

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0001**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 18, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 72714). The employer filed a timely request for hearing. On November 30, 2021, ALJ Scott conducted a hearing, and on December 7, 2021 issued Order No. 21-UI-181275, affirming decision # 72714. On December 20, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's December 20, 2021 and January 20, 2022 written arguments 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. To the extent the employer asserted in the December 20, 2021 written argument that they were "not aware [of the need]" to provide direct witness testimony, as opposed to hearsay testimony, the record shows that the "Notice of Rights" provided to the employer as an attachment to the Notice of Hearing placed them on notice that "[h]earsay evidence is admissible, but is generally given less weight than first-hand testimony." December 20, 2021 written argument at 1; Record Document, "Notice of Rights" at 7. As such, the employer was on notice prior to the hearing of the benefit of providing direct witness testimony, as opposed to relying on hearsay evidence, and their failure to do so therefore was not due to a circumstance beyond their reasonable control. 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. EAB considered the employer's written arguments to the extent they were based on the record.

Claimant's January 19, 2022 and January 23, 2022 written arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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. EAB considered claimant's written arguments to the extent they were based on the record.

**FINDINGS OF FACT:** (1) Kenneth Jones (the owner) DMD PC employed claimant as a dental hygienist from July 30, 2019 to February 4, 2020. The owner is the employer's only dentist at the practice.

(2) Approximately "a week or two" before February 4, 2020, the owner's assistant informed the owner that the assistant had overheard claimant tell a patient that claimant would falsify the patient's chart so that the patient's insurance company would authorize extra dental cleanings for the patient every year. Transcript at 9. The owner was concerned about the potential ramifications of the allegation if "the insurance company ever called [him] on it" and he "mull[ed]" over the proper action to take towards claimant. Transcript at 6, 8. The owner did not make claimant aware of the allegation.

(3) On February 4, 2020, the owner and claimant were working together to treat a patient towards the end of the day and "were in kind of a hurry." Transcript at 32. Claimant attempted to prepare an x-ray on a computer terminal but failed to do so in a manner that met the owner's expectation. Instead of giving claimant more time with the x-ray image, the owner "grabbed the mouse and did [his] thing with it so [he] could see the x-ray a little better." Transcript at 32. In the process, claimant believed that the owner had intentionally "push[ed]" her away from the computer causing claimant to lose her balance. Exhibit 1 at 9.

(4) Claimant did not address the push with the owner, but did inform the owner's receptionist about the incident prior to leaving work for the day. The receptionist informed the owner about the push allegation and, believing the allegation to be false, the owner sent a text to claimant later that evening telling her not to return to work. The owner did not mention the reasons for his decision to discharge claimant in the text.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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) (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).

In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. 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 record shows that although the owner had been “mulling” over what to do about the allegation that claimant had falsified a patient’s records one to two weeks prior, the proximate cause of claimant’s discharge on February 4, 2020 was the owner’s determination that claimant had falsely accused the owner of pushing her on that date. The preponderance of the evidence shows that but for the owner’s determination that he had been falsely accused of having pushed claimant, the owner would not have discharged claimant on February 4, 2020.

The owner discharged claimant, but not for misconduct. Here, the owner had a right to expect that his employees would not falsely accuse him of any form of unwanted contact in the workplace, let alone a push, as a matter of common sense, and claimant knew or should have known of this reasonable expectation. At hearing, however, the evidence differed as to whether any push actually occurred on February 4, 2020. Claimant testified that the owner wanted to enlarge the x-ray, that he “pushed [claimant] out of the way” to do so, and that she did not believe that it was possible she might have “misinterpreted” the owner’s conduct. Transcript at 17, 24. Conversely, the owner “one hundred percent” denied claimant’s allegation that he had pushed her, and stated that he would not “touch” any of his employees because he was mindful that he was “the only guy in the office” and it otherwise was “just not [his] style.” Transcript at 28, 32. Furthermore, the record suggests that this interaction between the owner and claimant occurred in a “hurried” setting making it reasonable to conclude that both parties could have misinterpreted the other’s actions.

Where, as here, the evidence in the record is no more than equally balanced, the party with the burden of persuasion - here, the employer – fails to meet their evidentiary burden. *State v. James*, 339 Or 476, 123 P3d 251, 255-256 (2005). Because the evidence as to whether the owner pushed claimant is no more than equally balanced, it follows that the evidence of whether claimant had falsely accused the owner of pushing her is also no more than equally balanced. Thus, because the employer discharged claimant for falsely accusing the owner of pushing her at the workplace, and because the evidence on this issue is no more than equally balanced, the employer has failed to meet their evidentiary burden to show that claimant committed misconduct.<sup>1</sup> Claimant therefore is not disqualified from receiving benefits based on this work separation.

**DECISION:** Order No. 21-UI-181275 is affirmed.

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

**DATE of Service:** January 27, 2022

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<sup>1</sup> Even if the owner’s decision to discharge claimant was based, in part, on his belief that she had committed misconduct by falsifying dental records one to two weeks prior, the discharge still would not have been for misconduct. The employer has a right to expect that his employees will not falsify patient records as a matter of common sense and claimant should have known of this expectation. However, claimant denied that she ever falsified any records at hearing and the record evidence that suggested that she might have falsified any records came only from the owner’s hearsay testimony. Transcript at 5-6, 17. Thus, because claimant’s first-hand testimony is entitled to more weight than the owner’s hearsay evidence, the employer would have failed to meet their burden to show that claimant committed misconduct with respect to the allegation that she falsified patient records.

**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 listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](https://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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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**

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**  
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