

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-1278**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 11, 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 July 23, 2023 (decision # 111206). Claimant filed a timely request for hearing. On October 27, 2023, ALJ Lewis conducted a hearing, and on October 31, 2023, issued Order No. 23-UI-239983, affirming decision # 111206. On November 19, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant did not declare that he provided a copy of his November 19, 2023, argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019), and it was therefore not considered. Claimant's December 24, 2023, argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2). EAB considered claimant's December 24, 2023, argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Tradewinds Transportation LLC employed claimant as a dispatch and sales agent from June 3, 2013, until July 28, 2023.

(2) The employer expected that their sales agents would follow a set of procedures when handling potential customers. These procedures required seeking approval from the sales manager, requesting that a credit check be conducted, and then adding the customer to the sales agent's customer list. The sales agent was also to update their customer list once or twice a year when requested by the employer. Claimant understood this expectation.

(3) Sometime in 2019 or 2020, claimant began providing service to a business, S.A., after accepting them as a customer. Claimant believed he had obtained verbal approval from a sales manager to do so, but claimant inadvertently failed to request a credit check or add S.A. to his customer list initially and

during subsequent list updates. The employer's managers knew that claimant was providing service to S.A. from the time they became a customer through July 2023, despite their name not appearing on claimant's customer list.

(4) On June 28, 2023, a sales manager requested that claimant and other sales agents update their customer lists for review by July 6, 2023.

(5) On July 11, 2023, the employer issued a written warning to claimant. In addition to a "Failure to Follow Instructions" box being checked, the warning cited "rude / banter via email to employees / argumentative" and "complaining of company pay." Exhibit 1 at 33. The warning did not specifically mention S.A.

(6) On July 21, 2023, claimant's supervisor noticed that S.A. did not appear on claimant's updated customer list, and further research showed no record of a credit check having been conducted or management approval having been granted to take S.A. on as a customer. Claimant was asked to produce evidence of the credit check request or management approval from three years prior, but was unable to do so.

(7) On July 28, 2023, the employer discharged claimant for failing to follow procedure with regard to taking S.A. on as a customer, as well as the previous points of dissatisfaction with claimant's performance for which he received the July 11, 2023, warning.

**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).

A discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of misconduct before the discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012. The proximate cause of discharge is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009.

The order under review concluded that claimant "failed to follow employer's instructions and protocol as it pertained to new customers. Therefore, claimant willfully, or with wanton negligence, violated employer's reasonable policies or expectations." Order No. 23-UI-239983 at 4. The record does not support that claimant's failure to follow procedure regarding S.A. was willful or wantonly negligent.

When the employer discharged claimant, they cited several reasons for doing so, nearly all of which had occurred prior to July 11, 2023, and had been the subject of a warning issued on that date. As the employer chose not to discharge claimant for those reasons at the time of the July 11, 2023, warning, they were not the proximate cause of claimant's discharge on July 28, 2023. While both the July 11, 2023, warning and July 28, 2023 termination notification cited insubordination and being argumentative as reasons for their issuance, the record does not show alleged instances of this conduct occurring after the July 11, 2023 warning. Similarly, the employer did not assert that claimant "continue[d] to break company policy" regarding "vetting and using carriers," as alleged in the termination notification, after July 11, 2023. Exhibit 1 at 32. The only instance of alleged misconduct occurring *after* the July 11, 2023, warning—identified specifically by the employer as the "final incident" leading to his discharge—was the discovery by the employer that claimant had not included S.A. on his updated customer list, and had apparently not followed procedure three years prior when S.A. was accepted as a customer. Transcript at 6. Accordingly, this discovery and claimant's conduct leading to it are the subject of the discharge analysis.

The employer has shown by a preponderance of the evidence that claimant failed to follow procedure when taking S.A. on as a customer and failed to update his customer list to include S.A. thereafter. The employer testified that they could not find evidence in their records that claimant had requested a credit check or had requested approval from management for S.A. to become a customer. Transcript at 7-8. Claimant testified that he did not know what transpired when S.A. became a customer three years earlier and thought that "maybe it was a verbal okay" that he received from management, based on his inability to locate written documentation of the approval or credit check. Transcript at 16-17. It can reasonably be inferred that written records of S.A.'s credit check or approval would have been located had they ever existed, as claimant described this as "out of the 10 years I've been there. . . the one situation where I . . . could not find an email." Transcript at 16. Claimant's lack of recollection as to whether he obtained approval or requested a credit check for S.A. is therefore less persuasive evidence of whether he had done so than the employer's lack of records that would have existed if claimant had taken those actions. Therefore, more likely than not, claimant failed to seek approval or request a credit check for S.A. The parties did not dispute that claimant thereafter failed to include S.A. on his customer list during the subsequent three years. Claimant's failure to follow procedure when taking S.A. on as a customer and to include S.A. on his customer list therefore violated the employer's expectations.

However, the employer did not meet their burden to prove that claimant's failures to act were willful or wantonly negligent. Claimant testified, "I've always tried to do and follow the procedure 100 percent[.]" Transcript at 18. He explained, "I worked with [S.A.] as an agent. I put all of their freight on our company trucks over the three years. It was no secret I was working with this customer. . . I didn't realize [he had failed to follow procedure] until this was brought to my attention." Transcript at 17. Claimant further testified, "I wasn't aware I made the mistake" and "I didn't benefit from the mistake." Transcript at 19. Claimant explained regarding S.A.'s omission from his customer list, and the omission going unnoticed during three years of updates, that the lists "could be quite long sometimes," and that he would "go through those the best I can and try to update knowingly what I can. . . [apparently] I missed something there." Transcript at 17.

The employer did not rebut claimant's testimony that he did not personally benefit from failing to follow procedure in accepting S.A. as a customer. This supports that claimant had no motive to willfully disregard the procedure or omit S.A. from his list. That the employer submitted into evidence examples

of claimant *following* their procedure, and did not offer evidence of other recent instances of claimant failing to follow it, suggests that the failure to follow procedure was isolated, unintentional, and not the result of indifference to the employer's policy or interests. *See* Exhibit 1 at 19-22. Therefore, the employer has not shown by a preponderance of the evidence that claimant's failure to follow procedure or include S.A. on updated customer lists was the result of more than mere negligence.

Claimant may have violated the employer's expectations in other ways prior to July 11, 2023, for which he received a warning. However, the employer has not shown that claimant's failure to follow their procedures three years earlier, or include S.A. in his client list thereafter, constituted a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. As this belated discovery was the proximate cause of claimant's discharge, he was not discharged for misconduct.

For these 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. 23-UI-239983 is set aside, as outlined above.

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

**DATE of Service:** January 2, 2024

**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 desisyong.

## 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  
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