policy. Thus, even if claimant did not actually know that using the work truck to tow a personal trailer without permission was a violation of the employer's policy, he *should* have known that it was. Claimant's violation of the policy was therefore wantonly negligent.

However, the record shows that claimant's policy violation was an isolated instance of poor judgment. The employer did not offer evidence to show that claimant had previously engaged in willful or wantonly negligent violations of their standards of behavior, and claimant testified that he had been given "no warnings." Transcript at 14. Thus, claimant's policy violation was isolated. In concluding that claimant's conduct violated the law (thereby making a continued employment relationship impossible), the order under review found that claimant had violated ORS 164.135(c), a Class C felony. Order No. 22-UI-189576 at 3. A person violates that statute when:

Having custody of a vehicle, boat or aircraft pursuant to an agreement between the person or another and the owner thereof whereby the person or another is to perform for compensation a specific service for the owner involving the maintenance, repair or use of such vehicle, boat or aircraft, the person intentionally uses or operates it, without consent of the owner, for the person's own purpose in a manner constituting a gross deviation from the agreed purpose[.]

The record does not show that claimant's conduct violated ORS 164.135(c). The employer issued claimant a work truck for the purposes of travelling to and from work sites. Claimant was using the truck for this purpose, returning home to Prineville, when the accident occurred on January 28, 2022. Claimant's decision to hitch a trailer to the work truck and use the truck to tow the trailer home, without permission from the employer, probably constituted a deviation from the agreed upon purpose for which the employer gave claimant custody of the truck. However, the record does not show that it was a *gross* deviation. Claimant testified at hearing that the employer had previously suggested that claimant attach a personal trailer to the work truck for the purpose of hauling his own property between job sites. Transcript at 18. Thus, the fact that claimant hitched a borrowed trailer to the truck in order to haul his own property from his brother's home (where he was staying while in the area for work) to his home in Prineville was a deviation from the agreed upon purpose of claimant's custody of the truck, but not a *gross* deviation. Thus, the record does not show that claimant's conduct violated, or was tantamount to a violation of, any laws. Neither does the record show that claimant's conduct created an irreparable breach of trust or otherwise made a continued employment relationship impossible. Therefore, claimant was discharged due to an isolated instance of poor judgment, which is 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. 22-UI-189576 is set aside, as outlined above.

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

**DATE of Service: June 29, 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.

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**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.



# 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 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  
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