

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0967**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 7, 2022, 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 May 15, 2020 (decision # 111147). Claimant filed a timely request for hearing. On September 2, 2022, ALJ Wardlow conducted a hearing, and on September 6, 2022 issued Order No. 22-UI-202134, affirming decision # 111147. On September 16, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Vima Investments LLC employed claimant as a front desk clerk at their Best Western hotel from July 29, 2020 until May 15, 2022.

(2) When a lost item belonging to a hotel guest was discovered, the employer expected their front desk clerks to log the item in a lost-and-found log book, store the item in a closet for 30 days, and return the item to the guest if the guest came back to claim the item. The employer's assistant manager verbally instructed claimant about this policy, and claimant understood it.

(3) On May 15, 2022, claimant was working the front the desk. During claimant's shift, a housekeeper found a metal detector a guest had left behind in a room. The housekeeper gave the metal detector to claimant, and claimant placed the item in the closet. Claimant did not log the metal detector in the log book. A short time later, claimant removed the item from the closet, placed it in a plastic bag, and exited the hotel with it. While outside, claimant used the metal detector, but then noticed that some guests were approaching. Rather than return to the front desk with the item and put it back in the closet, claimant placed the metal detector in her truck. Claimant then returned to the front desk and helped the guests.

(4) Claimant helped the guests, took out some trash, and then, about an hour and a half after putting the metal detector in her truck, claimant's shift ended. Claimant concluded her shift without logging the metal detector in the log book and went home with the metal detector still in her truck. That evening, claimant did some laundry, and used her truck to transport the laundry from the laundromat. After

midnight that night, while unloading the laundry, claimant recognized that the metal detector remained in her truck, but did not return it to the hotel at that time.

(5) On the morning of Monday May 16, 2022, the guest who lost the metal detector called the employer seeking to recover it. The employer's assistant manager checked the lost-and-found log book and saw there was no entry for the item in the log book. The manager called the housekeeper who had cleaned the guest's room, and the housekeeper confirmed that she had found the item and handed it to claimant for placement in the closet. When the manager checked the closet, however, the metal detector was not there. The manager sent a group text to the employer's employees about the metal detector, but claimant did not respond, and the employees who did respond did not know the metal detector's whereabouts. The manager then checked the front desk security camera footage from May 15, 2022, and saw that claimant took the item out of the closet, placed it in a plastic bag, exited the hotel with the item, and placed it in her truck.

(6) After viewing the video footage, the assistant manager tried calling claimant but received no answer so she left a voicemail for claimant to return her call. Claimant did not receive or respond to the manager's text or voicemail. Although the manager did not explicitly say in her voice message that claimant was discharged, the manager believed claimant had stolen the metal detector, intended to discharge claimant for theft, and "put out word" among the staff that that was her intention. Transcript at 27. When claimant did not return the manager's call, the manager instructed a different front desk worker to work claimant's shift that night.

(7) On the night of May 16, 2022, claimant went to the employer's hotel intending to work her shift that was scheduled to begin at midnight. When she arrived, she saw that a different front desk clerk was working the front desk. The clerk told claimant that she no longer worked for the employer, would not allow claimant to use the employer's phone to call the manager, and would not let claimant into the building to work her shift. The clerk told claimant, "You stole the metal detector." Transcript at 29. Claimant denied doing so and said "it's in my car, right here." Transcript at 29. Claimant then got the metal detector out of her truck, and gave it to the clerk. Claimant then left the hotel and never returned to work.

**CONCLUSIONS AND REASONS:** The employer discharged claimant for misconduct. Claimant's wage credits are not subject to cancellation.

**Nature of the Work Separation.** If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The nature of the work separation was a discharge that occurred on May 16, 2022. The record shows that after viewing the May 15, 2022 video footage, the employer's assistant manager intended to discharge claimant for theft of the metal detector and "put out word" among the staff that that was her intention. Transcript at 27. The assistant manager then assigned a different employee to work claimant's May 16, 2022 shift, and when claimant arrived that night for work, the front desk clerk told her that she no longer worked for the employer and would not let claimant into the building to work her shift. This

evidence shows that claimant was willing to continue to work for the employer for an additional period of time on May 16, 2022 but was not allowed to do so by the employer. The employer therefore discharged claimant on May 16, 2022.

**Discharge.** 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).

Claimant’s conduct on May 15, 2022 was a willful violation the employer’s reasonable expectations. The record shows that the employer expected claimant to log lost items in the lost-and-found log book and store the items in the employer’s closet for 30 days unless a guest returned to claim the item. The record further shows that claimant understood these expectations because the assistant manager conveyed them to claimant verbally. Despite this, on May 15, 2022, after receiving the metal detector from the employee who found it, claimant placed the item in the closet but failed to log it in the log book. Then, a short time later, rather than leaving the item in the closet for 30 days, claimant removed it from the closet, put it in a bag, exited the hotel with it, and after seeing how it worked, placed it in her truck.

At hearing, claimant testified that she failed to log the metal detector in the log book because she busy and forgot. Transcript at 19-20. However, even if the rush of business caused claimant to not be conscious of her conduct in not logging the item initially, she would have been reminded of her obligation to do so once she removed the metal detector from the closet to see how it worked. Further, claimant had ample time to log the item once she removed it from the closet, since she had the available free time to take it outside to see how it worked, and there was at least an hour and half remaining in her shift. Moreover, claimant did not dispute that she consciously removed the metal detector from the closet to see how it worked and then put it in her truck, which breached the aspect of the employer’s policy that required claimant to store a lost item in the closet for 30 days, unless the guest who lost it returned to claim it. Accordingly, the record evidence is sufficient to conclude that claimant willfully violated the employer’s expectations.

The analysis thus turns to whether claimant’s conduct was an isolated instance of poor judgment. If so, per OAR 471-030-0038(3)(b), claimant’s conduct would not be considered misconduct. 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, claimant's conduct was not an isolated instance of poor judgment because her conduct in taking the metal detector exceeded mere poor judgment in that it was tantamount to unlawful conduct. The unlawful conduct it was tantamount to was the crime of theft of lost, mislaid property. *See* ORS 164.065 ("A person who comes into control of property of another that the person knows . . . to have been lost . . . commits theft if, with intent to deprive the owner thereof, the person fails to take reasonable measures to restore the property to the owner."). At hearing, claimant denied that she took the metal detector with the intent to steal it, asserting instead that she put it in her truck and simply forgot it was there. Transcript at 13, 16, 18, 22. However, the record evidence, when viewed in its totality, belies this assertion.

The record shows that on May 15, 2022, after receiving the metal detector from the housekeeper who found it, claimant placed the item in the closet but failed to log it in the log book. Shortly thereafter, claimant took it out of the closet, put it in a bag, exited the hotel with it, and used it outside. Then, rather than return to the hotel with the metal detector, claimant placed it in her truck. Failing to log in the item and putting it in a bag indicates an effort to conceal it, which suggests an intent to steal. Taking the item outside to use it when she could have used it inside the hotel, and placing it in her truck when she could have brought it back inside, also suggests an intent to steal.

Furthermore, claimant testified that she became aware of the metal detector when unloading her laundry the night of May 15, 2022, but it was after midnight so she thought it was too late to return it. Transcript at 17. However, given that claimant's shift for the next day, May 16, 2022, was scheduled to begin at midnight, and she ultimately did return the metal detector to the employer at the same time the following day, it is not evident why claimant could not have returned the item after midnight on May 15, 2022. Her failure to do so, when viewed in combination with the facts above, is also suggestive of an intent to steal. Finally, based on claimant's testimony, when she arrived for her shift on May 16, 2022, she only returned the metal detector after the front desk clerk accused her of having stolen it. Transcript at 29. When considered in light of claimant's testimony that she had discovered the metal detector late the

night of May 15, 2022 and decided to return it when she arrived for her May 16, 2022 shift, it is more logical to expect that claimant would have approached the clerk with the item, ready to return it unprompted. Transcript at 15.

Accordingly, when considering the above-cited evidence in its totality, the record is sufficient to conclude that claimant came into control of the property of the hotel guest, which she knew was lost, and put it in her truck with the intent to permanently deprive the hotel guest of it. This is tantamount to the unlawful conduct prohibited by ORS 164.065. Claimant's conduct therefore exceeded mere poor judgment and was not an isolated instance of poor judgment. As result, claimant's conduct was misconduct under ORS 657.176(2)(a).

For the reasons outlined above, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective May 15, 2022.

**DECISION:** Order No. 22-UI-202134 is affirmed.

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

**DATE of Service:** December 2, 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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# 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**

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**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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