

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0609**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 23, 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 unemployment insurance benefits effective May 9, 2021 (decision # 81347). Claimant filed a timely request for hearing. On July 19, 2021, ALJ Ramey conducted a hearing, and on July 21, 2021 issued Order No. 21-UI-170780, affirming decision # 81347. On July 27, 2021, claimant 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 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) Safe Transportation Inc. employed claimant as a driver from January 22, 2019 until May 10, 2021. Claimant's work entailed transporting children with special needs back and forth from school.

(2) On May 10, 2021, claimant learned when she arrived at work that the employer's car she was assigned to drive that morning had been equipped with a camera and GPS device. The fact that the employer required claimant to drive a car with a camera upset claimant. Claimant then left the workplace to pick up a child and used the car's speedometer to adjust her speed as she drove. This caused claimant to drive unusually slowly because, unbeknownst to claimant, the car's speedometer was programmed to show the car's speed in kilometers per hour. Claimant's slow speed caused some other motorists to honk at her as she drove, which also made claimant upset.

(3) Claimant found the events of the morning to be too upsetting and pulled the car over. Claimant called the employer's owner and informed him that she was too upset to drive and it would not be safe for her to transport the child. Claimant told the owner that she knew the owner "pretty much did not like [her]" and wanted claimant to quit. Transcript at 7. Claimant stated that she would eventually look for a

different job but would not quit “no matter what” because she needed the job. Transcript at 12. The owner responded that he would send someone to pick up claimant and the car. Claimant told the owner that he need only send someone to pick up the car. The call then ended, and the owner directed some drivers to pick up the car and complete the job of transporting the child.

(4) Thereafter, claimant called her daughter and explained what had upset her. While talking to her daughter, claimant realized that the speedometer was set to kilometers per hour, and claimant reprogrammed the speedometer to show miles per hour. Resolving the speedometer problem and speaking with her daughter calmed claimant down and caused her to reconsider what she had said about being too upset to transport the child. Thereafter, claimant called the employer and reached the dispatch manager. Claimant informed the dispatch manager that she would complete transporting the child as originally planned. Claimant then picked up the child, dropped the child off at school, and returned to the workplace. After being dispatched, the additional drivers the owner had sent discovered that claimant had transported the child and also returned to the workplace.

(5) After claimant returned to the workplace, she asked what time she was expected to pick up the child from school to take him home and the owner instructed claimant to join him for a meeting. When claimant did so, the owner told her that he was accepting her resignation that she had offered during their telephone conversation that morning. Claimant responded that she had not quit when she called him earlier that day. The owner repeated that claimant’s resignation was accepted. Thereafter, the employer had someone escort claimant off the employer’s property.

(6) When claimant got home she sent the owner an email stating again that she did not quit and requesting to be allowed to work as soon as possible. The owner did not respond and claimant did not work for the employer again.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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).

The order under review concluded that the work separation was a voluntary quit and that claimant quit work without good cause. Order No. 21-UI-170780 at 2-3. The record does not support these conclusions.

At hearing, the parties differed regarding whether claimant stated that she was quitting during the May 10, 2021 telephone conversation. Claimant testified that she told the owner that she was too upset to transport the child, knew that the owner wanted her to quit, and would eventually look for a different job but “will not quit . . . no matter what” because she needed the job. Transcript at 7, 12, 25. In contrast, the employer’s owner testified that claimant stated that the employer had “no trust or loyalty,” and that she was quitting. Transcript at 27-28, 54. If claimant said she was quitting during the telephone conversation, a factual basis would exist ample to support that the work separation was a voluntary leaving, and the separation would remain a voluntary leaving even though claimant later calmed down,

drove the child to school, and returned to the workplace where the owner informed her that her resignation was accepted. *See Counts v. Employment Dept.*, 159 Or App 22, 976 P.2d 96 (1999) (where claimant gives notice of resignation then attempts to rescind and the employer rejects the rescission, work separation remains a voluntary leaving).

However, it is more likely than not that claimant did not say that she was quitting during the telephone conversation with the owner and therefore did not resign on May 10, 2021. First, claimant's behavior on that date was more consistent with someone who had not quit work than with someone who had. It is undisputed that after the call with the owner ended, claimant proceeded to transport the child to school, return to the employer's workplace, and, once there, ask when she was expected to pick the child up from school. Further, during the in-person meeting in which the owner informed her that her resignation was accepted, claimant vigorously denied ever saying that she quit, a fact acknowledged by the owner at hearing. Transcript at 29. Claimant's position that she had not quit remained consistent after she was escorted off the employer's property as well, because the record shows that after she got home on May 10, 2021, she sent the employer an email again stating that she had not quit and requesting to be allowed to work as soon as possible.

Further, claimant presented at hearing as a slightly more believable witness than the owner. During questioning, claimant's testimony that she had not quit was clear and consistent and she displayed an ability to recall fine details about both the May 10, 2021 telephone conversation and the in-person meeting with the owner later that day. By contrast, the owner's testimony as to whether claimant said she quit was somewhat less confident. On a couple of occasions, while testifying about the May 10, 2021 telephone conversation, the owner asked claimant what she had said, thus appearing to defer to her recollection to some degree. Transcript at 28, 54. Also, although the owner testified several times that claimant told him she quit during their telephone conversation, at one point he stated that he would not have dispatched the other drivers to complete the job of transporting the child "unless somebody has quit. . . . I'm not in the habit of just sending out a mechanic and another driver when somebody's going to do a job." Transcript at 31. This implies that the owner may have assumed claimant was quitting based on her statements that she was too upset to transport the child and needed someone to pick up the employer's car, rather than based on having actually heard claimant say that she was quitting.

At bottom, the record in this case contains evidence that is almost evenly balanced as to whether claimant quit on May 10, 2021. For the reasons discussed above, however, the weight of the evidence supports that claimant did not state that she was quitting during the telephone conversation on May 10, 2021, and therefore did not resign at that time. Thus, at the time claimant met in-person with the owner and was informed that her resignation was accepted, the record shows she was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer. Accordingly, the work separation was a discharge that occurred on May 10, 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 record indicates that the employer discharged claimant because the owner believed she had resigned and was accepting her resignation, when in fact, more likely than not, claimant had not resigned. The record therefore fails to show that the employer discharged claimant because she had engaged in conduct the employer considered a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her or a disregard of the employer’s interests. Accordingly, the employer did not discharge claimant for misconduct under ORS 657.176(2)(a).

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Order No. 21-UI-170780 is set aside, as outlined above.

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

**DATE of Service:** August 27, 2021

**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.

**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 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**

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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.

**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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