

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0326**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 16, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective November 26, 2023 (decision # 91817). Claimant filed a timely request for hearing. On March 12, 2024, ALJ Contreras conducted a hearing, and on March 20, 2024, issued Order No. 24-UI-250477, affirming decision # 91817. On March 29, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Davis Trans-Lite employed claimant as a commercial truck driver from March 20, 2023, until November 29, 2023.

(2) The employer expected their drivers to refrain from causing preventable damage to company vehicles by driving inattentively. Claimant understood these expectations.

(3) On November 29, 2023, the employer assigned claimant to use a dump truck to pick up and transport a load of sand. Claimant picked up a load, but it was slightly overweight and claimant needed to unload some of it. Claimant engaged reverse and began backing up to the sand pile to perform the unloading. After claimant had reversed several truck lengths, he heard a loud bang, and discovered the truck would not move.

(4) Claimant inspected the truck and observed that the truck driveline had broken at the U-joint. The driveline transferred power from the truck's transmission to the wheels and upon breaking made the truck inoperable. The driveline was made of two and a half inches of solid steel. The U-joint held the driveline together and was made of cast steel, which was strong but more prone to breakage. Claimant saw there was a crack in the U-joint.

(5) Claimant called the employer's mechanic and explained what occurred. The mechanic asked if claimant had "drop[ped] the clutch" and claimant advised that he had not. Transcript at 30. The employer's owner and mechanic inspected the truck. They believed that the break to the driveline was a

“clean break” that would require “an extreme power application,” which led the employer to “surmise” that when claimant backed up, he did not give “the brakes a chance to release” and had abruptly placed the truck in reverse causing the driveline to break. Transcript at 6-7.

(6) Later that day, the employer’s owner discharged claimant because he believed claimant’s inattentiveness had caused the damage to the truck’s driveline. When he discharged claimant, the owner told claimant the break occurred because claimant had “dropped the clutch[.]” Transcript at 31. Claimant responded that he had “never dropped the clutch,” the conversation ended, and claimant departed the workplace.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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).

The order under review concluded that claimant, with wanton negligence, breached the employer’s prohibition against causing preventable damage to company vehicles by driving inattentively when, on November 29, 2023, the truck’s driveline broke while claimant was backing it up. Order No. 24-UI-250477 at 4. The order concluded that the November 29, 2023, incident constituted misconduct because it was not an isolated instance of poor judgment. Order No. 24-UI-250477 at 4. The record does not support the conclusion that the November 29, 2023, incident constituted misconduct.

At hearing, the employer’s witness testified that the November 29, 2023, incident was the reason the employer discharged claimant. Transcript at 19-20. That incident is therefore the focus of the discharge analysis because it was the incident without which the discharge would not have happened when it did. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). While a portion of the hearing in this matter involved the parties offering evidence about vehicle damage caused by claimant’s alleged inattentiveness on occasions prior to November 29, 2023, those prior incidents are not material. The prior incidents are not material because the November 29, 2023, incident was the proximate cause of the discharge and, as discussed below, the employer did not meet their burden to show claimant violated the employer’s expectations willfully or with wanton negligence on that occasion.

The employer did not meet their burden to prove that claimant's conduct on November 29, 2023, was a willful or wantonly negligent violation of the employer's prohibition against causing preventable damage to company vehicles by driving inattentively. At hearing, the employer's witness testified that claimant's alleged violation of the employer's expectation was not intentional. Transcript at 9. As such, it is undisputed that claimant did not operate the truck on that day with the intent to cause the driveline to break, and therefore claimant did not violate the employer's expectations willfully.

Nor did the employer prove that more likely than not claimant's conduct was a wantonly negligent violation of their standards. At hearing, the parties offered differing accounts of what occurred on November 29, 2023. The employer's witness testified that she understood that the break in the driveline was a "clean break" that would require "an extreme power application," which led the employer to "surmise" that when claimant backed up, he did not give "the brakes a chance to release" and just "threw it in reverse," thus causing the amount of torque necessary to break the driveline. Transcript at 6-7. The employer's witness did not inspect the truck after the incident herself, and although the witness testified that photographs of the driveline break existed, they were not offered into evidence, nor was the firsthand testimony or inspection reports of the mechanic and owner who had inspected the truck following the incident. Transcript at 48.

In contrast, claimant testified that he "was actually already . . . going in reverse for at least four truck lengths . . . when it happened," suggesting the truck's brakes were fully released and that he had not abruptly shifted into reverse. Transcript at 25. Claimant also stated that, rather than a clean break, the drive line break occurred at the U-joint, which was made of "cast steel," which is strong but more prone to breakage than solid steel. Transcript at 24-25. Claimant also testified that when the driveline break occurred, he contacted the employer's mechanic and that individual asked if claimant had "dropped the clutch" of the truck, to which claimant responded that he had not. Transcript at 30. Claimant also testified that when the employer's owner advised he was discharging claimant, he stated that claimant had "dropped the clutch" to which claimant responded, "I never dropped the clutch." Transcript at 31.

Claimant's first-hand account of what occurred on November 29, 2023, is entitled to more weight than the account of the employer's witness, which was based on what the employer had surmised after the incident took place and then conveyed to the witness. Where the two accounts materially differ, the facts of this decision have been found in accordance with claimant's account. The fact that claimant had engaged reverse for several truck lengths before the driveline broke tends to show that he sufficiently allowed the brakes to release and had not suddenly placed the vehicle in reverse. Claimant's assertion that the break occurred at the U-joint suggests that it was possible the break could have occurred without an extreme application of power. Claimant also consistently denied that he had dropped the truck's clutch prior to the driveline break, a fact that also makes it less likely that claimant had been driving inattentively when the break occurred.

For these reasons, the employer did not meet their burden to prove that claimant, with wanton negligence, violated the employer's prohibition against causing preventable damage to company vehicles by driving the truck inattentively on November 29, 2023. Accordingly, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 24-UI-250477 is set aside, as outlined above.

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

**DATE of Service: May 10, 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.

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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**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
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