

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0776**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct within 15 days of a planned quit that was not for good cause, and that claimant was denied benefits beginning May 26, 2019 (decision # 141422). Claimant filed a timely request for hearing. On July 31, 2019, ALJ Janzen conducted a hearing, and on August 2, 2019 issued Order No. 19-UI-134452 concluding claimant voluntarily left work without good cause, and was disqualified from benefits effective May 26, 2019. On August 16, 2019, claimant filed an application for review with the Employment Appeals Board (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 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Comcast Cablevision of Willow Grace employed claimant from February 15, 2016 until May 21, 2019. The employer last employed claimant as a business account executive.

(2) As business account executive, the employer expected claimant to secure new commercial customers for the employer's products or services and generate revenues. The employer established sales goals for business account executives and required them to generate revenues of at least 70 percent of those goals or the employer would place them on a corrective action. The employer had three levels of corrective action. At the third level, the employer would discharge the employee if the employee did not meet the goals that the employer set out. The employer only discharged employees after they were on a third level corrective action and did not achieve the goals of that corrective action.

(3) Sometime before May 2019, the employer placed claimant on a first level corrective action for not achieving 70 percent of his sales goals. On May 2, 2019, claimant met with the employer's human resources manager to discuss job concerns, how he could improve his sales performance, and options for transferring into other positions with the employer. Claimant wanted to continue working for the employer, but not in a sales position like that of business account executive. The manager told claimant that the employer would not transfer him to a different position while he was on a corrective action. The manager also indicated to claimant that the employer likely would not re-hire him if he was discharged for unsatisfactory work performance, even if he applied for a different position than the one from which he was discharged.

(4) On May 7, 2019, the employer issued a second level corrective action to claimant for not achieving 70 percent of his sales goals for the April 2019 fiscal month. At that time, claimant thought the employer was not adequately supporting him in his efforts to improve his performance and was concerned that the employer would issue a third level corrective action to him in the future. If the employer issued a third level corrective action to claimant, he thought he would need to achieve 70 percent of his sales goals for two or three months to get off the corrective action.

(5) On May 17, 2019, claimant notified the employer that he was leaving work effective May 31, 2019. Claimant decided to leave work because he did not think he would achieve his sales goals in May 2019. As a result, claimant thought the employer likely would issue a third level corrective action to him for his May 2019 performance, the employer might subsequently discharge him, and the employer would not re-hire him for a non-sales position.

(6) On May 20, 2019, claimant met with the regional sales manager to discuss his resignation. The sales manager told claimant that there was no business or administrative reason for him to work after May 21, 2019 because that was the last day of fiscal month May 2019. The manager told claimant to close his sales on May 21, and not continue to report for work. However, the manager told claimant that the employer would pay him through May 31, 2019.

(7) May 21, 2019 was claimant's last day working for the employer. Claimant did not report for work thereafter.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, not for misconduct, on May 21, 2019, within 15 days of claimant's planned quit without good cause on May 31, 2019. Claimant therefore is disqualified from receiving benefits effective the week including May 31 based on his planned quit without good cause. Claimant is eligible for benefits for the week including May 21.

Claimant notified the employer that he planned to leave work effective May 31. However, although the employer paid claimant through May 31, claimant did not work after May 21 because the employer did not require him to do so. Thus, the first issue this case presents is whether the employer discharged claimant on May 21, or claimant quit work on May 31. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The record does not show that the employer directly told claimant that he was discharged, fired or the like as of May 21. However, a reasonable interpretation the sales manager's May 20 statements to claimant was that the employer was unwilling to have him work after May 21. It is well established that for an employment relationship to continue, there must be some *future opportunity* for the employee to *perform services* for the employer, and it is not sufficient that the employee will receive pay for a period when the employer is unwilling to allow the employee to continue providing services.<sup>1</sup> Here, because claimant did not perform services for the employer after May 21, a discharge occurred on that date despite the employer having paid claimant through May 31, the date claimant planned to quit.

However, ORS 657.176(8) states that "when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date." Because the employer discharged claimant on May 21, which was 10 days before claimant's planned voluntary leaving on May 31, ORS 657.176(8) is potentially applicable to claimant's work separation. Whether claimant's planned voluntary leaving was with good cause, and whether the employer's discharge of claimant was for misconduct, will be addressed in turn.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (December 23, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Claimant planned to quit work to avoid receiving a third level corrective action for unsatisfactory sales, and to avoid being discharged due to unsatisfactory sales. In *McDowell v. Employment Dep't.*, 348 Or 605, 236 P3d 722 (2010), the Court of Appeals held that the claimant showed good cause for quitting work to avoid a discharge when the discharge was imminent, inevitable, and would be the "kiss of death" to claimant's future career prospects as a teacher. Here, claimant had not yet received a third level corrective action when he resigned. While the record fails to show when claimant likely would have received the third level corrective action if his sales had not improved, it is inferred that it would have been sometime in June 2019, the month following the month of his resignation. Based on the apparent timelines under the prior corrective actions issued to claimant, it is further inferred that a discharge based on a failure to achieve the sales goals in a third level corrective action would occur, at

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<sup>1</sup> Unemployment Insurance Benefits Manual (4/1/10 rev) §410 (in establishing the date of the separation, the receipt of wages or other payments does not indicate that the work relationship has continued and, "if a worker receives payment *after* the last day worked, the employer may insist the person is still employed [but] \*\*\*\* the employer must show what service the worker was providing."); *Appeals Board Decision*, 18-EAB-1031 (November 30, 2018); *Appeals Board Decision*, 18-UI-0018 (February 2, 2018).

the earliest, a month after that corrective action was issued. Accordingly, claimant did not show that the discharge he resigned to avoid was imminent at the time he resigned. Additionally, while being discharged may have been harmful to claimant's prospects for future employment with his current employer, claimant did not show, as did the claimant in *McDowell*, that a discharge likely would have been stigmatizing to his future prospects of obtaining employment with *other employers* in his *chosen career field*. On this record, claimant did not show that his circumstances were grave when he resigned and, accordingly, did not show good cause for leaving work when he did.

Because claimant's planned quit was not with good cause, ORS 657.176(8) remains potentially applicable to whether claimant is disqualified from receiving benefits. Next considered is whether the employer discharged claimant for misconduct on May 21.

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).

The employer discharged claimant on May 21 because the employer thought there was no business or administrative need for claimant to work until his planned leaving date of May 31. It was not misconduct for claimant to give notice of a resignation, and the record does not show that the employer's reasons for discharging claimant on May 21 resulted from misconduct on claimant's part. The employer therefore discharged claimant, not for misconduct, on May 21, 2019.

Because claimant's planned voluntary leaving on May 31 was not for good cause, and the employer's May 21 discharge of claimant was not for misconduct, ORS 657.176(8) applies to the work separation at issue. Because the work separation is adjudicated as if the discharge had not occurred, claimant is disqualified from receiving benefits effective the week including May 31 based on his planned quit without good cause. Claimant is eligible for benefits for the week including May 21.

**DECISION:** Order No. 19-UI-134452 is affirmed.

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

**DATE of Service:** September 23, 2019

**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](http://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 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 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 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 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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