

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-0907**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective May 17, 2020 (decision # 64254). Claimant filed a timely request for hearing. On July 13, 2021, ALJ Micheletti conducted a hearing, and on July 21, 2021 issued Order No. 21-UI-170771, reversing decision # 64254 by concluding that claimant quit working with good cause and was not disqualified from receiving benefits. On July 23, 2021, the employer filed an application for review of Order No. 21-UI-170771 with the Employment Appeals Board (EAB). On August 26, 2021, EAB issued EAB Decision 2021-EAB-0611, reversing Order No. 21-UI-170771 and remanding the case to the Office of Administrative Hearings (OAH) for further proceedings necessary to complete the record. On September 27, 2021, ALJ Micheletti conducted a hearing, and on October 20, 2021 issued Order No. 21-UI-177647, again reversing decision # 64254 by concluding that claimant quit work with good cause and was not disqualified from receiving benefits based on the work separation. On October 29, 2021, the employer filed an application for review of Order No. 21-UI-177647 with the EAB.

**FINDINGS OF FACT:** (1) McClure & Sons Inc. employed claimant as a laborer and “hole watch” from April 20, 2020 to May 19, 2020. Transcript at 22. The employer built bridges, dams, and wastewater and freshwater treatment plants.

(2) Prior to May 14, 2020, claimant worked for the employer at their Durham site. During one shift, claimant became concerned with the erratic behavior of a coworker whom claimant believed was under the influence of drugs. Claimant refused to work with the coworker, left the jobsite without notice, and later emailed his concerns to the employer’s president. The employer’s president apologized to claimant and moved him to the Vancouver worksite because the president believed that “if we wronged [claimant] we need to make it right.” Exhibit 101 at 23.

(3) On May 14, 2020, the employer moved claimant to their Forest Grove worksite to work as a “hole watch.” As a hole watch, claimant’s job was to monitor coworkers performing repairs at the base of a clarifying tank 30 feet below his location for any signs of distress or injury, particularly those that might

result from succumbing to sewage-related gases. In addition to its 30 foot depth, the tank was approximately 60 to 80 feet across with a motor powered pump in the middle of the tank and a catwalk running from one end of the tank to the pump. A section of the catwalk floor grating had been removed and a tripod was installed over the hole created by this section removal to lower tools to the workers in the clarifying tank 30 feet below. Claimant's job responsibilities included accessing the pump in the center of the catwalk to keep water pumped out of the tank so workers could perform maintenance and repairs. Because claimant had to maneuver around the tripod and the catwalk hole to access the pump, claimant requested that the employer's site superintendent provide claimant a harness for his safety because he feared he "was gonna die, going over" the hole. Transcript at 6. The site superintendent told claimant that because the worksite had just been set up, there were no harnesses currently available, but when they became available claimant would be provided one. Although the employer was willing to provide claimant a harness when one became available, the employer did not believe that a harness was necessary when using the catwalk.

(4) On May 19, 2020, claimant's third day at the Forest Grove site, the employer had still not provided claimant with a safety harness. Claimant did not raise this issue during the morning safety meeting. The site superintendent discovered a bucket of tools on the catwalk that had been left out in the rain. The site superintendent "yelled" at claimant because the tools were expensive and they needed to be kept out of the rain. Transcript at 4. Claimant decided that he would no longer cross the catwalk hole without a harness, and the site superintendent told claimant that if he was "gonna be that guy [he] can just walk to [his] truck and go home." Transcript at 4. Claimant left the job site without notice. The employer sent out an investigation team to locate claimant because they were unaware he had left the site and were concerned that he may have been injured. When the site superintendent discovered that claimant's truck was gone, he believed claimant had abandoned the job despite the availability of continuing work. Claimant assumed that when the site supervisor told claimant to go home it meant that claimant had been discharged. Claimant never returned to work for the employer.

(5) On or about May 20, 2020, claimant filed a complaint regarding the safety of the employer's worksite with the Oregon Occupational Safety and Health Division (Oregon OSHA). Oregon OSHA inspected the Forest Grove site and cited the employer because the catwalk hole "was not guarded by a cover or equivalent protective systems," which exposed employees to a potential fall. Exhibit 1 at 5.

**CONCLUSIONS AND REASONS:** Claimant voluntarily quit working for the employer without good cause.

**Nature of the work separation.** The first issue in this case is the 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 preponderance of the evidence shows that claimant's work separation was a voluntary leaving because he could have continued working for the employer for an additional period of time but he chose not to do so. As an initial matter, the record fails to show that the site superintendent ever told claimant he had been discharged and it is not clear from the record that the site superintendent, as opposed to the employer's president, had this authority, nor that claimant believed the site superintendent had this

authority. Furthermore, although the record shows that on May 19, 2020 the site superintendent told claimant that he could “go home,” the preponderance of the evidence suggests that the site superintendent did not actually expect that claimant would leave the worksite in response to this statement, or that he intended to convey by this language that claimant was being discharged. This conclusion is supported by the site superintendent’s actions after discovering claimant missing from the jobsite when, concerned for claimant’s safety, he formed an investigation team to try to locate claimant. Because the preponderance of the evidence shows that claimant could have continued working for the employer but for his decision to leave the work site, and that claimant only assumed that he had been discharged on May 19, 2020 and did not subsequently return to work, claimant’s work separation was a voluntary leaving.

**Voluntary quit.** 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) (September 22, 2020). “[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 order under review concluded that claimant quit voluntarily quit work with good cause. The order under review reasoned that claimant faced a grave situation “when claimant’s supervisor told claimant to cross the catwalk without fall protection and threatened to send [claimant] home if he did not cross the catwalk.” Order No. 21-UI-177647 at 3-4. The order under review further reasoned that the site supervisor’s threat, coupled with Oregon OSHA’s conclusion that “fall protection was required,” and the fact that “[c]laimant had been confronted with working above the clarifying tank without fall protection for three days” further supported the conclusion that claimant faced a grave situation. Order No. 21-UI-177647 at 3-4. Finally, the order under review concluded that claimant had no reasonable alternatives to quitting given that he had requested that the site supervisor provide him with safety equipment and that although the site supervisor said he would do so, the site supervisor never provided a harness to claimant. Order No. 21-UI-177643 at 4. However, the record does not support a finding that claimant quit with good cause.

The record does not support the order’s conclusion that the site supervisor told claimant to cross the catwalk *immediately* prior to claimant’s decision to leave the worksite. Rather, the preponderance of the evidence, including claimant’s testimony and his written statement, shows that the site supervisor did not tell claimant to cross the catwalk at that moment, but conveyed his expectation that claimant be willing to cross the catwalk going forward, and that claimant was no longer willing to meet this expectation, for fear of injury, and instead left the worksite. Transcript at 4. Exhibit 101 at 14. Nevertheless, the record shows that claimant’s job duties during his three days at the Forest Grove site included, at times, crossing over the catwalk hole to get to the center pump. Although the parties disagreed as to the safety risk posed to claimant by the catwalk hole and the need for any safety harness, the record supports the conclusion that, more likely than not, claimant faced a risk of injury from falling and, hence, a grave situation, during those times he was required to crossover the catwalk hole to access the pump. The record includes an Oregon OSHA citation resulting from claimant’s complaint that

specifically identified the catwalk hole as exposing workers to the potential hazard of a 23.8 foot fall to the tank below if “protective systems” were not implemented to extinguish the risk. Exhibit 1 at 5. As such, the record supports the conclusion that to the extent claimant’s job duties required him to periodically cross over the catwalk hole, claimant faced a grave situation.

However, even though claimant may have faced a grave situation, the record shows that claimant failed to pursue reasonable alternatives that were available to him prior to his decision to quit. Claimant requested a safety harness on May 14, 2020 during his first day at the Forest Grove work site, and the employer told claimant that they would provide him a harness when one was available. However, instead of exercising the reasonable alternative of refusing to cross the catwalk hole until he received the harness equipment, claimant continued to cross the catwalk hole during his three days at the Forest Grove worksite, and did not reiterate his safety concerns during the employer’s morning safety meeting on May 19, 2020. Furthermore, given that the employer’s president took action to “make it right” with claimant in response to Claimant’s prior, unrelated complaint by moving claimant to a different work site, the record demonstrates that claimant had the reasonable alternative to call or email the employer’s president to seek assistance with obtaining either safety equipment to cross the catwalk hole, a new role at the Forest Grove work site, or a reassignment to a different worksite. Because the preponderance of the evidence shows that claimant had reasonable alternatives to quitting work when he did, claimant failed to meet his burden to show that he quit work with good cause. Claimant therefore is disqualified from receiving unemployment insurance benefits effective May 17, 2020 based on his work separation.

**DECISION:** Order No. 21-UI-177647 is set aside, as outlined above.

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

**DATE of Service: December 3, 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 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 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 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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