

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0721**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On May 3, 2023, 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 April 9, 2023 (decision # 140608). Claimant filed a timely request for hearing. On June 12, 2023, ALJ L. Lee conducted a hearing, and on June 16, 2023 issued Order No. 23-UI-228153, affirming decision # 140608. On June 27, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered claimant's argument in reaching this decision.

**FINDINGS OF FACT:** (1) Penske Truck Leasing employed claimant from July 16, 2018 through April 13, 2023, most recently as a customer experience specialist.

(2) Claimant was paid \$27 per hour and the employer expected him to work Monday through Thursday, 7:30 a.m. to 4:30 p.m., and 7:30 a.m. to 2:00 p.m. on Friday, with a 30-minute unpaid lunch break. Minor variations to this schedule, such as starting and leaving a few minutes earlier or later, were permitted at claimant's discretion with the expectation that claimant work a total of 40 hours per week. The employer did not permit claimant to work overtime without pre-approval from his supervisor, except for minimal amounts resulting from these schedule variations.

(3) The employer tracked the time worked by their hourly employees by means of a time clock at the worksite, which employees used to record the times they started and stopped working during each day. The employer paid employees their wages based on these time records.

(4) The employer issued claimant a laptop in order to complete some work duties at other worksites maintained by the employer. On occasion, claimant sought and was granted permission to work from home for a day or part of a day using the laptop due to special circumstances, such as illness, inclement weather, or having his car repaired. The employer did not permit claimant to work from home except

when they gave him permission on these occasions. Claimant discovered that his employer-issued laptop enabled him to punch in or out of work remotely as if utilizing the time clock at the worksite.

(5) The employer expected their hourly employees would not use the time clock system to record time as worked that they did not actually work, and not attempt to work remotely without prior authorization. Claimant signed employer's "Associate Behavior and Work Rules Policy" in 2019 which stated that "falsifying company records or reports, including one's time records," "failing to observe working schedules," or "working overtime without authorization" could subject him to being "terminated without prior notice or disciplinary action[.]" Exhibit 1 at 4-8.

(6) Beginning in approximately the summer of 2022, claimant would punch in for work using the time clock at the worksite, however he would typically leave work at or before 4:00 p.m., after letting his supervisor know he was leaving and without punching out using the time clock. He would then drive from the worksite in North Portland to his home in Beaverton, a commute of approximately 20 to 25 minutes at that time of day. Claimant would then respond to work-related emails on the laptop, if any, or work-related calls he received on his personal telephone, if any, until approximately 5:00 p.m., and then punch out using the laptop. As a result, claimant was paid, sometimes at the overtime rate, for the time between leaving the worksite and punching out on the laptop at home.

(7) On approximately March 24, 2023, claimant's supervisor discovered that claimant had been using his laptop to punch out for the end of his shift rather than using the time clock. He was unaware that claimant was making the entries from home or supposedly engaging in remote work after leaving the worksite. That day, the supervisor initiated a conversation with claimant about "people not logging their hours." Transcript at 38. Claimant stated that he used the computer to "log all my hours," and the supervisor responded by questioning why he used the laptop rather than the time clock to do this. Transcript at 39, 45-46. Claimant believed that he stated, "I'm approved to work remotely. It's no longer necessary for me to stay in the office 'til 5 p.m. every day," and that the conversation immediately ended. Transcript at 45-46, 56. Claimant's supervisor believed that claimant simply stated that it was easier than using the time clock, without any suggestion that he was claiming to be working remotely after leaving the worksite. The supervisor also believed that he then admonished claimant to use only the time clock to punch in or out thereafter.

(8) On Tuesday, March 28, 2023, claimant left the worksite for the day at 3:47 p.m. and drove home. He did not use the time clock to punch out or seek permission to work remotely. At 5:03 p.m., claimant used the laptop at home to punch out for the day. Claimant similarly left the worksite without punching out on the time clock and later used the laptop to punch out from home on at least one other day during that week, March 30, 2023. Claimant's supervisor was not at the worksite during that week.

(9) During the week of April 2, 2023, claimant's supervisor returned to the office. He discovered that claimant had continued to punch out using the laptop during the week following the March 24, 2023 conversation in which he believed he had admonished claimant to use only the time clock to punch in or out. The supervisor reviewed surveillance footage to determine that claimant had left the worksite 76 minutes prior to punching out on the laptop on March 28, 2023. Claimant maintained that he was working remotely during this time, and the employer asked claimant to provide specific proof of what work he was doing, such as "any sort of dealings about customer emails," or evidence of calls or

meetings, but claimant was “unable to provide any proof of him working.” Transcript at 18-19. Claimant was suspended from work pending further investigation.

(10) On April 13, 2023, the employer discharged claimant for failing to use the time clock to punch out of at least two shifts during the week of March 28, 2023, and for using the laptop to cause the time system to record time as worked during that week that claimant did not actually work, or that he claimed to be working remotely despite not having authorization to do so.

**CONCLUSIONS AND REASONS:** Claimant was discharged 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 because on March 28, 2023, and at least one other day that week, March 30, 2023, claimant failed to punch out using the time clock when leaving the worksite, and punched out later using his laptop in order to be paid for time he did not work, or that he claimed to be working remotely despite not having authorization to do so. An employer has the right to expect that their hourly employees will not attempt to work remotely without permission and will not claim to have worked time that they did not actually work. Claimant was aware of these expectations as a matter of common sense and from knowing the employer's established policies.

The parties disputed whether claimant understood from the March 24, 2023 conversation with his supervisor that the employer expected him to use only the time clock at the worksite to punch in and out for his shifts. *See* Transcript at 9, 56. Even if claimant did not understand the employer's expectation regarding time clock use from this conversation, claimant was discharged for violations of other expectations that were known to him – that he not attempt to work remotely without authorization or claim to have worked hours that he did not actually work. Claimant did not rebut his supervisor's testimony that he saw claimant on surveillance video driving away from the worksite at 3:47 p.m. on March 28, 2023, and that claimant punched out on his laptop at 5:03 p.m. from home. Transcript at 7. The record shows that claimant engaged in nearly identical conduct on March 30, 2023. Exhibit 1 at 4-8. The record also suggests that claimant had regularly been engaging in such conduct for the preceding ten months. Transcript at 54. The question of misconduct therefore turns on whether this conduct, an example of which occurred on March 28, 2023, violated the employer's expectations that he not attempt to work remotely without authorization or claim to have worked hours that he did not actually work.

Claimant contended that his actions did not constitute an attempt to claim to have worked hours that he did not work “because while I drove home at 4 p.m., I took my laptop and was available for calls and answered any emails that may have popped up, until 5 p.m. every day.” Transcript at 28. Claimant testified that his afternoon commute home typically lasted 20 to 25 minutes because “when I would leave at 4:00 I would typically miss traffic.” Transcript at 34. The record therefore shows that claimant was engaged solely or primarily in the personal pursuit of driving to his home, rather than being available to perform work responsibilities, for at least 20 of the 76 minutes he claimed to be working for the employer after leaving the worksite on March 28, 2023. Further, the employer inspected claimant's computerized work calendar and emails for evidence that he had done work during this period and offered claimant an opportunity to present evidence of what specific work he had done, but no such evidence was found or presented, supporting the employer's assertion that claimant was not working during this time. Claimant testified that, “I have to drive to – to get to North Portland for a job that I can easily do from my house, so there's no real reason for me to stay ‘til 5 p.m. If I clocked out at 5 p.m. in the office, or I clock out at 5 p.m. at home, and I'm doing my job, it's the same hours.” Transcript at 55. This demonstrated that claimant felt entitled to leave the worksite for the day when he desired, yet be paid for time spent commuting home and thereafter being “available” for potential calls or emails from customers or coworkers – who likely had assumed he finished working for the day when he left the worksite – regardless of whether such actions were authorized or of any value to the employer. The record therefore shows that, more likely than not, claimant did not perform work for the employer for the entire period of 3:47 p.m. to 5:03 p.m. on March 28, 2023. To the extent he claimed to have been working during the time he was driving, claimant knew or should have known he was providing little or no service of value to the employer, and therefore willfully violated the employer's reasonable expectation by falsely claiming to have been working during this time. This constituted misconduct.

Moreover, even if claimant *believed* he was performing work for the employer after leaving the worksite because he was “available” to receive unexpected calls or emails for some of the 76 minutes he claimed to be working, he knew or should have known that the employer did not authorize him to engage in such work. The record suggests claimant felt he was “approved to work remotely” simply because he was given the technological capability to do so. Transcript at 44-46. He testified that the employer expected him to “come to work every day” unless he had prior authorization to work from home, either for a full day or part of a day, and that such authorizations had been given on specific occasions. Transcript at 46. Despite claimant knowing he needed prior authorization to work from home on specific occasions, he inferred that he had permission to do so at will after leaving the worksite near the typical end of his shift, despite not asking for such permission, “[b]ecause every time I would leave the building, I would either inform [the supervisor and] he would look me in the eye and say, ‘yes,’ you know, ‘have a good day’ . . . [or another manager], or just any of my colleagues. . . and it was seeing me leave with my laptop[.]” Transcript at 47. Claimant asserted that because his supervisor likely saw that he was leaving with a laptop and saw that he was punching out later in the day from home, and that this “was never brought up as an issue,” that his conduct was authorized. Transcript at 54. The supervisor testified that he did not see claimant with a laptop when claimant stopped to tell the supervisor he was leaving, and did not note at what time claimant left work in order to cross-reference it with the time clock records, and was therefore unaware that claimant was claiming to be working from home after leaving the worksite. Transcript at 62. Accordingly, claimant did not contend that he affirmatively sought authorization to work remotely on March 28, 2023 despite knowing the employer’s policies required it, and relied only on the absence of disapproval by the employer, who was unaware of what he was doing, to justify his actions. Therefore, the record shows he willfully violated the employer’s expectation that he secure a specific authorization in order to work remotely after leaving the worksite. This constituted misconduct.

Claimant’s actions were repeated acts, rather than single or infrequent occurrences, and therefore not an isolated instance of poor judgment. Claimant repeatedly argued that he was not warned that his actions violated the employer’s expectations prior to being discharged. Transcript at 25-27. Claimant knew, as demonstrated by his testimony, that the employer required prior authorization for each instance of remote work, and knew or should have known as a matter of common sense that the employer’s policies did not allow him to be paid for the time he was not working, such as when he was driving home from work. Nonetheless, claimant engaged in these actions, by his own admission, for a period of “ten months in this role without issue prior to me being suspended without warning.” Transcript at 27. The supervisor’s questions on March 24, 2023 about claimant using the laptop to punch out should have, at a minimum, suggested to claimant that the employer was unaware of his actions and likely would not have approved of them, yet he failed to inquire further and continued to engage in these acts on at least March 28, 2023 and March 30, 2023. Accordingly, claimant’s willful violations of the employer’s reasonable expectations cannot be excused as an isolated instance of poor judgment.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 9, 2023.

**DECISION:** Order No. 23-UI-228153 is affirmed.

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

**DATE of Service: August 9, 2023**

**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**

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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[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.