

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0307**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On February 22, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was disqualified from receiving benefits effective November 1, 2020 (decision # 65532). Claimant filed a timely request for hearing. On March 31, 2021, ALJ S. Lee conducted a hearing, and on April 5, 2021 issued Order No. 21-UI-164163, affirming decision # 65532. On April 16, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Roth Senior Care LLC employed claimant as a caregiver from October 14, 2019 until November 6, 2020.

(2) Claimant performed caregiving services both at individual clients' homes and at group care facilities. Claimant did not own a car, and relied on public transportation to travel to and from her clients.

(3) Prior to September 26, 2020, claimant's schedule often consisted of single 12-hour shifts. On October 5, 2020, the employer's managing director met with claimant and told her to contact the office directly to schedule herself for shifts for the following two weeks. The employer stopped automatically scheduling claimant for shifts at that point.

(4) On at least one occasion after the October 5, 2020 meeting, claimant contacted the office as directed to schedule herself for shifts. At that time the office informed claimant that only three-hour shifts were available, rather than the 12-hour shifts for which claimant had previously been scheduled. Between October 5, 2020 and November 6, 2020, claimant did not accept any of the three-hour shifts that the employer made available to her. Claimant did not accept the shifts because she believed that the commute time to and from the clients would exceed the length of the shifts themselves.

(5) The employer maintained a policy that considers an employee to have voluntarily quit if the employee has not communicated with the employer or worked a shift for 30 days. On November 6, 2020, the employer "deactivat[ed]" claimant because she had not accepted a shift for 30 days.

**CONCLUSIONS AND REASONS:** Order No. 21-UI-164163 is reversed and the matter remanded for further development of the record.

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 relevant part, “the date an individual is separated from work is the date the employer-employee relationship is severed.” OAR 471-030-0038(1)(a).

The order under review concluded that because “the employer had continuing work available for claimant, but she did not accept it because it was less than the hours she had previously been working,” claimant voluntarily quit. Order No. 21-UI-164163 at 3–4. The record as developed does not support this conclusion. The record shows that claimant had continued contact with the employer during at least some of the period between October 5, 2020 and November 6, 2020, and that claimant did not accept the shifts available to her during that time because they were short in duration. The fact that claimant declined some shifts between October 5, 2020 and November 6, 2020 could indicate that claimant voluntarily quit. However, the record is insufficient to determine whether, based on the declined shifts alone, claimant was unwilling to continue to work for the employer for an additional period of time and therefore quit. The record also shows that the employer eventually “deactivated” claimant in their system because claimant had not accepted any shifts for 30 days. This fact could indicate that claimant was discharged. However, the record is insufficient to determine if claimant had voluntarily quit before the employer “deactivated” claimant.

At hearing, while claimant did not expressly deny that she quit working for the employer, her testimony did not conclusively show either that she did quit or, if she did, when that occurred. Transcript at 6. That the employer “deactivated” claimant in their system and thereafter, by policy, considered claimant to have voluntarily quit does not mean that claimant did so. On remand, the record should be developed to determine the precise date on which the employer-employee relationship was severed and the party who severed it.

Inquiry on remand should also be made to determine whether claimant voluntarily quit for good cause, or, if claimant was discharged, whether claimant was discharged for misconduct. Claimant’s testimony established that her reason for declining the three-hour shifts was because of the unfavorable ratio of commute time to hours worked that those shifts would entail—in at least some cases, a four-hour round-trip bus ride for a three-hour shift. Transcript at 6. To the extent that the record on remand supports the conclusion that claimant voluntarily quit, the record should be developed to determine whether claimant’s reason for quitting can reasonably be considered to be due to a “reduction in hours” as contemplated by OAR 471-030-0038(5)(e), or whether claimant instead quit because of the commute involved. To that end, the record should be developed to show whether all of the three-hour shifts that were available to claimant entailed the four-hour round-trip length of commute; if not, to what extent they varied; and whether the length of the commute constituted good cause for quitting.

If the record on remand shows that claimant was discharged, inquiry should be made as to whether claimant’s failure to accept any available shifts between October 5, 2020 and November 6, 2020 was a willful or wantonly negligent violation of the employer’s reasonable expectations.

Additionally, at hearing, the ALJ did not explain the difference between a discharge and a voluntary quit, the criteria used to determine a discharge for misconduct or a voluntary quit without good cause, the fact that neither party bears the burden to prove whether the separation was a discharge or a voluntary quit, and, in either case, which facts the parties were required to prove or disprove in order to determine whether the separation was disqualifying. Audio Record at 3:05 to 3:28. On remand, the ALJ should explain the issues involved in the hearing in accordance with ORS 657.270(3).<sup>1</sup>

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 claimant voluntarily quit or was discharged, and whether in either case the separation was disqualifying, Order No. 21-UI-164163 is reversed, and this matter is remanded.

**DECISION:** Order No. 21-UI-164163 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** May 24, 2021

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-164163 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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<sup>1</sup> “When the claimant or the employer is not represented at the hearing by an attorney, paralegal worker, legal assistant, union representative or person otherwise qualified by experience or training, the administrative law judge shall explain the issues involved in the hearing and the matters that the unrepresented claimant or employer must either prove or disprove.”



# 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

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## 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**

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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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