

**EMPLOYMENT APPEALS BOARD DECISION**  
**2021-EAB-1077**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 1, 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 31, 2020 (decision # 83341). Claimant filed a timely request for hearing. On December 3, 2021, ALJ McGorin conducted a hearing, and on December 8, 2021 issued Order No. 21-UI-181440, reversing decision # 83341 by concluding that the employer discharged claimant but not for misconduct and was not disqualified from receiving benefits based on the work separation. On December 14, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Jacent Strategic Merchandising LLC employed claimant, most recently as a utility merchandiser, from July 23, 2019 until November 2, 2020.

(2) Claimant worked on an on-call basis. The nature of claimant's job was such that claimant could go long periods of time without the employer offering her any work shifts.

(3) In July 2020, the employer did not offer claimant any shifts to work. Claimant texted her area manager from time to time during the month requesting shifts. The area manager responded that claimant should call in on specific dates to check if shifts were available. Claimant was unable to call in on two of the occasions the area manager told her to do so because her cell phone service was turned off for two weeks in July 2020. Claimant otherwise called in when instructed to do so in July 2020, and each time she did the area manager informed her that no shifts were available.

(4) In August 2020, the employer did not offer claimant any work shifts. Claimant texted her area manager from time to time during the month requesting shifts. The area manager responded that claimant should call in on specific dates to check if shifts were available. Claimant called in when instructed to do so in August 2020, and each time she did the area manager informed her that no shifts were available.

(5) Also in August 2020, claimant linked a new email account to her employer-provided tablet and began using the email account to exchange emails with the area manager.

(6) In September 2020, the employer did not offer claimant any work shifts. Claimant texted her area manager from time to time during the month requesting shifts. The area manager responded that claimant should call in on specific dates to check if shifts were available. On one occasion in September 2020, claimant's cell phone service was turned off and she did not call in when instructed to do so. Thereafter, on September 21, 2020, claimant again texted the area manager requesting shifts. The area manager responded that claimant "needed to reapply." Transcript at 18. Based on the area manager's word choice, claimant was concerned the employer may have terminated her employment. However, the area manager lacked the authority to do so, and the employer did not terminate claimant's employment at that time. Claimant otherwise called in when instructed to do so in September 2020, and was not offered any shifts each time she did.

(7) In mid-October 2020, claimant's area manager and head manager informed the employer's Human Resources (HR) generalist that they had tried to contact claimant to offer her some shifts but claimant did not respond. Claimant did not receive any communications from the area manager or head manager in October 2020. Claimant wanted to continue working for the employer and would have worked any shifts offered by the area manager or head manager in October 2020 had she received the communications.

(8) On October 27, 2020, the HR generalist sent an email to claimant advising that if claimant did not respond by October 30, 2020, the employer would assume claimant had quit working for the employer and claimant's employment would be terminated. Claimant was not aware of the HR generalist's email because the HR generalist sent the email to claimant's old email address. On November 2, 2020, after receiving no response from claimant, the employer terminated claimant's employment.

(9) Later in November 2020, claimant received an email from the head manager via the email account claimant had linked to her tablet in August 2020. In the email, the head manager informed claimant of the employer's decision to terminate claimant's employment.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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 preponderance of the evidence supports that the employer discharged claimant on November 2, 2020. The record shows that, besides a few occasions when her cell phone service was turned off, claimant was persistent about contacting her area manager for shifts in July, August, and September 2020 but no shifts were available. The record further shows that claimant wished to continue working for the employer and would have accepted any shifts offered in October 2020 had she received the communications of the area manager and head manager. Thus, at the time of the work separation,

claimant was, more likely than not, willing to continue to work for the employer for an additional period of time. The record shows that claimant was not allowed to do so by the employer, however, because the employer terminated claimant's employment. This occurred on November 2, 2020, after claimant failed to respond to the HR generalist's email, believing the claimant had voluntarily quit, and not when the area manager, who lacked authority to terminate employment, texted that claimant "needed to reapply." Transcript at 18. Nevertheless, because the record shows that claimant was willing to continue to work at that time and the employer's decision to terminate claimant's employment prevented claimant from doing so, the work separation was a discharge that occurred on November 2, 2020.

**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 suggests that the employer discharged claimant because the employer believed claimant had voluntarily quit and 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. To any extent the employer considered claimant's failure to respond to the HR generalist's email to be misconduct, the record does not support that claimant's failure to respond to the email was a willful or wantonly negligent violation of a known expectation. This is because the record does not show that claimant knew or should have known about the expectation to respond to the email given that she was unaware of the email because the HR generalist sent the email to claimant's old email address.

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

**DECISION:** Order No. 21-UI-181440 is affirmed.

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

**DATE of Service:** January 20, 2022

**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**

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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