

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0013**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 27, 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 31, 2020 (decision # 120433). Claimant filed a timely request for hearing. On December 16, 2020, ALJ Scott convened a hearing but re-scheduled the hearing to a later date to allow time for the employer to serve on claimant's counsel documents the employer wished to offer into evidence. On December 22, 2020, ALJ Scott conducted the re-scheduled hearing, and on December 30, 2020 issued Order No. 20-UI-158373, affirming decision # 120433. On January 5, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** Claimant submitted a written argument. EAB considered the written argument to the extent it was based on information received into evidence at the hearing. The argument made several contentions. First, it disagreed with a fact found by Order No. 20-UI-158373 that claimant told the employer that claimant "could make more money not working and collecting unemployment insurance benefits and asked [the employer] to lay her off." Order No. 20-UI-158373 at 2. The argument asserted that claimant was not given an opportunity to rebut the employer's testimony on this point, offered a declaration from claimant, and invited EAB to consider it as rebuttal evidence. EAB did not consider the information contained in the declaration when reaching this decision because claimant failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information contained in the declaration during the hearing. OAR 471-041-0090 (May 13, 2019). The ALJ gave claimant an opportunity to provide rebuttal testimony when the ALJ asked claimant's counsel whether she had any other evidence that she wanted to offer, and claimant's counsel declined to ask any questions. Transcript at 25.

Next, the argument objected to several findings of fact set forth in Order No. 20-UI-158373, arguing that the findings were based on official notice that was improperly taken, or were not supported by the record. EAB finds that the order under review properly took official notice and the order's findings to which claimant objected were supported by substantial evidence. Finally, the argument contended that the ALJ did not properly inquire of claimant or properly follow-up with claimant during the ALJ's questioning. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

**EVIDENTIARY MATTER:** On January 5, 2021, claimant objected in writing to the ALJ's taking of official notice in Order No. 20-UI-158373 that, following the imposition of mandatory COVID-19 safety restrictions, "[n]on-essential businesses, including hair salons, barber shops, gyms, and retail stores other than convenience and grocery stores, were allowed to reopen on or about May 15, 2020." Order No. 20-UI-158373 at 2. Claimant directed this objection to the Office of Administrative Hearings (OAH). Because OAH did not rule on the objection, EAB addresses the objection herein. The basis of claimant's objection was that the ALJ used the noticed fact to draw an inference about claimant's knowledge of COVID-19 order requirements, which claimant argued was improper. Under OAR 471-040-0025(7), however, the ALJ was permitted to take official notice of general facts within the ALJ's specialized knowledge. Whether or not the ALJ drew any inferences from the fact of which the ALJ took official notice, claimant did not allege or show in her objection that the noticed fact was not within the ALJ's specialized knowledge. Therefore, claimant's objection is overruled.

**FINDINGS OF FACT:** (1) Beaches Boutique employed claimant from December 2018 until June 2, 2020 as a store manager. The employer was a retail store that sold gift shop items.

(2) In late March 2020, the Governor of Oregon issued an order relating to the COVID-19 pandemic that required most retail stores to close. The employer remained open despite the Governor's order, but instituted new safety precautions such as requiring masks to be worn, social distancing, and surfaces to be sanitized.

(3) Claimant had a weakened immune system and believed she would be particularly susceptible to COVID-19 while working at the employer's store. The employer's decision to remain open concerned claimant because she believed the Governor's order required the employer to close. Claimant also thought the safety precautions undertaken by the employer were inadequate. Despite her concerns, claimant continued working for the employer.

(4) In March or April 2020, claimant mentioned to the employer on a couple of occasions that she was interested in claiming unemployment insurance, but continued working for the employer during those months.

(5) On May 3, 2020, while still working for the employer, claimant filed a claim for unemployment insurance benefits, and shortly thereafter learned that her claim was processed. From May 17, 2020 through June 1, 2020, claimant took an employer-approved vacation.

(6) On June 2, 2020, claimant voluntarily quit working for the employer because claimant's unemployment insurance claim had been processed and she believed she would receive benefits.

Claimant also quit working for the employer because of her health concerns relating to the employer remaining open despite the Governor's order, and her view that the safety precautions undertaken by the employer were inadequate.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work without good cause.

**Nature of 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).

The weight of the evidence indicates that claimant voluntarily left work on June 2, 2020. At hearing, the parties offered different explanations of what was supposed to occur after claimant's vacation ended on June 1, 2020. Claimant testified that upon learning that her claim for unemployment insurance benefits was processed she and the employer orally agreed that starting June 2, 2020 claimant would take a leave of absence that was to continue until COVID-19 restrictions were lifted. Transcript at 8. The employer, in contrast, testified that she expected claimant to return to work on June 2, 2020 and when claimant did not report to work that day, assumed claimant quit because claimant had previously mentioned her interest in claiming unemployment insurance. Transcript at 16, 17-18. An email exchange in the record undermines the view that the parties mutually understood that claimant would take a leave of absence starting June 2. In the email, which is dated May 6, 2020, claimant stated, "I can . . . start vacation Sunday, May 17th – Monday, June 1st Return to work Tuesday, June 2nd," to which the employer responded, "Okay". Exhibit 2, May 6, 2020 Email Exchange. Viewing this evidence in combination with the testimony, the record shows that more likely than not the parties contemplated that claimant would return to work on June 2, 2020, meaning that continuing work was available for claimant on that day. Since claimant could have continued to work for the employer for an additional period of time on June 2, 2020 but did not, the work separation was a voluntary leaving.

**Voluntary Leaving.** 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). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). 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. When a claimant who quits work had a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h), good cause for voluntarily leaving work is such that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

29 C.F.R. §1630.2(h) defines "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Claimant had a weakened immune system. Claimant testified that she had discussed her condition with the employer “long before the pandemic,” and stated in a declaration that she expressed her health concerns over the length of her employment. Transcript at 9; Exhibit 1 at 3. The record is insufficient to establish that claimant’s weakened immune system condition was of sufficient duration to implicate the modified reasonable and prudent person standard that applies where a claimant has a permanent or long-term physical or mental impairment. On this record, however, the outcome is the same whether claimant’s voluntary quit is analyzed under an unmodified reasonable and prudent person standard or the standard of a reasonable and prudent person with the characteristics and qualities of an individual with a weakened immune system.

Claimant left work because she learned her unemployment insurance claim had been processed and she believed she would receive benefits. At hearing, claimant testified that, “[o]riginally my intention was to return to work on June 2nd, but then I had filed and got approved for the benefits, so that voided that intention, that I did not return to work on June 2nd.” Transcript at 4. Claimant failed to establish good cause to quit work on this basis. Claimant offered no evidence to show how qualifying for benefits presented her with a situation of such gravity that she had no reasonable alternative but to leave work.

Claimant also left work, in part, because she was concerned about her health given the employer’s decision to remain open despite the Governor’s order, and because she believed that the COVID-19 safety precautions the employer undertook were inadequate. The record does not support that these reasons were of such gravity that claimant had no reasonable alternative but to quit on June 2, 2020. Claimant’s assertion that the employer’s decision to stay open presented her with a grave situation is undermined by the fact that from the point the Governor issued her order in late March 2020 until claimant voluntarily quit, claimant continued working for the employer for multiple weeks. Claimant did not offer evidence to explain why conditions at the employer’s store were tolerable enough for her to continue working there while it remained open during late March throughout April and into May but became – by the time claimant quit – of such gravity that she had no reasonable alternative but to leave work.

Further, the evidence as to whether claimant was subject to unsafe working conditions because of inadequate COVID-19 safety measures is no more than equally balanced. For example, while claimant contended that the employer failed to implement any meaningful COVID-19 safety measures, the employer asserted that it implemented and consistently enforced an array of such measures during the period of March 2020 through June 2020. Exhibit 1 at 2-3; Exhibit 1 at 5-6. Claimant also supplied evidence about the adequacy of the employer’s COVID-19 safety measures through the declaration of a third party employee but this, too, did no more than present evidence that is equally balanced. While the employee’s declaration suggested the employer’s aisles were too narrow for social distancing, it also

showed that the employer employed the employee for the specific purpose of reminding customers to wash their hands and take proper COVID-19 safety precautions. Exhibit 1, Declaration of Kirk Gage II. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, claimant – has failed to satisfy her evidentiary burden. In light of claimant’s burden of persuasion, and given the equal balance of the evidence on this point, the evidence claimant offered relating to inadequate COVID-19 safety measures was not sufficient to establish a grave situation.

For these reasons, claimant has not shown that no reasonable or prudent person would have continued to work for the employer for an additional period of time. Nor has claimant shown that no reasonable or prudent person with the characteristics and qualities of an individual with a weakened immune system would have continued to work for the employer for an additional period of time. Claimant therefore quit work without good cause, and is disqualified from receiving unemployment insurance benefits effective May 31, 2020.

**DECISION:** Order No. 20-UI-158373 is affirmed.

S. Alba and D. P. Hettle.

**DATE of Service:** February 10, 2021

**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.

**NOTE:** This decision denies payment of your Unemployment Insurance (UI) benefits. However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the “Contact Us” form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

**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 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**  
 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.