

**EMPLOYMENT APPEALS BOARD DECISION**  
**2020-EAB-0742**

*Order No. 20-UI-156164 Modified –  
Late Request for Hearing Allowed, No Disqualification*  
*Order No. 20-UI-156172 Modified – No Overpayment or Penalties*

**PROCEDURAL HISTORY:** On September 14, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective May 3, 2020 (decision # 132456). On September 23, 2020, the Department served notice of another administrative decision, based in part on decision # 132456, concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessing a \$10,906.00 overpayment that claimant was required to repay to the Department, a \$735.90 monetary penalty, and a 31 week penalty disqualification from future benefits. On October 5, 2020, decision # 132456 became final without claimant having filed a timely request for hearing. On October 9, 2020, claimant filed a late request for hearing on decision # 132456 and a timely request for hearing on the September 23, 2020 overpayment decision.

On November 4, 2020, ALJ Snyder conducted a consolidated hearing regarding both administrative decisions. On November 6, 2020 ALJ Snyder issued Order No. 20-UI-156164, allowing claimant's late request for hearing on decision # 132456 and affirming that decision. Also on November 6, 2020, ALJ Snyder issued Order No. 20-UI-156172, modifying the overpayment decision by concluding that claimant was overpaid \$10,906.00 in benefits he was required to repay to the Department but had not willfully made a misrepresentation in order to obtain benefits and was not subject to a monetary penalty or penalty weeks. On November 26, 2020, claimant filed applications for review of Orders No. 20-UI-156164 and No. 20-UI-156172 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 20-UI-156164 and 20-UI-156172. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2020-EAB-0742 and 2020-EAB-0741).

**WRITTEN ARGUMENT:** 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).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of Order No. 20-UI-156164 allowing claimant's late request for hearing on decision # 132456 is **adopted**. Also based on a *de novo* review of the entire record in these cases, and pursuant to ORS 657.275(2), the portion of Order No. 20-UI-156172 concluding that claimant did not willfully make a misrepresentation to obtain benefits and was not subject to penalties is **adopted**. The remainder of this decision addresses the work separation and overpayment issues.

**FINDINGS OF FACT:** (1) Palm Harbor Homes Inc. employed claimant from June 11, 2018 until May 7, 2020.

(2) On May 6, 2020, claimant told the employer that his young son was at high risk of complications if he were to contract COVID-19, and that claimant was uncomfortable reporting to work because of the risk of contracting the virus and passing it to his son. Claimant told the employer that he would not be "coming to work for a while" but planned to return when the dangers imposed by the pandemic "calmed down." Transcript at 23. The employer told claimant that he could submit Family Medical Leave Act (FMLA) paperwork with information from his son's doctor, and that if he did so the employer would allow him to take a leave of absence.

(3) Claimant was unable to return the FMLA paperwork to the employer in time because the doctor did not respond to him quickly enough. Claimant did not return to work.

(4) On May 7, 2020, because claimant had neither returned to work nor returned the FMLA paperwork to the employer, the employer advised claimant that they considered him to have voluntarily quit. Claimant did not express to the employer that he had intended to quit. At that time, the employer also advised claimant that he could return to work when he felt safe doing so, and that the employer would consider the separation to have been ". . . like [claimant] was being laid off." Transcript at 48.

(5) Claimant claimed benefits for the weeks of May 10, 2020 through August 1, 2020 (weeks 20-20 through 31-20, the weeks at issue). Claimant received waiting week credit for week 20-20, and was paid his full weekly benefit amount of \$446 each week from week 21-20 through week 31-20, for a total of \$4,906 in regular benefits. In addition, claimant received \$600 in FPUC benefits for each week from week 21-20 through 30-20, for a total of \$6,000 in FPUC benefits.

**CONCLUSIONS AND REASONS:** Claimant was discharged, but not for misconduct. Claimant was not paid benefits to which he was not entitled and is not assessed an overpayment.

**Nature of the Work Separation.** 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).

Order No. 2020-UI-12725 found that claimant “had a difficult time contacting his son’s doctor quickly, and did not complete the FMLA paperwork or return to work,” and concluded that claimant quit work. However, the record instead shows that claimant attempted to take time off from work through FMLA leave, telling the employer that he would not be “coming to work for a while” and that he planned to return once the pandemic “calmed down.” Transcript at 23. It also shows that after claimant failed to return the FMLA paperwork or return to work, the employer informed claimant that they considered him to have voluntarily quit and that his employment had ended. Transcript at 23.

The record therefore establishes that claimant was willing to continue working for the employer for an additional period of time—even if he required a leave of absence before returning to work—but the employer did not permit claimant to do so because he had not returned to work and did not return the FMLA paperwork by May 7, 2020. The work separation was a discharge that occurred on May 7, 2020.

**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). “[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).

The employer discharged claimant after he failed to either return to work or return the FMLA paperwork as the employer had directed him to do. Claimant’s testimony indicated that he did not return to work for fear of contracting COVID-19 and passing it to his high-risk child, and did not return the paperwork because the doctor had not yet signed it and returned it to claimant. The record does not indicate that either of these occurrences were the result of claimant’s intentional or wantonly negligent disregard of the standards of behavior that the employer had set for him. As a result, the employer has not met their burden to show that claimant was discharged for misconduct, and claimant is therefore not disqualified from receiving benefits on the basis of this work separation.

**Overpayment.** ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual’s knowledge or intent. *Id.*

Order No. 20-UI-156172 concluded that because claimant quit working for the employer without good cause, he was disqualified from, and therefore overpaid, the \$4,906 in regular benefits paid to him for weeks 21-20 through 31-20 and \$6,000 in FPUC benefits paid to him for weeks 21-20 through 30-20. The order further concluded that because claimant received those benefits based upon a false certification to the Department that he had been laid off due to a lack of work, he was liable to repay

those benefits to the Department. However, having concluded in this decision that claimant was discharged but not for misconduct, claimant is not disqualified from receiving those benefits for the weeks at issue. Accordingly, claimant was not overpaid the \$10,906 in benefits he received and is not liable to repay that amount to the Department.

**DECISION:** Order No. 20-UI-156164 is modified, as outlined above. Order No. 20-UI-156172 is modified, as outlined above.

S. Alba and D. P. Hettle.

**DATE of Service: December 28, 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](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 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 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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