

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0220**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On January 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer suspended claimant for misconduct (decision # 135214). Claimant filed a timely request for hearing. On February 26, 2020, ALJ Janzen conducted a hearing, and on February 28, 2020 issued Order No. 20-UI-145295, affirming decision # 135214. On March 12, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**CONCLUSIONS AND REASONS:** This matter is reversed and remanded for additional proceedings.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

Decision # 135214 found as fact that the employer suspended claimant for violating “multiple employer rules and policies” including “dishonesty and untruthfulness” in the final incident, and concluded that claimant’s suspension was for misconduct. The order under review agreed the suspension was for misconduct, finding that the employer suspended claimant for failing to comply with a judge’s directions regarding a project, refusing to return to a meeting, refusing to check on a courtroom, and other matters. *See* Order No. 20-UI-145295 at 3. However, the record viewed as a whole does not support those conclusions, and additional evidence is required to reach a determination in this case.

The employer’s witness testified that the employer suspended claimant “based upon reasons that he was dismissing her,” then described that conduct to include dishonesty, loss of trust, lack of truthfulness, and lack of accountability, among other things. *See* Transcript at 6. In their written argument, the employer alleged, consistent with that testimony, that claimant’s suspension was for 14 different reasons. *See* Employer’s written argument at 1. However, that testimony and argument is irreconcilably different than the employer’s Exhibit 1.

Exhibit 1 includes a memorandum to the employer’s human resources director from the presiding judge regarding claimant’s appeal of the employer’s notice of dismissal. In addition to listing the variety of incidents and behavior that led to the employer deciding to *discharge* claimant from her employment, the memorandum stated with respect to the *suspension*:

[Claimant] remained in the workplace during the investigative process and was not suspended until the Notice of Potential Dismissal was served. She was suspended with pay when that document was served. It was necessary to suspend her under JDPR 9.09(1)(b) because she was continuing to involve subordinate staff in the process and was disrupting the workplace. She was suspended without pay after the Notice of Intent to Dismiss was served as required by JDPR 9.09(3)(b).

Exhibit 1, February 5, 2020 Memorandum at 8. JDPR 9.09(1)(b)(ii) allows the employer to suspend employees with pay pending completion of the notice of potential cause for dismissal process. Exhibit 1, Rule 9 Disciplinary Action at 9-7 to 9-8. JDPR 9.09(3)(b)(ii) requires the employer to suspend employees without pay once notice of decision to dismiss is issued, and that the suspension continue until the latter of when the dismissal takes effect, a decision on appeal of the discharge is issued, or the dismissal is overturned. Exhibit 1, Rule 9 Disciplinary Action at 9-10 to 9-12.

According to the employer’s exhibit, then, and contrary to testimony and the written argument, the employer did not actually suspend claimant “based upon the [14] reasons” she was being discharged. Rather, the employer suspended her from November 21, 2019 to January 2, 2020 for “continuing to involve subordinate staff in the process and [] disrupting the workplace,” and, effective January 3, 2020, suspended her not because of her behavior, but because her suspension was required by one of the employer’s policies.

During the February 26, 2020 hearing, the record was not adequately developed to determine whether claimant continued to involve subordinate staff in the process and disrupted the workplace, how she did that, and, if she did, whether she understood the employer’s expectations around that conduct and violated them willfully or with wanton negligence, and whether her conduct was excusable under OAR

471-030-0038(3)(b). The record was also not developed sufficiently to support a determination about whether claimant's suspension beginning January 3, 2020 was required by JDPR 9.09(3)(b) rather than based upon claimant's willful or wantonly negligent behavior, and whether or not that portion of the suspension was attributable to claimant as misconduct. On remand, the ALJ must develop the record with respect to those issues. The ALJ should also provide the employer with the opportunity to explain the discrepancy between the reasons for suspension cited in the Exhibit 1 February 5, 2020 Memorandum and required by policy with their testimony at the hearing and their written argument.

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 for a determination of whether or not all or a portion of claimant's suspension was for misconduct, Order No. 20-UI-145295 is reversed, and this matter is remanded.

**DECISION:** Order No. 20-UI-145295 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:** April 7, 2020

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-145295 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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