

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0435-R**

*EAB Decision 2024-EAB-0435 Affirmed on Reconsideration  
Disqualification*

**PROCEDURAL HISTORY:** On February 23, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective December 17, 2023 (decision # 132642). Claimant filed a timely request for hearing. On April 15, 2024, ALJ Contreras conducted a hearing, and on April 23, 2024, issued Order No. 24-UI-252792, modifying decision # 132642 by concluding that claimant was disqualified from receiving benefits effective December 10, 2023. On May 8, 2024, claimant filed an application for review of Order No. 24-UI-252792 with the Employment Appeals Board (EAB).

On June 18, 2024, EAB issued EAB Decision 2024-EAB-0435, affirming Order No. 24-UI-252792. After EAB issued EAB Decision 2024-EAB-0435, EAB considered claimant's timely-filed written argument.<sup>1</sup> On its own motion, EAB has reconsidered EAB Decision 2024-EAB-0435. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

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

**FINDINGS OF FACT:** (1) Penske Logistics employed claimant as a truck driver from March 22, 2021, until December 14, 2023.

(2) The employer expected that their truck drivers would not commit an "unsafe act," defined as a "behavioral departure from a policy, procedure, or accepted norm or practice that has the potential to result in a preventable [traffic] incident. . . which may or may not result in a preventable [traffic]

<sup>1</sup> The argument was submitted June 6, 2024, but was captioned with an incorrect case number and was therefore not immediately associated with this appeal. EAB discovered the error on June 20, 2024.

incident. . . or moving violation.” Exhibit 1 at 5. Claimant was aware of this expectation from having acknowledged receiving the employer’s written policy which contained it. The employer had a progressive disciplinary policy that classified policy violations into different levels based on severity, and called for an employee’s discharge after accumulating a number of low-level violations over a period of time.

(3) The employer also expected that their employees would wear seatbelts whenever working as “hostlers,” operating tractors to move trailers in the employer’s truckyard. This policy was generally not enforced at the beginning of claimant’s employment, but this began to change in approximately May 2023, around the same time an automated camera system was installed in the employer’s vehicles for use in identifying policy violations.

(4) On August 9, 2023, the employer issued claimant a first warning under their disciplinary system for failing to wear a seatbelt while performing hostler duties. Claimant was thereafter aware of the employer’s expectation regarding compliance with their seatbelt policy. Claimant believed that the seatbelt in the tractor he used was “installed improperly,” causing it to “cut into” his neck. Transcript at 55. In response to claimant’s complaint in this regard, the employer obtained a sleeve to go over the seatbelt, but claimant “did not want to use it” and claimant declined to use a seatbelt thereafter when working as a hostler. Transcript at 64. Alternate vehicles with different seatbelt styles were available for claimant to perform this work, but he did not request such a vehicle following the August 2023 warning.

(5) On September 13, 2023, claimant failed to wear a seatbelt while working as a hostler because it caused him discomfort. The employer issued claimant another warning under their disciplinary policy for this violation.

(6) On December 10, 2023, at approximately 4:00 a.m., claimant was driving one of the employer’s trucks on a highway in Oregon with a 55 mile-per-hour speed limit. Claimant approached a curve with a posted advisory speed of 40 miles per hour. Claimant took the curve at 51 miles per hour, causing him to make a wide turn into the opposing lane of travel to prevent the truck from rolling over. The incident was video recorded by the truck’s automated system and the footage later viewed by the employer.

(7) On December 14, 2023, the employer discharged claimant after having suspended him on December 12, 2023, for what the employer considered an “unsafe act” as depicted in the December 10, 2023, recording. Exhibit 1 at 9. While this was viewed as a low-level violation, the employer considered the cumulative number of such violations as grounds for discharge under their policy.<sup>2</sup>

**CONCLUSIONS AND REASONS:** EAB Decision 2024-EAB-0435 is reconsidered on EAB’s own motion, and is adhered to as clarified herein.

**Reconsideration.** ORS 657.290(3) authorizes EAB to reconsider any previous decision of the Employment Appeals Board, including “the making of a new decision to the extent necessary and appropriate for the correction of previous error of fact or law.” “Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment

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<sup>2</sup> The employer asserted that other low-level policy violations occurred prior to December 10, 2023, which are not discussed in this decision.

Department rule, or officially stated Employment Department position, or prior Employment Department practice.” OAR 471-041-0145(1) (May 13, 2019).

Claimant filed a timely written argument. EAB’s decision to issue EAB Decision 2024-EAB-0435 without considering the argument was error. EAB has therefore reconsidered the decision on its own motion.

**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). 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 under their progressive disciplinary policy because they believed that claimant committed several infractions of their policy, the last of which occurred on December 10, 2023.

The initial focus of a discharge analysis is 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 the discharge is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009. Therefore, claimant's driving through the curve on December 10, 2023, was the proximate cause of his discharge.

The employer reasonably expected that employees would not drive their trucks in a way that could result in a moving violation or cause damage or injury, and claimant was aware of this expectation. The employer's witness testified based on having reviewed video footage recorded from inside and outside of the truck claimant was driving on December 10, 2023. According to this testimony, the video showed that claimant entered a curve with a posted speed limit of 40 miles per hour at 51 miles per hour, and therefore had to turn the truck so widely that it entered the opposing lane of travel. Transcript at 8-9, 29. The employer asserted that sensors inside the truck determined that it was at risk of rolling over during the turn because of its speed. Exhibit 1 at 9.

Claimant did not dispute that he negotiated the curve at 51 miles per hour, and did not dispute that he caused the truck to enter the opposing lane of travel. Transcript at 48-49. However, he testified that the posted speed limit was 55 miles per hour, and that the curve had a posted advisory speed of "40 to 45" miles per hour. Transcript at 48-49. To the extent these accounts differ, the evidence is no more than equally balanced as to what the speed limit was. Therefore, the employer has not shown by a preponderance of the evidence that the speed limit was other than 55 miles per hour, and the facts have been found accordingly. In weighing the testimony offered by both parties regarding the speed sign seen by the employer in the video, it is more likely than not that it depicted an advisory speed for the curve of 40 miles per hour.

The record shows that even if claimant did not exceed the posted speed limit of 55 miles per hour while driving through the curve, his actions in causing the truck to enter the opposing lane of travel could have resulted in a moving violation if observed by law enforcement.<sup>3</sup> Further, the employer's assertion that sensors in the truck determined that the speed at which it negotiated the curve generated "forces significant enough to cause a roll-over" was not rebutted. Exhibit 1 at 9. Therefore, the employer has shown that claimant's driving constituted an "unsafe act" in violation of their written policy.

Claimant's testimony suggested that he noticed, and disregarded, the posted advisory speed of 40 miles per hour when approaching the curve. Moreover, claimant testified that he did not think that his failure to decelerate to a speed that would have allowed him to safely remain on the right side of the road was "wrong" or inconsistent with his training. Transcript at 49. It can reasonably be inferred from this evidence that claimant made a conscious decision to drive the truck at a speed at which it could not safely remain on the right side of the road through the curve, and he was, at least, indifferent to the consequences of this decision. Accordingly, the employer has shown that claimant violated their policy by committing an "unsafe act" on December 10, 2023, with at least wanton negligence.

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<sup>3</sup> *See* ORS 811.295(1), requiring driving on the right half of a roadway if there is "sufficient width" to do so; ORS 811.305(a), prohibiting "driving on the left side of the center of the roadway. . . [u]pon any part of a grade or upon a curve in the roadway where the driver's view is obstructed for such a distance as to create a hazard in the event another vehicle might approach from the opposite direction;" and ORS 811.310(1), prohibiting "crossing the center line on a two way, four lane road," except under circumstances inapplicable here.

Further, while isolated instances of poor judgment are not misconduct, the employer has shown that this incident was not isolated. The employer reasonably expected that employees serving as hostlers would wear seatbelts while operating tractors. Claimant testified that he understood this policy after receiving “the first write-up” for violating it in August 2023. Transcript at 55. Claimant testified that after this warning, he “tried to wear [the seatbelt]” and “when it cut into my neck. . . I just stopped using it.” Transcript at 55. Claimant did not rebut the employer’s testimony that they reviewed a video showing claimant operating a tractor as a hostler without wearing a seatbelt in September 2023, for which he was disciplined.

It can be inferred from claimant’s testimony that he made a conscious decision not to wear the seatbelt in September 2023, despite knowing that it was required, because it caused him discomfort. The employer’s witness testified that alternatives to operating the tractor with the seatbelt he found to be uncomfortable were available, such as assigning claimant an alternate style of vehicle, which claimant did not rebut. Transcript at 65. As claimant’s testimony established that he was aware of the video recording devices in the tractors prior to September 2023, it can reasonably be inferred that claimant’s failure to use the seatbelt in September 2023 was a conscious decision made with the knowledge that the employer would likely discover it and consider it a policy violation. *See* Transcript at 56. Therefore, claimant’s failure to use the seatbelt on this occasion was willful, or at least wantonly negligent. Accordingly, the employer has met their burden to show that the December 10, 2023, incident was not isolated, and can therefore be considered misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective December 10, 2023.

**DECISION:** Order No. 24-UI-252792 is affirmed.

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

**DATE of Service:** July 23, 2024

**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 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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