

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0631**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 30, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving unemployment insurance benefits effective March 15, 2020 (decision # 92057). Claimant filed a timely request for hearing. On September 2, 2020, ALJ Schmidt conducted a hearing, and on September 3, 2020, issued Order No. 20-UI-153624, affirming the Department's decision. On September 23, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with their application for review. 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) McCormick - Schmick employed claimant as a "busser" from June 2019 to March 23, 2020. Transcript at 4.

(2) Claimant had asthma and an autoimmune disorder that put him at high risk for complications if he ever contracted COVID-19.

(3) In February 2020, claimant became aware of the increasing risk of contracting COVID-19 based on news reports. Claimant wanted to reduce his risk of contracting the virus, knew that his risk of exposure was greater in a restaurant environment where he would encounter many members of the public, and for that reason decided to resign from his employment. On February 28, 2020, claimant notified the employer's general manager through the employer's email that he intended to resign, effective March

14, 2020. Shortly thereafter, the general manager asked claimant if he would stay until March 16, 2020 to give the general manager sufficient time to hire a replacement for claimant. Claimant agreed.

(4) On or about March 8, 2020, the employer's floor manager approached claimant at work and asked him to reconsider his decision to resign and instead remain as an on-call employee, effectively cutting his hours from approximately 20 hours per month to approximately one shift of five hours per month. Because claimant believed that the floor manager's request balanced his health concerns with his desire for at least some employment, claimant agreed to the floor manager's request.

(5) On or about March 11, 2020, the floor manager told claimant to talk to the general manager about the discussed reduction in hours and scheduling change.

(6) At the close of business on March 16, 2020, the employer temporarily shut down its operations to comply with the Governor Brown's COVID-19 directive to restaurants to discontinue on-site dining due to the pandemic.

(7) Between March 16, 2020 and March 22, 2020, claimant had continuing access to the employer's email server and received emails directed to all employees. Claimant believed that he remained employed as an "on-call employee" based on his discussion with the floor manager. Transcript at 9.

(8) On March 22, 2020, claimant sent an email to the employer's general manager using the employer's server in which he related "the conversation" he previously had with the floor manager "about the change in [his] hours and the fact that [he] was staying on and not leaving entirely." Transcript at 20. He also requested permission to use his accrued sick pay.

(9) On March 23, 2020, claimant checked the employer's email server for a response and discovered that he no longer had access to the email server. He then sent the general manager a text message informing him that he "could no longer see any messages he [had] sent me." Transcript at 6. The general manager responded to claimant by text message that day informing claimant that "his last day was on the 14<sup>th</sup>," and that the general manager was not able to reinstate claimant to pay him sick pay. Transcript at 6, 17-18.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

**Work Separation.** The employer asserted that claimant quit work, effective March 14, 2020. However, the application of Oregon Administrative Rules determine the nature of a work separation for determining eligibility for unemployment insurance benefits. 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) (September 22, 2020). 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).

After finding that the floor manager "did not have authority over hiring and firing and did not communicate [his] arrangement with claimant to the general manager," Order No. 20-UI-153624 concluded claimant quit work, effective March 14, 2020. The order reasoned:

Although claimant believed he had been allowed to rescind his resignation, the floor manager did not have the authority to make this decision. Before claimant's last day of work, the floor manager advised claimant that he needed to discuss the altered schedule with the general manager...This evidence is persuasive that claimant knew or should have known that the schedule he discussed with the floor manager had not been approved. As such claimant never effectively communicated his desire to continue to work for the employer. Claimant voluntarily left work.

However, the record does not support the conclusion that claimant voluntarily left work. By asking claimant to continue as an employee after March 14, 2020 at reduced hours, the floor manager neither hired nor fired claimant. Moreover, when asked by the ALJ whether the floor manager could have offered claimant "that kind of arrangement," the general manager responded, "it is possible [the floor manager] could have had the conversation." Transcript at 15. Even though the floor manager may have advised claimant that he needed to discuss his altered scheduled with the general manager, the record fails to show that the floor manager advised claimant to do so before a specific date. By referring to "the change in [his] hours and the fact that [he] was staying on and not leaving entirely" in his email to the general manager on March 22, 2020, claimant followed the floor manager's directive and effectively communicated his desire to continue to work for the employer. By removing claimant's access to the employer's email on March 23, 2020 and responding to claimant texting that "his last day was on the 14<sup>th</sup>", the employer informed claimant that he would not be allowed to continue his employment. Accordingly, the work separation was a discharge.

**Discharge.** 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) (September 22, 2020).

The general manager asserted that claimant quit and failed to present evidence that claimant was discharged for violating a reasonable employer expectation or disregarded the employer's interest. The record shows that claimant's discharge was the result of a lack of communication between the floor manager and the general manager about the floor manager's March 11, 2020 conversation with claimant, and claimant's delayed communication with the general manager about that conversation. Regardless, the record fails to show that the employer discharged claimant because he violated a reasonable employer expectation or disregarded the employer's interest.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of that work separation.

**DECISION:** Order No. 20-UI-153624 is set aside, as outlined above.

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

**DATE of Service: October 27, 2020**

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 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 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.