

State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

**EMPLOYMENT APPEALS BOARD DECISION**  
**2025-EAB-0124**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 14, 2025, 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 December 8, 2024 (decision # L0008616198).<sup>1</sup> Claimant filed a timely request for hearing. On February 10, 2025, ALJ Micheletti conducted a hearing, and on February 14, 2025, issued Order No. 25-UI-283154, affirming decision # L0008616198.<sup>2</sup> On February 23, 2025, claimant filed an application for review of Order No. 25-UI-283154 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) PDX Refinishers, Inc. employed claimant as a painter from July 18, 2023, through December 10, 2024.

(2) The employer had a written policy regarding telephone use while driving that stated, in relevant part, “Absolutely no texting, emailing, internet surfing, using Facebook or other apps, writing, [or] game playing on any cell phone or other device by [the] driver of a vehicle while the vehicle is in gear . . . Phone use with hands-free phone memory dialing features does not constitute safe use of the device.” Audio Record at 19:05. The employer intended the policy to be “basically consistent with Oregon law.” Audio Record at 5:00. Claimant signed an acknowledgement of having received a copy of this policy.

(3) The employer required their painters to drive to various worksites throughout the workday. Claimant’s manager would often text time-sensitive information to claimant while he was driving,

<sup>1</sup> Decision # L0008616198 stated that claimant was denied benefits from December 15, 2024 to December 13, 2025. However, as decision # L0008616198 concluded that claimant was discharged on December 10, 2024, it should have stated that claimant was disqualified from receiving benefits beginning Sunday, December 8, 2024 and until he earned four times his weekly benefit amount. *See* ORS 657.176.

<sup>2</sup> Order No. 25-UI-283154 stated that it affirmed decision # L0008616198, but that claimant was disqualified from receiving benefits effective December 15, 2024 despite having been discharged on December 10, 2024. Order No. 25-UI-283154 at 3. It is presumed that the order under review intended to disqualify claimant from receiving benefits effective December 8, 2024.

including messages informing claimant that a job he was in route to had been cancelled and providing a new address to which he should report instead. Claimant was also expected to acknowledge these messages from his manager, and to tell customers that he was on his way to them. Claimant believed that the employer expected him to use his telephone while driving, though without holding it in his hand, to read or send these messages or use the navigation app.

(4) The employer installed a camera system in their vehicles that watched the driver's eyes and alerted the employer when footage was captured that suggested the driver's attention was diverted from the road, such as when looking at a telephone. The system could not capture video footage of other parts of the vehicle's interior, below the driver's chest.

(5) On April 4, 2024, the employer gave claimant a warning for a violation of the employer's telephone use policy. In the incident for which he was warned, claimant had held a telephone in his hand and used it while driving, which was captured by the vehicle's camera system. Ordinarily, the vehicle claimant drove was equipped with a telephone holder for hands-free use. However, the holder had broken, causing claimant to hold the telephone while using it on this occasion. Claimant understood before and after the warning that such use of the telephone while driving violated the employer's policy, but believed it was a violation only because he had held it in his hand while using it.

(6) On December 6, 2024, claimant was driving one of the employer's vehicles with his telephone placed in the holder. For approximately 20 seconds, claimant's eyes were focused on the telephone as he used its navigation app. Claimant did not believe that this violated the employer's policy. The vehicle's camera system alerted the employer that footage was obtained of potential distracted driving, which the employer later reviewed.

(7) On December 10, 2024, the employer discharged claimant for his alleged December 6, 2024, violation of the telephone use policy. The employer had also been dissatisfied with claimant having arrived at work late on several recent occasions, but would not have discharged claimant on that date for that reason had the December 6, 2024, telephone incident not occurred.

**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 prove misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he had violated their telephone use policy on December 6, 2024. Claimant testified that the employer told him that the “main reason” he was being discharged “was because I was late, not so much because of the texting,” referring to several instances of tardiness prior to the December 6, 2024, incident. Audio Record at 14:40. In contrast, the employer testified that when he saw the warning from the distracted driving camera system and reviewed video of the December 6, 2024, incident, it was “the final straw.” Audio Record at 6:16. The employer was asked, “If [claimant] hadn’t been late all those other times, would he still have been discharged for this [telephone] incident?” and the employer responded affirmatively. Audio Record at 6:54. In weighing this testimony and the timing of these incidents in relation to the discharge, it is more likely than not that the proximate cause of claimant’s discharge was his telephone use on December 6, 2024. Therefore, the December 6, 2024, incident is the initial subject of the discharge analysis.<sup>3</sup>

The employer had a written policy, a copy of which had been provided to claimant, which stated, “Absolutely no texting, emailing, internet surfing, using Facebook or other apps, writing, [or] game playing on any cell phone or other device by [the] driver of a vehicle while the vehicle is in gear. . . . Phone use with hands-free phone memory dialing features does not constitute safe use of the device.” Audio Record at 19:05. The order under review concluded that claimant violated the policy willfully or with wanton negligence because he should have fully understood the policy’s terms following the April 2024 warning. Order No. 25-UI-283154 at 3. The record does not support this conclusion.

Despite the text of the employer’s policy, claimant believed that the employer expected him to use his telephone while driving to worksites if the need arose to “change directions or send a text message to customers that I’m on the way.” Audio Record at 10:40. Claimant explained regarding the April 4, 2024, warning that the vehicle’s telephone holder had been broken, so he kept the telephone in a cup holder and would “grab” the telephone to perform these functions while driving. Audio Record at 10:28. Claimant testified that he believed that discipline was imposed for holding the telephone in his hand while using it, and that using the telephone for navigation and messaging while it was in the holder was what the employer expected. Audio Record at 10:43; 13:08; 21:07. Claimant further explained, “There would be times where . . . jobs would get cancelled while I’m headed to one job and I would get a message from my manager saying, ‘Hey, this job is cancelled, can you go and take over for another job?’” Audio Record at 20:23. Claimant would then have to input the new address in the telephone’s navigation app and “acknowledge” the text message. Audio Record at 20:28. Claimant testified that he “wasn’t aware” that, according to the written policy, “every time you need to change your address or whatever you had to pull over, put the car in park, and do that. I thought as long as it’s mounted to the vehicle, then that’s safe . . . that’s upholding the policy.” Audio Record of 20:47.

Claimant’s failure to understand that the employer expected him not to use his telephone while the vehicle was in gear, even if he was not holding it, was reasonable under the circumstances. The employer seemingly presented claimant with conflicting expectations, in that his manager would send him time-sensitive text messages at times the manager knew him to be driving, and would expect claimant to promptly read them and take appropriate action including use of the messaging and

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<sup>3</sup> 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).

navigation apps. These actions presumably could be accomplished lawfully through use of the telephone's hands-free features when it was placed in the holder.<sup>4</sup> However, the employer's written policy stated that even using hands-free features to place a call was not permitted while the vehicle was in gear, in contrast to the employer's contention that the policy was "basically consistent with Oregon law," which permits hands-free use under some circumstances. Audio Record at 5:00. The record shows that after the April 2024 warning, claimant used the telephone only while it was in the holder. This showed that claimant was not indifferent to the consequences of his actions and intended to comply with the employer's directive, as he understood it, that the telephone only be used safely and lawfully.

As to claimant's conduct on December 6, 2024, the employer testified that the video footage he reviewed showed only claimant's eyes, not his hands or the telephone, and that claimant's eyes were "consistently off the road for at least 20 seconds." Audio Record at 15:52. This evidence does not prove a willful or wantonly negligent violation of the employer's policy. The testimony is insufficient to conclude that claimant, more likely than not, used the telephone in a way that fell outside of what is permitted under ORS 811.507(4)(b). Further, to the extent the employer's written policy prohibited the use of any telephone app under any circumstances while the vehicle was in gear, claimant did not willfully violate this aspect of the policy because he did not understand that it extended to such use. Moreover, claimant did not act with indifference to the employer's interests or the intent of the policy, given his efforts to minimize his physical contact with the telephone. Additionally, claimant's sincere but mistaken belief that the employer permitted him to use the telephone while driving to perform work tasks if it remained in the holder amounted to a good faith error, which is not misconduct. *See Goin v. Employment Dep't.*, 203 Or App 758, 126 P3d 734 (2006) (A "good faith error" logically involves some sort of mistake made with the honest belief that one is acting rightly.) Therefore, the employer has not met their burden of showing by a preponderance of the evidence that claimant willfully or with wanton negligence violated their telephone use policy. Accordingly, claimant 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. 25-UI-283154 is set aside, as outlined above.

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

**DATE of Service:** March 26, 2025

**NOTE:** This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

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<sup>4</sup> ORS 811.507(1)(b) provides, "'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." ORS 811.507(2) prohibits the use of a mobile electronic device while driving, while providing an affirmative defense under ORS 811.507(4)(b) if the driver is 18 years of age or older and using a hands-free accessory.

**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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# 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 دستورالعمل 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

Email: [appealsboard@employ.oregon.gov](mailto:appealsboard@employ.oregon.gov)

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