

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0047**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 120022). The employer filed a timely request for hearing. On January 10, 2020, ALJ M. Davis conducted a hearing, and on January 14, 2020, issued Order No. 20-UI-142607, concluding the employer discharged claimant for misconduct. On January 19, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

**EVIDENTIARY MATTER:** On January 7, 2020, claimant submitted a document to the Office of Administrative Hearings (OAH) for consideration by the ALJ at the January 10, 2020 hearing. Claimant sent a copy of the document to the employer before the hearing. Audio Record at 4:54 to 6:10. On January 9, 2020, OAH received the documents, it was not included in the case file until after the January 10 hearing. For that reason, the document was not considered by the ALJ in this case. The document consisted of a statement by claimant describing the events that occurred during last three weeks of his employment. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by claimant are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, claimant's document, marked as EAB Exhibit 1, is admitted into the record and a copy is attached. Any party that objects to the admission of EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

Due process requires that claimant have the opportunity to explain the information in EAB Exhibit 1, and that the employer have the opportunity to respond to all new information. It is primarily for this reason that this case is being remanded to OAH for further information. Each party will have the opportunity to testify about or respond to EAB Exhibit 1. The parties will also have the opportunity to offer any other new information they consider relevant and material at the hearing on remand. However, any party that wishes to have new documentary evidence included in the record at the remand hearing

must comply with the procedures set forth by OAH in the notice of hearing and should contact OAH directly if the party needs help understanding those procedures. During the remand hearing, the ALJ will decide if a party's additional information, other than EAB Exhibit 1, is relevant to the issues on remand and should be admitted into evidence, and the other party would have the opportunity to respond to the new information, if admitted.

**FINDINGS OF FACT:** (1) Sutherlin Autocare Corp. employed claimant from June 20, 2018 until it discharged him on October 2, 2019.

(2) The employer expected its employees to refrain from harassing and threatening its other employees. Claimant understood this expectation as a matter of common sense.

(3) On September 12, 2019, claimant's coworker reported to the manager that claimant was smoking a cigarette and not working after claimant had clocked back in from his lunch break. The manager told claimant he should not smoke a cigarette after he had clocked back in to work. Claimant considered the coworker to be his friend and felt "betrayed" by the coworker for reporting claimant's conduct to the manager. Transcript at 20.

(4) On September 14, 2019, claimant told the coworker, "[D]on't betray me like that again or our friendship is going to be over." Transcript at 20.

(5) On September 24, 2019, the coworker sent claimant a text message stating, "I apologize for what I did." Transcript at 23. After receiving the text, claimant went to the workplace at the end of the coworker's shift to speak with the coworker, and they argued.

(6) On September 26, 2019, the manager met with claimant, gave him a verbal warning, and suspended him until October 2, 2019, when the owner would return from a trip abroad.

(7) On October 2, 2019, the employer's owner met with claimant to discuss claimant's conduct regarding the coworker who reported that claimant took a break off the clock on September 12, and discharged claimant.

**CONCLUSIONS AND REASONS:** Order No. 20-UI-142607 is reversed and this matter remanded for further inquiry, including inquiry about the information in EAB Exhibit 1, and including an opportunity for the employer to respond to information contained in EAB Exhibit 1.

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) (December 23, 2018). "[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 owner discharged claimant for allegedly making a threatening statement on September 24, 2019 to his manager regarding a coworker who had reported claimant taking a break to smoke a cigarette after claimant had already clocked back in from his meal break. Claimant allegedly described “smashing [the coworker’s] face in a windshield.” Transcript at 28. The owner testified regarding her October 2, 2019 meeting with claimant when the owner discussed the September 24 incident with claimant. The owner testified first that, during that meeting, claimant “did admit that he said those words to [the manager] about shoving [the coworker’s] face into a car.” Transcript at 12. However, the owner testified later in the hearing that claimant told her during the meeting that he “didn’t say it to [the coworker], but I was so mad I looked out the window and I saw a car, and I said *to myself*, or something like that, *thought it* or something he said.” Transcript at 28 (*italics added*). On remand, it is necessary to clarify this apparent discrepancy in the owner’s testimony. Additionally, the record does not contain sufficient information to determine if claimant’s conduct in the final incident was an isolated instance of poor judgment.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary to allow the parties to explain and respond to EAB Exhibit 1, and to otherwise provide information necessary for a determination of whether claimant was discharged for misconduct, Order No. 20-UI-142607 is reversed, and this matter is remanded.

**DECISION:** Order No. 20-UI-142607 is set aside, and this matter remanded for further proceedings consistent with this order.

J. S. Cromwell and D. P. Hettle;  
S. Alba, not participating.

**DATE of Service: February 14, 2020**

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-142607 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If 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 ito.

## 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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.