

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0044**

*Reversed & Remanded*  
*Revocada y Remitida*

**PROCEDURAL HISTORY:** On October 22, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective May 10, 2020 (decision # 133508). Claimant filed a timely request for hearing. On November 17 and December 28, 2020, ALJ Snyder conducted a hearing interpreted in Spanish, and on January 5, 2021 issued Order No. 21-UI-158636, affirming decision # 133508. On January 20, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**HISTORIA PROCESAL:** El 22 de octubre de 2020, el Departamento de Empleo de Oregon (el Departamento) envió notificación de una decisión administrativa concluyendo que el empleador despidió al reclamante por mala conducta y que el reclamante fue descalificado de recibir beneficios de desempleo a partir del 10 de mayo de 2020 (decisión # 133508). El reclamante sometió una aplicación oportuna para una audiencia. El 17 de noviembre de 2020 y el 28 de diciembre de 2020, la jueza administrativa Snyder llevó a cabo una audiencia que fue interpretada al español. El 5 de enero de 2021, la jueza administrativa emitió la Orden No. 21-UI-158636, confirmando la decisión # 133508 del Departamento. El 20 de enero de 2021, el reclamante presentó una aplicación para revisión de la Orden No. 21-UI-158636 a La Junta de Apelaciones de Empleo (EAB).

**WRITTEN ARGUMENT:** The employer submitted written argument to EAB. The employer's contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

Claimant submitted written argument to EAB. Claimant did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the

information during the hearing as required by OAR 471-041-0090. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**ARGUMENTO POR ESCRITO:** *El empleador sometió argumento por escrito a EAB. El argumento por escrito del empleador contiene información que no es parte del expediente de la audiencia en este caso, y el empleador no demostró que razones o circunstancias afuera de su control le impidieron ofrecer esa información durante la audiencia. De acuerdo con ORS 657.275(2) y OAR 471-041-0090 (13 de mayo de 2019), EAB solamente puede considerar información que haya sido recibida como evidencia en la audiencia judicial.*

*El reclamante sometió argumento por escrito a EAB. El reclamante no declaró que envió una copia de su argumento por escrito a todas las partes en este caso, de acuerdo con OAR 471-041-0080(2)(a) (13 de mayo de 2019). El argumento también contiene información que no es parte del expediente de este caso, y la parte no demostró que razones o circunstancias afuera de su control le impidió ofrecer esa información durante la audiencia, de acuerdo con OAR 471-041-0090. EAB solamente consideró información recibida en evidencia durante la audiencia. Vea ORS 657.275(2).*

**EVIDENTIARY MATTER:** The ALJ admitted Exhibits 1 and 2 into the record, but failed to identify or mark the exhibits such that they are readily identifiable for review. Because the exhibits were not readily identifiable from the record, this matter is being remanded to OAH so that the ALJ can mark the exhibits considered, send them to the parties in a format that they may be able to open and review, and give the parties an opportunity to object to their admission. Further proceedings may be necessary to allow the parties to provide testimony regarding the documents and engage in cross-examination.

**FINDINGS OF FACT:** (1) Marcos Café and Espresso Bar employed claimant as a kitchen chef from March 2020 until May 11, 2020.

(2) During the entirety of claimant's employment, the employer's business was closed to in-person dining, and claimant prepared food exclusively for takeout orders. On April 20, 2020, the employer's owner gave claimant a verbal warning based on an interaction claimant had with the manager on April 18, 2020.

(3) On May 8, 2020, claimant and the business owner had a disagreement regarding tips paid at the café and how those tips were paid to the employees.

(4) Prior to Sunday, May 10, 2020, the employer had advertised a special Mother's Day takeout menu for May 10, 2020. On Saturday, May 9, 2020, claimant was preparing take-out orders and pre-orders for May 10, 2020. At some time during its regular business hours on May 9, 2020, the restaurant continued taking orders for May 9, 2020 but stopped taking additional orders for May 10, 2020. The owner did not give the restaurant staff permission to stop taking orders for May 10, 2020.

(5) On May 10, 2020, the café was scheduled to be open until 7:00 p.m., but closed early.

(6) On May 11, 2020, the café general manager and claimant engaged in a disagreement. Later that

day, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** Hearing Decision 21-UI-158636 is reversed, and this matter remanded for completion of the record.

ORS 657.275 provides that EAB shall review the record of the case and promptly affirm, modify, or set aside the decision of the ALJ if the Director of the Department or any interested party files a timely application for review. However, the record in this matter is incomplete, and further proceedings are or may be necessary before the record can be provided. Specifically, Order No. 21-UI-158636 states that Exhibits 1 and 2 were admitted to the record. The ALJ identified Exhibit 1 as a USB drive from claimant containing a 12-minute audio recording and a BOLI complaint. Audio Record (November 17, 2020) at 14:53 to 16:11. The employer's witness stated that the employer received "three documents" from claimant before the hearing, but was unable to open all of them. Audio Record (November 17, 2020) at 16:12 to 17:14. Exhibit 1 was admitted into the record. Audio Record (November 17, 2020) at 17:42. The ALJ identified the employer's documents as "Tammy's statement," three text message exchanges, a Yelp review, a handbook page signed by "Molly," and a disciplinary form for someone other than the claimant.<sup>1</sup> Audio Record (November 17, 2020) at 17:55 to 19:11. The documents were purportedly marked as Exhibit 2 and were sent to claimant before the hearing. Audio Record (November 17, 2020) at 19:15 to 19:25. The ALJ considered claimant's objection that the documents were not relevant, but overruled the objection and admitted them as Exhibit 2. Audio Record (November 17, 2020) at 19:26 to 21:26. However, the ALJ stated that the only information that would be considered would be the information that related to claimant and his conduct, and not information that related to other employees. Audio Record (November 17, 2020) at 22:05 to 23:09.

However, although the exhibits were purportedly marked, the documents that the ALJ considered based on whether they were related to claimant and his conduct are not readily identifiable from the record based on their descriptions during the hearing, or how they appear in the record. Nor are the documents marked and contained in the record in a format that they may be reviewed by EAB. Given these issues, Order No. 21-UI-158636 is unsupported by a complete record, and is remanded so that the ALJ may mark the exhibits considered, send them to the parties in a format that they may be able to open and review, and give the parties an opportunity to object to their admission. Further proceedings may be necessary to allow the parties to provide testimony regarding the documents and engage in cross-examination.

**DECISION:** Order No. 21-UI-158636 is set aside, and this matter remanded for further proceedings consistent with this order. *La Orden de la Audiencia 21-UI-158636 se pone a un lado, y esta materia se remite para otros procedimientos constantes con esta orden.*

S. Alba and D. P. Hettle.

**DATE of Service / FECHA de Notificación: February 26, 2021 / 26 de febrero de 2021**

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<sup>1</sup> The interpreter incorrectly translated the ALJ's description of the disciplinary form and stated that it was a disciplinary form for the claimant. Audio Record (November 17, 2020) at 18:48 to 19:10.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-158636 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

***NOTA:** La falta de cualquier parte de presentarse a la audiencia sobre la remisión no reinstalará la Orden de la Audiencia No. 21-UI-158636, ni devolverá esta orden a la EAB. Solamente una aplicación oportuna para revisión de la orden subsiguiente de la nueva audiencia volverá este caso a la 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 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

**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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