

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0055**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 4, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer with good cause and was not disqualified from receiving unemployment insurance benefits (decision # 133052). The employer filed a timely request for hearing. On January 6, 2021, ALJ Murdock conducted a hearing, and on January 8, 2021 issued Order No. 21-UI-158882, concluding claimant quit work without good cause and was disqualified from receiving benefits effective July 19, 2020. On January 27, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

On January 29, 2021, EAB acknowledged its receipt of claimant's application for review as required by OAR 471-041-0075 (May 13, 2019). Claimant submitted identical written arguments in support of their application for review on January 27, 2021 and February 19, 2021. However, OAR 471-041-0080 provides, in relevant part:

(1) Parties may submit written argument within 20 days of the date that EAB provides the notice required by OAR 471-041-0075.

(2) A party's written argument will not be considered unless it:

(a) Includes a statement that a copy was provided to the opposing party or parties...

(b) Is received within the time allowed.

With their January 27, 2021 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). For that reason, EAB did not consider that written argument. Because claimant's February 19, 2021 argument was not received by EAB within the 20 day time period allowed under OAR 471-041-0080(1), that argument also was not considered by EAB. OAR 471-041-0080(2)(b). Even if EAB had considered claimant's written arguments, it would not have changed the outcome of this decision for the reasons stated in the analysis below.

**FINDINGS OF FACT:** (1) Trinity St. Elizabeth employed claimant as a licensed registered nurse (RN), last as a clinical coordinator, from August 3, 1992 until July 20, 2020.

(2) The employer expected claimant to work within the scope of standards of practice for a registered nurse, which did not include administering COVID-19 tests or IV fluids to patients without a doctor's order. Claimant was aware of those limits on the scope of her nursing practice and the employer's expectation.

(3) On June 21, 2020, claimant administered a COVID-19 test to a patient in the employer's Intensive Care Unit (ICU) by collecting a swab from the patient without first contacting the admitting physician and obtaining a verbal or written order for the test, which was outside the scope of her nursing practice.

(4) On June 25, 2020, after discussing the June 21 incident with claimant, claimant's supervisor gave her a "Memo of Expectations." Exhibit 2 at 3. The memo clarified that the employer expected claimant to work only within the scope of her practice as an RN and advised her that a future violation of that expectation could result in discipline up to and including the termination of her employment.

(5) On Sunday, July 19, 2020, claimant administered IV fluids to a patient without first confirming that there was a doctor's order authorizing the procedure on that day. When the patient arrived at the facility and requested "rehydration" with IV fluids, claimant looked in the patient's chart but could not find a doctor's order authorizing the rehydration procedure on the weekend although an order did authorize the procedure on Mondays, Wednesdays and Fridays. Transcript at 9, 21. Claimant attempted to contact the patient's physician to obtain authorization for the procedure on that day without success. Rather than follow the employer's protocol for that situation and refer the patient to the emergency room for treatment, where a physician could assess the patient's need for the fluids, fluid type and rate of administration, claimant made those decisions on her own and treated the patient with IV fluids without a physician's order.

(6) Later on July 19, 2020, claimant sent a text message to her supervisor. She explained that she had "messed up again" and administered IV fluids to a patient before a doctor's order had been obtained. Exhibit 1 at 2. At the end of the message, claimant asked her supervisor for "a chance to resign, instead of being terminated." Exhibit 1 at 2.

(7) On July 20, 2020, claimant spoke to her supervisor by phone. Claimant's supervisor informed claimant that the employer would conduct an investigation concerning the incident, but that she believed it was likely that claimant's employment would be terminated in light of the recent incident and memo concerning a previous similar issue. Later on July 20, 2020, claimant submitted a written letter of resignation. Exhibit 1 at 1.

(8) On July 20, 2020, claimant quit work to avoid having her employment terminated based on the July 19, 2020 incident.

**CONCLUSIONS AND REASONS:** Claimant quit work without good cause.

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) (September 22, 2020). “[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.

Under OAR 471-030-0038(5)(b)(F), leaving work without good cause includes resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. 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). “[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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant resigned on July 20, 2020 to avoid being discharged for acting outside the scope of her nursing practice by administering IV fluids without a doctor’s order on July 19, 2020. Claimant knew that her conduct that day violated the employer’s expectation that she work only within the scope of her nursing practice. Given the proximity in time between that incident and June 25, 2020, when claimant received the “Memo of Expectations” from her supervisor, claimant likely knew or should have known that her conduct probably violated those employer expectations. Claimant’s failure to comply with those expectations was at least a wantonly negligent violation of a standard of behavior the employer had the right to expect of her.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to

act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Claimant's July 19, 2020 conduct is not excusable as an isolated instance of poor judgment. Claimant's wantonly negligent conduct on July 19, 2020 was not isolated and was a repeated act of similar wantonly negligent behavior that had occurred less than a month before. On June 21, 2020, claimant administered a COVID-19 test to a patient in the employer's ICU without first contacting the admitting physician and obtaining a verbal or written order for the test, which was outside the scope of her nursing practice. At hearing, claimant admitted that she knew at that time that it was standard practice to have a physician's order "prior to collecting a specimen for COVID testing," but that she collected the specimen in question prior to contacting the admitting physician. Transcript at 15-16. More likely than not, claimant knew or should have known that her conduct on June 21, 2020 probably violated the employer expectation that she not work outside the scope of her nursing practice.

Nor is claimant's July 19, 2020 conduct as a good faith error in her understanding of the employer's expectations. The record fails to show claimant sincerely believed, or had a rational basis for believing, the employer would condone her conduct in again working outside the scope of her practice as a registered nurse by administering a procedure without a doctor's order less than a month after she had been coached and given a memo of expectations criticizing her for similar conduct on June 21 2020.

Because claimant's July 19, 2020 conduct consisted of at least a wantonly negligent violation of a known employer expectation, and was not excusable under the exculpatory provisions of OAR 471-030-0038(3)(b), any discharge or potential discharge based on claimant's conduct that day would have been for misconduct. Accordingly, under OAR 471-030-038(5)(b)(F), because claimant quit work to avoid a discharge or potential discharge for misconduct, she quit work without good cause and is disqualified from receiving unemployment insurance benefits, effective July 19, 2020.

**DECISION:** Order No. 21-UI-158882 is affirmed.

S. Alba and D. P. Hettle.

**DATE of Service:** February 26, 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](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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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)

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