

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0064

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 5, 2024, 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 November 3, 2024 (decision # L0007489103).¹ Claimant filed a timely request for hearing. On January 9, 2025, ALJ Enyinnaya conducted a hearing, and on January 17, 2025 issued Order No. 25-UI-280250, affirming decision # L0007489103. On January 27, 2025, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Exhibit 1 was admitted at hearing and made part of the record as six unnumbered files. To facilitate citation by page number to this evidence, the files have been consolidated and marked for identification as EAB Exhibit 1, and a copy provided to the parties with this decision.

WRITTEN ARGUMENT: EAB considered the employer's written argument in reaching this decision. The employer submitted with their argument new information that was not part of the hearing record. The new information consisted of video footage that the employer asserted depicted claimant's conduct during the October 31, 2024 incident. Circumstances beyond the employer's reasonable control prevented the admission of this evidence at hearing because the ALJ could not open the video files due to technical difficulties. Audio Record at 7:13. However, because the record does not show a factual dispute between the parties as to the dispositive issue of whether claimant used a hand-held telephone while driving during the incident, as discussed in greater detail below, the evidence is of limited

¹ Decision # L0007489103 stated that claimant was denied benefits from November 10, 2024 to November 8, 2025. However, because decision # L0007489103 asserted that the work separation occurred on November 4, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, November 3, 2024, and until he earned four times his weekly benefit amount. See ORS 657.176.

probative value. EAB therefore declines to consider it under ORS 657.275(2) and OAR 471-041-0090(1)(b) (May 13, 2019).²

FINDINGS OF FACT: (1) Rogers NW Enterprises, Inc. employed claimant as a delivery driver from June 14, 2019 through November 4, 2024.

(2) The employer expected that their drivers would not drive “while texting or e-mailing [or] while using a hand-held telephone.” EAB Exhibit 1 at 3. Claimant was aware of this policy and at hire signed an acknowledgement that violating this policy “will result in immediate suspension or termination of employment.” EAB Exhibit 1 at 3.

(3) On October 8, 2024, claimant injured his back in connection with his work. Claimant wanted to seek medical treatment through a workers’ compensation claim but believed that the employer was uncooperative regarding the claim, and he therefore delayed treatment.

(4) On October 31, 2024, claimant, while on a break from driving, called a physical therapy provider to seek treatment for his injury and was “anxious” that the provider told him he would have to pay for the treatment out-of-pocket if not covered through the workers’ compensation claim. Transcript at 20-21. Claimant decided to think about the situation further before scheduling an appointment.

(5) Later that day, claimant decided to schedule an appointment with the provider despite the uncertainty over insurance coverage. While driving the employer’s vehicle, claimant called the provider using a hand-held telephone. Claimant felt that he could not wait until the end of his shift or pull over to make the call because he was concerned that the provider would close or not have appointments available if he waited longer. Claimant applied the vehicle’s brakes suddenly while using the telephone, causing an automatic video surveillance system to engage. Video of claimant driving while holding the telephone in his hand and conversing was sent to the employer.

(6) The employer subsequently reviewed the video footage, and on November 4, 2024, discharged claimant for violating the against using a hand-held telephone while driving. The employer believed that claimant had also committed two other “safety violations” on April 10, 2024 and July 20, 2024, for which he received warnings. EAB Exhibit 1 at 1. Claimant did not believe that the warnings for the two prior alleged violations were deserved.

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

² OAR 471-041-0090(1)(b) provides, in relevant part, “Any party may request that EAB consider additional evidence, and EAB *may* allow such a request . . .” (emphasis added).

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).

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:

(a) Used the mobile electronic device to communicate if the person was summoning or providing medical or other emergency help if no other person in the vehicle was capable of summoning help;

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

* * *

* * *

The employer discharged claimant for using a hand-held telephone while driving the employer’s vehicle. The employer expected that their employees would not use hand-held telephones while driving, and claimant understood this policy. ORS 811.507, which prohibits the same conduct as the employer’s policy, contains an exception if the telephone was used for “summoning or providing medical or other emergency help[.]” ORS 811.507(4)(a). The employer’s policy sets forth a standard of behavior which an employer has the right to expect of an employee, as it can reasonably be inferred that the exception provided in ORS 811.507(4)(a) would similarly apply to enforcement of the employer’s policy.

Claimant suggested at hearing that the discharge should not be disqualifying because he asserted that lesser discipline should have been imposed for a first violation of the telephone use policy, and because he believed the employer was inconsistent in imposing discipline among employees for safety violations. *See* Transcript at 31-33. However, the required analysis of the work separation is limited to determining whether the incident that proximately caused the employer’s decision to discharge claimant met the definition of misconduct under the relevant statute and rule. *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). The proximate cause of claimant’s discharge was his alleged use of a hand-held telephone while driving on October 31, 2024, without

regard to the other factors asserted by claimant. This incident is therefore the proper subject of the discharge analysis.

Claimant did not dispute that while driving the employer's vehicle on October 31, 2024, he placed a telephone call as he held the phone in his hand. Transcript at 20. However, claimant asserted that the situation was "a medical emergency." Transcript at 20. He further explained that he was at a red light and "wasn't able to pull over and . . . had to seek medical attention." Transcript at 20. Nonetheless, the record shows that claimant was not seeking *immediate* medical attention through the call, as he testified he was "trying to get an appointment for physical therapy[.]" Transcript at 20. Claimant's call to schedule an outpatient physical therapy appointment cannot reasonably be construed as "summoning" medical help to the vehicle, such that it would fall within the employer's or the relevant statute's emergency exception. Claimant therefore knew or should have known that his conscious action in using the telephone while driving would probably result in a violation of the employer's reasonable policy. Accordingly, the employer established that claimant violated the telephone use policy with wanton negligence.

Furthermore, this violation cannot be excused as an isolated instance of poor judgment. Claimant's actions involved poor judgment, but the parties dispute, to some degree, whether the incident was isolated or part of a pattern of other wantonly negligent safety violations. However, because claimant's use of the hand-held telephone while driving violated ORS 811.507(2), his actions on October 31, 2024 violated the law or were tantamount to unlawful conduct. Thus, claimant's conduct exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3), regardless of whether that policy violation was "isolated." Therefore, claimant's actions during the final incident cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b)(D), and the employer discharged him for misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective November 3, 2024.

DECISION: Order No. 25-UI-280250 is affirmed.

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

DATE of Service: February 28, 2025

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 stated above**. See ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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you are unable to complete the survey online and wish to have 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 – 本判决会影响您的失业救济金。如果您不明白本判决，请立即联系就业上诉委员会。如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

Traditional Chinese

注意 – 本判决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.

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Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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