

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0166**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 23, 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 # 141126). Claimant filed a timely request for hearing. On January 21, 2021, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for February 1, 2021 at 8:15 a.m. On February 1, 2021, claimant failed to appear at the hearing. On February 3, 2021, OAH served notice of a hearing scheduled for February 17, 2021 at 1:30 p.m. On February 17, 2021, ALJ Murdock conducted a hearing, and on February 18, 2021 issued Order No. 21-UI-161171, reversing decision # 141126 by concluding that claimant quit work with good cause and was not disqualified from receiving benefits. On March 3, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Platinum Staffing employed claimant as a travel nurse at a correctional facility in Vermont from March 5, 2020 until June 3, 2020.

(2) At the time that claimant worked for the employer, her primary residence was in Oregon. Aside from the 13-week contract she accepted with the employer, claimant had never previously worked out of state as a travel nurse. Claimant drove from Oregon to Vermont in order to accept the contract.

(3) At or near the end of the 13-week contract, the employer or the employer's client offered to extend claimant's assignment until the end of June 2020. The employer also offered claimant an additional contract to work in Maine at another assignment. Claimant declined both offers because she wished to return home to her family in Oregon. At the time, claimant was concerned that she may have difficulty driving home due to the worsening COVID-19 pandemic, because she suspected that the states she would have to drive through might close their borders or require quarantines.

(4) Claimant intended to seek work in Oregon once she returned home.

(5) The ALJ did not issue an order dismissing claimant's request for hearing as a result of claimant's failure to appear at the February 1, 2021 hearing.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-161171 is set aside and this matter remanded for further development of the record.

**Claimant's failure to appear at the February 1, 2021 hearing.** An administrative law judge may order that a request for hearing be dismissed if the appellant fails to appear at the hearing at the time and place stated in the notice of hearing. ORS 657.270(7)(a)(C); OAR 471-040-0035(3)(c) (August 1, 2004).

At the request of a party or on the administrative law judge's own initiative, an administrative law judge may order, orally or in writing, that a hearing be postponed. OAR 471-040-0021(1) (August 1, 2004). A postponement may be granted by Office of Administrative Hearings staff at the request of a party if the request is promptly made after the party becomes aware of the need for postponement and the party has good cause, as stated in the request, for not attending the hearing at the time and date set. OAR 471-040-0021(2). A party has "good cause" for requesting postponement of the hearing if the circumstances causing the request are beyond the reasonable control of the requesting party and failure to grant the postponement would result in undue hardship to the requesting party. OAR 471-040-0021(3).

At the request of a party or on the administrative law judge's own initiative, an administrative law judge may order, orally or in writing, that a hearing be continued. OAR 471-040-0026(1) (August 1, 2004). A continuance may be granted by an administrative law judge at the request of a party if the request is promptly made prior to the issuance of the administrative law judge's decision and the party has good cause, as stated in the request, for continuing the hearing at the. OAR 471-040-0026(2). A party has "good cause" for requesting continuance of the hearing if the circumstances causing the request are beyond the reasonable control of the requesting party and failure to grant the continuance would result in undue hardship to the requesting party. OAR 471-040-0026(3).

Claimant failed to appear at the original hearing on February 1, 2021, but the record does not show why she failed to appear, or why the ALJ apparently did not dismiss claimant's request for hearing under ORS 657.270(7)(a)(C) and OAR 471-040-0035(3)(c). Likewise, the record does not show if the ALJ instead postponed or continued the hearing on her own initiative, and if not, who requested a postponement or continuance, when the postponement or continuance was requested, why it was requested, or why it apparently was granted. On remand, the ALJ should develop the record so that a determination can be made as to whether a postponement or continuance was granted in accordance with the provisions of OAR 471-040-0021 or OAR 471-040-0026. If the record on remand shows that a postponement or continuance was granted either within the discretion granted to the ALJ under OAR 471-040-0021(1) or OAR 471-040-0026(1), or in accordance with OAR 471-040-0021(2) and (3) or OAR 471-040-0021(2) and (3), the record must be developed regarding the merits of decision # 141126, as discussed below.

**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). In the case of individuals working for temporary agencies, employee leasing

companies, the employment relationship “shall be deemed severed at the time that a work assignment ends.” OAR 471-030-0038(1)(a).

The order under review concluded that “the employer was willing to allow claimant to continue working [for] an additional period of time beyond the initial assignment or contract for 13 weeks, that claimant was not willing to do so, and, that the work separation therefore was a voluntary leaving.” Order No. 21-UI-161171 at 3. The record does not support that conclusion. At hearing, both parties testified that claimant had the option to continue her assignment for an additional period of time. Audio Record at 5:07, 10:46. However, the record is not clear as to what form this additional work would have taken. The hearing record does not show whether the employer was a temporary agency or employee leasing company. On remand, the record should be further developed to reflect whether claimant worked for the employer directly or whether she instead worked as a temporary or leased employee. Further, whether the employer or their client offered to extend claimant’s already-existing contract prior to its expiration or offered claimant a new contract that would have extended the assignment, may bear on whether or not the work assignment “ended” on its original expiration date of June 3, 2020, and therefore whether claimant’s work separation was a discharge or a quit. It also may bear on whether the employment relationship otherwise would have continued for a few more weeks, or indefinitely. On remand, the record must be developed to show the timing and terms of the offer, so as to make such determinations.

Assuming the record ultimately shows that claimant quit, 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.

Per OAR 471-030-0038(5)(b)(A), leaving suitable work to seek other work is not good cause for voluntarily quitting work. In determining whether any work is suitable for an individual, the Director of the Employment Department shall consider, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual, the length of unemployment and prospects for securing local work in the customary occupation of the individual and the distance of the available work from the residence of the individual. ORS 657.190.

Claimant declined to continue working for the employer because she wanted to return home to her family in Oregon and was concerned that possible COVID-19-related restrictions might make her return more difficult. Assuming claimant quit for that reason, the record is not sufficiently developed to determine whether or not it was of such gravity that claimant had no reasonable alternative but to quit. On remand, further inquiry should be made into the restrictions about which claimant was concerned, including the specific restrictions, where she had learned about them, how she believed the restrictions would impact her return to Oregon, and why she believed that working for another few weeks, if not indefinitely, would make a difference between getting home easily and being unduly delayed.

The order under review also concluded that, “Given the great distance of the work from claimant’s residence [in Oregon], the work [in Vermont] was not suitable,” and claimant therefore “left unsuitable work to return home to seek suitable work.” Order No. 21-UI-161171 at 3. Further information is necessary to determine if the work was unsuitable merely because of the distance of the available work from claimant’s residence, or in addition to other suitability factors described in ORS 657.190. Claimant worked for the employer for 13 weeks, presumably residing in Vermont during that period, prior to leaving and returning to Oregon. The record does not show that claimant was, for instance, commuting from Oregon to Vermont on a daily basis in order to work for the employer. To the extent that claimant voluntarily quit in order to seek work in Oregon, further inquiry must be made into why continuing to work for another few weeks, if not indefinitely, made the work unsuitable, and into the other suitability factors contemplated under ORS 657.190, in order to determine whether claimant quit suitable work to seek other work.

Assuming the record ultimately shows that the work separation was a 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).

As it stands, the record shows that if claimant’s work separation was a discharge, it was because her work assignment with the employer’s client ended, and not because claimant engaged in misconduct. However, the ALJ should ensure that the record developed at the hearing on remand shows a full and fair inquiry into the facts necessary for consideration of that issue.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether a postponement or continuance of the February 1, 2021 hearing was properly granted, and if so, whether claimant is disqualified from receiving benefits based on her work separation from the employer, Order No. 21-UI-161171 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-161171 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

**DATE of Service:** April 9, 2021

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-161171 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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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**

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**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.

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