

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0218**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 6, 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 March 29, 2020 (decision # 105045). Claimant filed a timely request for hearing. On March 23, 2021, ALJ McGorin conducted a hearing, and on March 26, 2021 issued Order No. 21-UI-163543, affirming decision # 105045. On March 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Maayan HaTorah Day School employed claimant as an early childhood teacher's assistant in the employer's daycare facility from August 27, 2019 until April 2020. In addition to the daycare facility, the employer operated a private school for kindergarten through 8<sup>th</sup> grade. Claimant's original written offer of employment was for August 27, 2019 until June 12, 2020, which coincided with the employer's 2019–2020 school year.

(2) On March 13, 2020, the employer closed its daycare facility due to the COVID-19 pandemic, and shortly thereafter moved its K-8 school instruction to remote learning only.

(3) On March 19, 2020, the employer offered claimant the opportunity to work in the private home of a married couple who both taught at the employer's school, and who were preparing to begin teaching remotely from home. Claimant's duties would have been similar to those performed at the daycare facility, except that she would only have been responsible for the couple's two youngest children instead of an entire class of children. Claimant's rate of pay would have been the same, and the employer would have continued to pay claimant as an employee of the daycare facility. The employer characterized the offer as "100% [claimant's] call." Exhibit 1 at 5. Claimant declined the employer's offer the same day, primarily because she was concerned about being infected with COVID-19 at the teachers' home and passing it on to the two high-risk people she lived with. When the employer made the offer to claimant, the employer did not inform her that she would not be allowed to continue working for them if claimant refused the offer, because the employer did not then know that the school would be closed for the remainder of the year. The employer and claimant did not discuss the offer to work in the teachers' home after March 19, 2020.

(4) Between March 13, 2020 and April 3, 2020, claimant continued working for the employer, performing work remotely. The employer did not have any additional work for claimant to perform remotely after April 3, 2020.

(5) On April 3, 2020, the employer informed claimant that they did not have any further work for her at that time, but that if the employer opened the facility again prior to the end of the school year, they would contact her.

(6) On or before April 23, 2020,<sup>1</sup> the employer learned that the facility would not be allowed to reopen for the remainder of the school year. Claimant never returned to work for the employer, as the employer did not have any other work that claimant could have performed for the rest of the school year.

**CONCLUSIONS AND REASONS:** Claimant was discharged, but not for misconduct.

**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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

The order under review concluded that claimant voluntarily quit working for the employer because after claimant declined the offer the employer made on March 19, 2020, the "employer had no other work for claimant," but "had claimant accepted the offer, [the] employer would have continued to employ claimant through the rest of the 2019-2020 school year." Order No. 21-UI-163543 at 3. The record does not support this conclusion. Had the employer, for instance, explicitly told claimant that she either was required to accept the offer to work in the teachers' private home or her employment would not continue, claimant's choice to decline the offer might have been properly construed as a voluntary quit. However, the record shows that neither claimant nor the employer believed that claimant's decision ended the employment relationship, and in fact the employment relationship did not end at that point.

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<sup>1</sup> See Executive Order No. 20-19, April 23, 2020, [https://www.oregon.gov/gov/Documents/executive\\_orders/eo\\_20-19.pdf](https://www.oregon.gov/gov/Documents/executive_orders/eo_20-19.pdf)

Instead, claimant continued working for the employer for about two more weeks, until the employer informed claimant that they had no further work for her at that time. The record does not show that the work in the private home was still available to claimant as of April 3, 2020, or that claimant had reason to believe that it was still available to her at that point.

The record further suggests that the employment relationship continued past April 3, 2020, because the employer told claimant that day that they would contact her if they opened the daycare facility again before the end of the school year. Although the record does not definitively show when the employer learned that it would not be permitted to do so, the record shows that, more likely than not, the employer knew no later than April 23, 2020 that it would not reopen the daycare facility for the 2019-2020 school year. At that time, Executive Order No 20-19 mandated that licensed childcare facilities, other than those approved to operate as “emergency” childcare facilities, remain closed until further notice by the governor. Therefore, the employment relationship was more likely than not severed at the time at which the employer learned that they would not be able to reopen for the remainder of the school year, and therefore would not have work for claimant for the rest of the school year. Thus, because the record shows that the separation was the result of the employer no longer having work for claimant, the work separation was a discharge, and not a voluntary leaving.

**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). “[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 discussed above, the employer discharged claimant because the employer no longer had any work for claimant to perform due the pandemic-related facility closure. As this was not related to claimant’s actions or behaviors, the employer did not discharge claimant for a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or a willful or wantonly negligent disregard of the employer’s interest. The employer discharged claimant, not for misconduct, and claimant is not disqualified from receiving benefits on the basis of that work separation.

**DECISION:** Order No. 21-UI-163543 is set aside, as outlined above.

S. Alba and D. P. Hettle.

**DATE of Service:** May 4, 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 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymoz.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)

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