

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-1268**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 22, 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 August 20, 2023 (decision # 111109). Claimant filed a timely request for hearing. On November 2, 2023, ALJ Chiller conducted a hearing, and on November 9, 2023, issued Order No. 23-UI-240940, affirming decision # 111109. On November 16, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) STA of Oregon, Inc. employed claimant as a school bus driver from April 26, 2023 until August 12, 2023.

(2) The employer expected that their employees would not engage in illegal telephone use while operating a school bus. Claimant was aware of this expectation.

(3) On August 10, 2023, claimant was outside of her bus conducting a pre-trip inspection when she received a “family emergency” call on her cell phone, which she answered. Transcript at 14. She spoke to the caller on speakerphone while outside of the bus, then boarded the bus and continued conversing without holding the cell phone while she briefly drove the bus. The call ended as claimant left the bus yard. Claimant’s activities on the bus were captured by a surveillance camera and later viewed by the employer.

(4) On August 12, 2023, the employer discharged claimant for violating their telephone use policy. Based on a grievance filed by claimant’s union, the employer later reversed their decision to discharge claimant and reinstated her to her position.

(5) On August 16, 2023, claimant filed an initial claim for unemployment insurance benefits, listing her separation date from the employer as August 12, 2023. She thereafter filed weekly claims for benefits

for the weeks including August 6, 2023 through September 16, 2023 (weeks 32-23 through 37-23), in which she reported having no earnings.<sup>1</sup>

**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).

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<sup>1</sup> EAB has taken notice of these facts which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed facts will remain in the record.

ORS 811.507 provides, in relevant part:

(1) (a) As used in this section:

(A) “Driving” means operating a motor vehicle on a highway or premises open to the public, and while temporarily stationary because of traffic, a traffic control device or other momentary delays.

\* \* \*

(b) “Hands-free accessory” means an attachment or built-in feature for or an addition to a mobile electronic device that gives a person the ability to keep both hands on the steering wheel at all times while using the device or requires only the minimal use of a finger, via a swipe or tap, to activate or deactivate a function of the device.

\* \* \*

(e) “Using a mobile electronic device” includes but is not limited to using a mobile electronic device for text messaging, voice communication, entertainment, navigation, accessing the Internet or producing electronic mail.

(2) A person commits the offense of driving a motor vehicle while using a mobile electronic device if the person, while driving a motor vehicle on a highway or premises open to the public:

(a) Holds a mobile electronic device in the person’s hand; or

(b) Uses a mobile electronic device for any purpose.

\* \* \*

(4) It is an affirmative defense to a prosecution of a person under this section that the person:

\* \* \*

(b) Was 18 years of age or older and was using a hands-free accessory;

\* \* \*

\* \* \*

**Date of work separation.** The record contains conflicting evidence regarding the date claimant separated from employment. At hearing, claimant testified that she believed the employer informed her that her employment was ending on “Monday, September 21, 2023.” Transcript at 13. The date of September 21, 2023, actually fell on a Thursday. The employer’s witness testified that he could not recall when claimant’s employment ended, but agreed she had been discharged and believed “it was sometime in September.” Transcript at 7. The Department’s records show that claimant filed her initial claim for unemployment insurance benefits on August 16, 2023, stating that she had last worked for the

employer on August 12, 2023. They also show that claimant filed weekly claims for benefits for that week and for the weeks that followed, and did not report any earnings. These filings are inconsistent with claimant having separated from employment on September 21, 2023, as it can reasonably be inferred by her filing of weekly benefit claims and having no earnings that she had either been indefinitely suspended or discharged from work prior to that date. That claimant mistakenly believed September 21, 2023 fell on a Monday further suggests her testimony that this was the separation date was erroneous. As claimant's initial claim for benefits was made closest in time to the events in question, it is likely the most reliable evidence of when the work separation occurred. Therefore, more likely than not, the employer discharged claimant on August 12, 2023, as claimant stated in her initial application for benefits, and the facts have been found accordingly.

**Discharge.** The employer discharged claimant on August 12, 2023 for using a cell phone while operating a bus on August 10, 2023. The order under review concluded that claimant's use of a speakerphone while operating a bus violated ORS 811.507(2) and therefore constituted a wantonly negligent violation of the employer's expectation regarding telephone use that exceeded mere poor judgment. Order No. 23-UI-240940 at 4. The record does not support this conclusion.

The employer discharged claimant because she was captured on video utilizing a speakerphone while driving a school bus. The employer expected that their employees would not use a mobile electronic device while driving in violation of the law. Claimant was aware of this expectation. The record suggests that the employer may have had a more restrictive policy against telephone use while driving than that provided by state law, but the employer did not establish precisely what conduct was prohibited by such a policy, if it existed. The employer's witness testified that claimant was discharged for "using a cell phone while . . . operating a school bus, which is a violation of not only federal law but of . . . Oregon Department of Education . . . policy." Transcript at 7. He further testified that the policy was based on "federal . . . Department of Transportation law." Transcript at 8-9. In her testimony, claimant denied knowing that "using the phone while it was on speakerphone would be a violation of [the employer's] policy" at the time of the incident, though she understood illegal telephone use violated the employer's policies. Transcript at 15. She further testified that even after becoming more familiar with the employer's policies following this incident, she was still unsure whether use of a speakerphone violated the employer's policies. Transcript at 16. Therefore, the employer has only shown by a preponderance of evidence that their expectation regarding telephone use was that their employees would abide by the provisions of ORS 811.507.

The employer did not show by a preponderance of evidence that claimant's actions violated ORS 811.507(2). The employer's witness did not view surveillance video of the incident and did not have personal knowledge of it. Claimant admitted to briefly using the speakerphone while operating the bus, testifying that, "I had finished my pre-trip [inspection] and then I had pulled out of the yard and then the call – the call ended," describing the length of the call as a "matter of a few minutes at best." Transcript at 16. This testimony suggests that claimant may not have operated the bus "on a highway or premises open to the public" if it remained in the bus yard while she used the speakerphone, which is necessary to be considered "driving" under ORS 811.507(1)(a)(A). Further, claimant testified that she "did not physically have the phone in [her] hand" while operating the bus and that video of the incident "did not actually show [her] physically holding or using [it]." Transcript at 14. This suggests that the cell phone had a "built in feature" that allowed claimant, by using the speakerphone function, the ability to keep both hands on the steering wheel at all times while using the device. The record does not show how the

call disconnected, but it can reasonably be inferred that either the other party ended the call without claimant touching the cell phone, or claimant used only a single touch of the cell phone to deactivate the device. Therefore, more likely than not, claimant was utilizing a “hands-free accessory” pursuant to ORS 811.507(1)(b). Accordingly, under ORS 811.507(4)(b), claimant’s use of the cell phone in this way did not constitute a violation of ORS 811.507(2), even if she met the statutory definition of “driving” at the time.

For these reasons, the employer has not met their burden of showing that claimant violated ORS 811.5017(2) and, in turn, their expectation regarding telephone use. Therefore, claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 23-UI-240940 is set aside, as outlined above.

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

**DATE of Service: December 28, 2023**

**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](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 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 الاستئناف 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)

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