

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0414**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 11, 2020, 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 unemployment insurance benefits effective April 5, 2020 (decision # 153109). Claimant filed a timely request for hearing. On May 14, 2021, ALJ Snyder conducted a hearing, and on May 21, 2021 issued Order No. 21-UI-167262, affirming decision # 153109. On May 25, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Curry Health District employed claimant from July 2014 until April 7, 2020, most recently as a nurse practitioner working in primary care.

(2) On September 26, 2019, claimant signed a three-year employment contract with the employer that took effect on November 4, 2019. In addition to claimant's salary and a signing bonus, the contract provided that the employer would pay claimant's student loan payments in the amount of \$2,667 per month until the loan balance of approximately \$70,000 was paid off. The contract also included a *force majeure* clause<sup>1</sup> which provided that "if either party was prevented from performing its obligations under [the contract] for a period of more than thirty (30) days for any reason beyond the party's reasonable control, each party's rights and obligations under the contract would cease with notice to the other party." Exhibit 2 at 2.

<sup>1</sup> A *force majeure* is "an unexpected and disruptive event that may operate to excuse a party from a contract."  
<https://www.dictionary.com/browse/force-majeure>

(3) In March 2020, the State of Oregon issued an executive order that temporarily restricted medical providers from performing elective procedures in order to contain the spread of COVID-19 pandemic. As a result, the employer's volume of patients in its clinics dropped significantly, and the employer subsequently made a large reduction in its staff. Several of the employer's clinical staff were offered the option to either accept a layoff or convert their employment from full-time to a per diem (on-call, as-needed) basis.

(4) In late March 2020, the employer offered claimant the option to either accept a per diem contract, in which she would not be guaranteed any scheduled hours, or full-time work as a registered nurse (RN), in which claimant would maintain her nurse practitioner rate of pay but the employer would no longer pay her student loan payments. Claimant did not accept the offers.

(5) On April 6, 2020, the employer sent claimant a letter advising her that they were invoking her employment contract's *force majeure* clause, and that the parties' rights and obligations under the contract ceased after April 6, 2020, because the employer was "unable to perform its obligations under [the contract]" as a result of the executive order and resultant loss of revenue. Exhibit 1 at 1. The letter also stated that the employer would pay claimant "any severance or pay out of earned Paid Time Off." Exhibit 1 at 2. The employer enclosed with the letter a document entitled, "Amendment to Employment Agreement." The document proposed to modify claimant's original employment contract to the per diem arrangement, similar to the arrangement they offered claimant in late March 2020, but would exclude the payment of claimant's student loans, effective April 7, 2020. Claimant did not accept the employer's proposal.

(6) On April 7, 2020, the employer terminated claimant's employment contract.

**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) (September 22, 2020).

The order under review concluded that because "claimant could have continued her employment as a nurse practitioner under the same contract if she converted to a per diem employee, or claimant could have continued her employment in a different position," claimant "could have continued to work for the same employer for an additional period of time," and therefore voluntarily quit working for the employer. Order No. 21-UI-167262 at 3. The record does not support this conclusion. While the employer offered other work arrangements to claimant prior to and at the time they served the termination notice on her, the record does not show that a continuing relationship between the parties would have existed after April 6, 2020.

Regardless of what the proposed per diem contract was titled, it was not an "amendment" to claimant's previous employment contract because the employer had already deemed claimant's previous contract to be "null and void" in the April 6, 2020 letter to claimant. Exhibit 1 at 1. At hearing, the employer's chief

executive officer (CEO) testified that she did not simply send the proposed per diem contract to claimant—without the separate termination notice—because she “wanted claimant to be fully aware and advised” that the employer intended to invoke the *force majeure* clause on April 6, 2020 if claimant did not accept the new contract. Transcript at 38. However, the termination letter did not so specify, and the record does not show that the employer explicitly advised claimant that the termination letter would only take effect *if* claimant did not sign the per diem contract. The effect of the April 6, 2020 letter was to sever the employment relationship on April 7, 2020. The employer offered claimant a *new* employment relationship, under significantly different terms, to begin on April 7, 2020. Therefore, the employer discharged claimant on April 7, 2020 and claimant did not voluntarily quit.

**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).

The record shows that the employer discharged claimant on April 7, 2020 because of a significant loss of revenue that resulted from an executive order relating to the COVID-19 pandemic. Because the decision to discharge claimant was the result of the employer’s financial difficulties and not related to claimant’s conduct, the record does not show that claimant was discharged for a willful or wantonly negligent disregard of the employer’s standards of behavior. Therefore, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 21-UI-167262 is set aside, as outlined above.

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

**DATE of Service:** July 1, 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 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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