

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0293**

*Modified*  
*No Disqualification*  
*Ineligible Week 40-20*

**PROCEDURAL HISTORY:** On December 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective September 27, 2020 (decision # 73419). Claimant filed a timely request for hearing. On March 17, 2021, ALJ Monroe conducted a hearing and on March 25, 2021, issued Order No. 21-UI-163490, reversing decision # 73419 and concluding that the employer discharged claimant, not for misconduct, and that claimant was not disqualified from receiving benefits. On April 13, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Donald Wolfe (DW) employed claimant as a caregiver from July 2019 to October 2, 2020. DW had a medical condition that required the assistance of caregivers and employed a care manager and multiple caregivers to assist him at his residence.

(2) DW's medical condition increased his risk for medical complications if he contracted COVID-19. On March 31, 2020, he "posted" a written notice for his caregivers that identified COVID-19 as a "[c]ritical health concern" that posed a "deadly danger" for him and requested that his caregivers take precautions to avoid "bring[ing the virus] to the house" when they reported to work. Transcript at 12; Exhibit 1.

(3) After DW posted the "[c]ritical health concern" notice on March 31, 2021, claimant occasionally engaged in conduct which DW believed increased her, and consequently his, risk for contracting

COVID-19. Claimant occasionally brought uninvited individuals into DW's residence and failed to follow such precautions as wearing a mask, remaining at the residence during her lunch break, and limiting her lunch break to 30 minutes. Although DW was dissatisfied with claimant's conduct on those occasions, he never disciplined claimant for her actions or discussed them with her.

(4) At the end of August 2020, claimant asked DW for time off from work to travel to Indiana to see her sister, who was "in the hospital" and "very ill." Transcript at 24. DW granted claimant the requested permission to be off work. Claimant had not spoken to the care manager about her request for time off.

(5) In mid-September 2020, DW and the care manager called claimant to discuss the need for her to be tested for COVID-19 and possibly quarantine prior to her return to work. At that time, claimant clarified to DW and the care manager that she was in Indiana and would not return to Oregon for "another two weeks." Transcript at 8. DW and the care manager approved claimant's additional time off from work.

(6) On September 26, 2020, DW called claimant, asked her when she would return to work and again told her that she was required to be tested for COVID-19 before returning to work. Claimant responded that she would return to Oregon the following week and would report for work on October 3, 2020. Transcript at 18-19. Shortly after that call ended, DW decided to terminate claimant's employment. He called claimant back and told her he was "ending [her] employment on October 8th," without stating a reason. Transcript at 21-22. Shortly after the call, claimant contacted the care manager, who confirmed that DW was ending claimant's employment, also without stating a reason. Transcript at 22.

(7) DW decided to terminate claimant's employment on September 26, 2020 for several reasons. He believed she had made the decision to travel to another state despite knowing that DW's medical condition put him at a higher risk of medical complications from COVID-19, and that traveling to another state would increase her chances of contracting COVID-19 and potentially exposing DW to it. DW believed that claimant might have to quarantine for an additional two weeks when she returned to Oregon and that he could replace claimant quickly because he was already conducting employment interviews to replace another caregiver. DW also remained dissatisfied that earlier in the year, claimant had engaged in conduct which increased his risk for contracting COVID-19 such as bringing uninvited guests into the residence and failing to follow precautions against contracting COVID-19.

(8) On September 30, 2020, claimant returned to Oregon and contacted DW, who told her she needed to be tested for COVID-19 before returning to work. Transcript at 20.

(9) On October 1, 2020, claimant was tested for COVID-19, but did not receive the test results until the following Monday, October 5, 2020.

(10) On Friday, October 2, 2020, claimant contacted DW and told him she had been tested for COVID-19. Transcript at 18. When DW asked her if she was intending to report for work on October 3, 2020, claimant told him, "[N]o, . . . I don't think it makes sense for me to come back on the 3rd and you're gonna terminate me on the 8th of October." Transcript at 18. Claimant quit work on October 2, 2020 because the employer planned to discharge her on October 8, 2020.

**CONCLUSIONS AND REASONS:** Claimant quit work without good cause on October 2, 2020, within fifteen days prior to the date of an impending discharge on October 8, 2020, not for misconduct.

Under ORS 657.176(7), claimant is not disqualified from receiving unemployment insurance benefits beginning October 4, 2020. However, because claimant quit work without good cause during the week including September 27, 2020 through October 3, 2020 (week 40-20), claimant is ineligible for benefits for that week.

**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 the employer terminated claimant’s employment “[o]n or around September 29, 2020.” Order No. 21-UI-163490 at 2. However, the record shows that on September 26, 2020, DW contacted claimant and told her he was ending her employment, effective October 8, 2020. Shortly after the call, claimant confirmed with the care manager that DW was discharging her. Thus, because DW told claimant that her employment would end on October 8, 2020, claimant’s impending work separation on October 8, 2020 was a discharge.

However, the record also shows that on October 2, 2020, DW asked claimant if she planned to report to work on October 3, 2020, and claimant told DW, “[N]o, . . . I don’t think it makes sense for me to come back on the 3rd and you’re gonna terminate me on the 8th of October.” Because the record shows that claimant could have continued to work for the employer for an additional period of time after October 2, 2020, and chose not to do so, the work separation was a voluntary leaving that occurred on October 2, 2020.

However, because claimant quit work on October 2, 2020, within fifteen days of claimant’s impending discharge on October 8, 2020, it is necessary to determine if the work separation should be adjudicated under ORS 657.176(7). ORS 657.176(7) states, “For purposes of applying subsection (2) of this section, when an employer has notified an individual that the individual will be discharged on a specific date and it is determined that: (a) The discharge would not be for reasons that constitute misconduct connected with the work; (b) The individual voluntarily left work without good cause prior to the date of the impending discharge; and (c) The voluntary leaving of work occurred no more than 15 days prior to the date of the impending discharge, then the separation from work shall be adjudicated as if the voluntary leaving had not occurred and the discharge had occurred. However, the individual shall be ineligible for benefits for the period including the week in which the voluntary leaving occurred through the week prior to the week in which the individual would have been discharged.”

**Discharge Not for Misconduct.** On September 26, 2020, DW notified claimant that she would be discharged on October 8, 2020. The next issue to determine is if ORS 657.176(7) applies to claimant’s work separation is to determine if the impending discharge was for misconduct. 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 a preliminary matter, the parties offered conflicting testimony about matters at issue, including whether, at the time claimant requested time off work in late August of 2020, claimant disclosed the duration of her planned absence and her intent to travel to Indiana during that period. Claimant testified that she disclosed the reason she requested time off, that she was uncertain how much time off she would need, and that she planned to travel to Indiana when she requested the time off from DW in late August. Transcript at 23-24. The employer’s witness presented only hearsay evidence that claimant did not disclose that information. Transcript at 8. The parties also offered conflicting testimony about whether DW ever complained to claimant about performance behaviors. Although the employer’s witness presented hearsay evidence that claimant’s decisions to bring uninvited individuals into the house, fail to wear a mask, or remain at the residence during her lunch break bothered DW, and DW spoke to claimant about it, claimant presented first-hand testimony that the employer never made her aware of these or any performance concerns. Transcript at 9, 27. Moreover, the employer failed to present any documentary evidence that claimant had been disciplined or even counseled regarding performance concerns. Absent a basis for concluding that claimant was not a credible witness, claimant’s firsthand testimony under oath on these issues was afforded more weight than the employer’s hearsay evidence, and EAB therefore found facts in accordance with her testimony on those issues.

DW discharged claimant, in part, because he believed she decided to travel to another state, which increased her chances of contracting COVID-19, despite knowing that DW was susceptible to increased complications from the virus if claimant passed it on to him when she returned. However, the record shows that DW was aware of claimant’s travel plans when she requested time off of work, and not only granted her permission to take the time off, but agreed to extend it to the end of September 2020. Accordingly, to the extent DW discharged claimant for that reason, he failed to show that he discharged her for a conscious violation of a standard of behavior he had the right to expect of her.

DW also discharged claimant, in part, because he concluded that claimant might need to quarantine for an additional two weeks upon her return. He also concluded that it might not take long to replace her. Although those conclusions were reasonable, to the extent DW discharged claimant for those reasons, he failed to show that he discharged her for conscious violations of standards of behavior that DW had the right to expect of claimant because the record shows that claimant told DW about her travel plans when requesting time off and he granted her request. Nor was DW’s ability to replace claimant quickly attributable to claimant as misconduct.

DW also discharged claimant, in part, because earlier in the year, DW concluded that claimant had engaged in conduct that increased his risk for contracting COVID-19. Although DW’s concern in that regard was objectively reasonable, the record fails to show that his concern was so great that he took steps to discipline claimant or even speak to claimant about those performance issues when they occurred. Accordingly, to the extent DW discharged claimant for such conduct, he failed to show that he

discharged her for conscious violations of standards of behavior the employer had the right to expect of her.

In sum, the reasons for which the employer planned to discharge claimant on October 8, 2020 were not misconduct under ORS 657.176(2)(a). The employer therefore discharged claimant, not for misconduct, effective October 8, 2020.

**Voluntary Leaving Not for Good Cause.** Claimant quit work on October 2, 2020, which was prior to the date of the impending discharge. The next issue to determine if ORS 657.176(7) applies to claimant's work separation is to determine if claimant quit work with or 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). "[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.

The record shows that claimant quit work on October 2, 2020 because the employer planned to discharge her on October 8, 2020. The record does not show that on October 2, 2020, the impending discharge created a situation of such gravity for claimant that no reasonable and prudent person would have continued to work for the employer for an additional period of time. Accordingly, under ORS 657.176(2)(c), claimant quit work when she did without good cause.

**Conclusion and Disqualification Period.** Because claimant quit work without good cause within 15 days of a planned discharge not for misconduct, under ORS 657.176(7), the work separation is adjudicated as a discharge, for which claimant is not disqualified from receiving benefits. However, because both the week of the voluntary quit and the week prior to the planned discharge was the week including September 27, 2020 to October 3, 2020 (week 40-20), under ORS 657.176(7), claimant is ineligible for benefits for that week.

**DECISION:** Order No. 21-UI-163490 is modified, as outlined above.

S. Alba and A. Steger-Bentz;  
D. Hettle, not participating.

**DATE of Service: May 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 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 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 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  
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