

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0582**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 26, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, which did not disqualify claimant from receiving unemployment insurance benefits (decision # 173232). The employer filed a timely request for hearing. On July 13, 2021, ALJ L. Lee conducted a hearing, and on July 19, 2021 issued Order No. 21-UI-170545, affirming decision # 173232. On July 21, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** 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 him 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) C & K Market Inc., a food store chain, employed claimant from April 1, 2020 to February 8, 2021, most recently as a part-time stocker at its Oakridge, Oregon store.

(2) The employer expected their employees to report for work as scheduled or notify the employer if they would be absent or late. Claimant was aware of the employer's expectations.

(3) Claimant began his employment as a deli worker at the employer's store. While working in the deli, claimant filed complaints against the employer with the Oregon Bureau of Labor and Industries (BOLI) and Oregon Safety and Health Administration (OSHA) regarding what he considered safety and health violations. Experienced workers within the deli also had complained to the employer that claimant was causing problems by telling them how to do their jobs. Shortly after the workers' complaints, the employer transferred claimant to a cashier position within the same store. Although claimant worked more hours as a cashier, claimant perceived his transfer as retaliation or harassment by management based on his BOLI and OSHA complaints.

(4) Shortly after claimant began work as a cashier, the employer offered to transfer him to a freight worker position within the store, which claimant accepted. Claimant perceived the employer's offer as a request to transfer, which he considered continued retaliation or harassment by management.

(5) Shortly after claimant began work as a freight worker, he submitted a written request to have Sundays through Tuesdays off because he was working on a project outside the store that he anticipated would take a month to complete. The employer granted claimant's request, but because he had not specified an end date, after a month's time, the employer continued to schedule him to be off on those three consecutive days. Claimant perceived his continued reduction in hours as retaliation or harassment by management.

(6) Beginning around October 2020, claimant's perception of continued harassment at work caused him to experience increasing symptoms of anxiety at both work and away from work. The symptoms included an increased heart rate, headache, blurred vision, nausea and shaking. Claimant verbally asked the store manager to file a worker's compensation claim on his behalf several times without success.

(7) On January 22, 2021, claimant called in sick and asked the store manager by text message to file a worker's compensation claim for work-related stress on his behalf. Later that day, the store manager filed the claim without claimant's signature.

(8) On January 27, 2021, claimant reported for work as scheduled. Shortly after he clocked in, the store manager asked claimant why he was at work. The store manager told claimant that because he had filed a workers' compensation claim, he was on a leave of absence until he received a diagnosis and necessary accommodations had been determined. Claimant clocked out from work and returned home.

(9) The employer had scheduled claimant to work on January 29, 2021, February 3, 2021, and February 5, 2021. On January 29, 2021, a regular payday, claimant went to the employer's store to pick up his paycheck, but did not report for work because he believed he was on a leave of absence. While there, he met with the store manager, who asked claimant to sign his worker's compensation paperwork and then showed claimant on his computer that going forward all of the days on claimant's work calendar had been changed to show that claimant was on "worker's compensation leave." Transcript at 20, 41-42.

(10) On February 2, 2021, claimant met with his medical provider and discussed his work-related stress and worker's compensation claim. The provider was not able to render a diagnosis at that time without more information or testing. Claimant was scheduled to attend another appointment for testing on February 10, 2021.

(11) On February 3, 2021 and February 5, 2021, claimant did not report for work as previously scheduled or notify the employer that he would be absent because he believed he remained on a leave of absence.

(12) On February 8, 2021, claimant texted the store manager and requested that he mail claimant's next regular paycheck, scheduled to be issued on February 12, 2021, to his residence. On February 8, 2021, the employer prepared claimant's final paycheck. The employer had concluded that claimant failed to report for work without notice for three consecutively scheduled shifts on January 29, 2021, February 3, 2021, and February 5, 2021, and had quit through job abandonment.

(13) On February 9, 2021, the store manager texted claimant and told him that he could pick up his “final pay” at the store that day. Transcript at 21. After claimant responded by asking the store manager if he had been “fired,” the manager responded that he had “resigned,” which claimant denied. Transcript at 22–23.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, but not for misconduct.

As a preliminary matter, the parties offered conflicting testimony about what occurred on January 27, 2021 and January 29, 2021. Claimant testified that on January 27, 2021, he reported for work as scheduled but that shortly after he clocked in, the store manager asked claimant why he was at work; and that the store manager then told him that because he had filed a workers' compensation claim, he was on a leave of absence until he received a diagnosis and necessary accommodations had been determined. Transcript at 17. Claimant also testified that on January 29, 2021, he went to the store to pick up his paycheck and met with the store manager, who asked claimant to sign the worker's compensation paperwork and then showed claimant on his computer that he had changed claimant's work calendar to show that claimant was on “worker's compensation leave” indefinitely. Transcript at 20, 41–42. The employer's human resources director, who was not present at the work site on January 27, 2021 or January 29, 2021, and did not speak to claimant about what transpired at the store on those days, presented hearsay evidence that claimant never spoke to the store manager on either day. Transcript at 75–76, 81–82. Absent a basis for concluding that claimant was not a credible witness, his firsthand testimony under oath outweighs the human resources director's hearsay evidence, and EAB therefore found facts in accordance with claimant's testimony regarding what occurred on January 27, 2021 and January 29, 2021.

**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).

At hearing, the parties disagreed regarding the nature of the work separation. The employer's witness asserted that claimant voluntarily resigned by not reporting for work for three consecutive days without notice, thereby abandoning his job, but admitted that claimant never told her that he quit. Transcript at 4, 5. The employer's witness also asserted that the employer prepared claimant's final paycheck on February 8, 2021. Transcript at 8. When claimant exchanged text messages with the store manager on February 9, 2021, claimant denied that he had ever quit and asserted at hearing that he was “fired” while on leave. Transcript at 23, 47. By preparing claimant's final paycheck on February 8, 2021, the employer indicated that they were no longer willing to allow claimant to continue his employment. By denying that he had quit work to the store manager on February 9, 2021, claimant indicated that he was willing to continue to work for the employer. Accordingly, under OAR 471-030-0038(2)(b), the work separation was a discharge that occurred on February 8, 2021.

**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).

The employer discharged claimant for not reporting for work for three consecutive work shifts without notifying the employer that he would be absent. The employer reasonably expected claimant to report for work as scheduled or notify the employer if he would be absent or late, and claimant was aware of those expectations. However, the employer failed to establish that claimant violated those expectations on January 29, 2021, February 3, 2021, and February 5, 2021 willfully or with wanton negligence.

Claimant did not contest that he did not report for work on the three dates in question. However, the record shows that claimant believed that he was on an indefinite worker’s compensation leave of absence on and after January 27, 2021 based on the store manager’s statements to him on January 27, 2021 and January 29, 2021. On those dates, the store manager led claimant to believe that claimant was on an indefinite leave of absence at least until he received a formal medical diagnosis and necessary work accommodations had been determined. Because those issues had not yet been resolved, claimant reasonably concluded that the employer did not expect him to report for work on those dates, which the record shows is why he failed to do so or notify the employer that he would be absent. Because the record fails to show claimant knew or should have known the employer expected him to work on the three dates in question, the employer failed to meet their burden to establish misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Order No. 21-UI-170545 is affirmed.

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

**DATE of Service:** August 25, 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.

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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 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 الإستئناف 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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