

**EMPLOYMENT APPEALS BOARD DECISION**  
**2022-EAB-0059**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 12, 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 October 17, 2021 (decision # 111327). Claimant filed a timely request for hearing. On December 29, 2021, ALJ Wardlow conducted a hearing, and issued Order No. 21-UI-182959, reversing decision # 111327 by concluding that claimant voluntarily quit work with good cause and was not disqualified from receiving benefits based on the work separation. On January 3, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Northwest Regional Education employed claimant as an occupational therapist from January 14, 2020 to October 18, 2021.

(2) In 2017 or 2018, claimant's medical provider diagnosed her with autism. Due to her autism, claimant experienced symptoms, which included tactile sensitivity and impaired ability with social interactions. Claimant's tactile sensitivity made it difficult for her to "hav[e] something over [her] face," such as a mask, and when she did have something over her face, "[i]t creat[ed] anxiety." Transcript at 18.

(3) In March 2021, claimant and the employer prepared an "accommodation agreement" related to claimant's autism. Transcript at 8. Claimant understood that the agreement would include an accommodation that allowed claimant the option "to engage in writing" during public meetings, instead of "verbal exchanges," because claimant's autism had a tendency to cause claimant to become "stressed" in such settings which would lead to her "verbal communications simply shut[ting] down." Transcript at 8, 16. Claimant later discovered that the writing accommodation had been left out of the agreement and in August 2021 she emailed both the employer's human resources office, and the employer's specific individual who handled disability claims (DC employee) to correct the omission. Claimant received no response to her emails.

(4) At some point between August 2021 and October 4, 2021, claimant met with her supervisor for her annual review. During the review, claimant's supervisor told claimant that the employer preferred that claimant communicate verbally, instead of in written form, because her written communications "get to[o] confusing for us." Transcript at 15. The employer had been "frustrated with [claimant's] copious communication" when she communicated in writing. Transcript at 28. Claimant was "frustrate[ed]" by the employer's comment, felt "pressured . . . to communicate more verbally, in meetings," and expressed her frustration in "a pretty lengthy statement . . . on [her] annual review." Transcript at 9, 15. Despite claimant's attempts to address her request for a writing accommodation through her emails to the employer, and her lengthy statement on her annual review, her efforts "ended" without a correction to the accommodation agreement being made. Transcript at 15.

(5) On October 4, 2021, claimant emailed the DC employee to request that she be allowed to wear an "air purifier respirator" as an accommodation to the employer's COVID-19 masking requirement. Claimant's request included a note from her doctor recommending that claimant not wear a mask. The employer responded by providing claimant a vaccine exemption form to complete. Because she believed her request had nothing to do with vaccines, and that she had otherwise complied with the employer's vaccine requirement, claimant responded that her request had nothing to do with vaccines but was only a disability accommodation request. Claimant received no further response to her disability accommodation request to wear the respirator in lieu of a mask. Claimant viewed the employer's lack of a response to her request as the employer's "normal behavior." Transcript at 7.

(6) On October 8, 2021, claimant notified the employer of her intent to resign her position effective October 29, 2021. Although claimant provided multiple reasons for her decision to resign, the employer's failure to respond to her respirator accommodation request was the "last straw." Transcript at 8. Had the employer allowed her to wear the respirator, she would not have resigned when she did.

(7) On October 11, 2021, the employer emailed claimant to schedule a meeting for October 12, 2021 to discuss claimant's multiple concerns and her resignation. Claimant did not see the employer's email until October 14, 2021 because she was scheduled to be off work on October 11, 2021, and she was out sick on October 12 and October 13, 2021.

(8) On October 13, 2021, the employer emailed claimant and accepted her resignation, but informed her that she would not be allowed to work beyond October 18, 2021 because she had failed to provide "an accepted vaccination card." Transcript at 11. The employer's email also noted the October 12, 2021 meeting they had scheduled, which claimant "did not attend." Transcript at 25. Claimant received this email on October 14, 2021, when she returned to work. The employer had not previously made claimant aware of a vaccine card issue.

(9) On October 18, 2021, claimant worked her last day for the employer.

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

**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 employer discharged claimant on October 18, 2021, not for misconduct. The employer discharged claimant on October 18, 2021 for failure to provide an “accepted vaccine card” and because she had not participated in an October 12, 2021 meeting where, apparently, her lack of a vaccine card was one of the issues to be discussed. However, the record shows that claimant believed that at all times she had complied with the employer’s vaccine requirement through her prior submission to the employer of paperwork documenting her participation in a “COVID-19 vaccine [research] trial.” Transcript at 11-12. Furthermore, the preponderance of the evidence shows that claimant was not aware of the October 12, 2021 meeting due to employer-approved absences from work, and that she did not become aware until October 14, 2021; the same day the employer accepted her resignation but notified her of her discharge effective October 18, 2021. Likewise, claimant only learned about the “vaccine card” issue for the first time on October 14, 2021. Because the record shows that claimant was not indifferent to the employer’s vaccine requirement, but thought she had complied with it, the employer has failed to meet their burden to show that claimant should have known that she had violated a reasonable employer expectation related to the COVID-19 vaccine. This conclusion is further supported by the employer’s decision to discharge claimant due, in part, to her absence from the October 12, 2021 scheduled meeting. The record shows that claimant could not have known about this meeting due to her approved absence from work and the record suggests that the employer elected to discharge claimant rather than attempt to reschedule the meeting. Under these circumstances, the record shows that claimant was discharged on October 18, 2021, not for misconduct.

**ORS 657.176(8).** While the record shows that claimant was not discharged for misconduct, it is necessary to determine whether ORS 657.176(8) applies to this case. ORS 657.176(8) states, “For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.”

Here, claimant notified the employer that she would quit work on October 29, 2021. The employer discharged claimant, but not for misconduct, on October 18, 2021. Therefore, applicability of ORS 657.176(8) turns on whether claimant’s planned quit on October 29, 2021 was without good cause. “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). “[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). Claimant had autism, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

The voluntary leaving claimant planned on October 29, 2021 was for reasons that constitute good cause. The record shows that beginning in March 2021 claimant made efforts to seek workplace accommodations related to her autism, which included a writing accommodation request, and later a mask accommodation request, and that both of her accommodation requests were directly tied to her autism symptoms. Despite initial indications that they would approve claimant’s writing accommodation request via an accommodation agreement, the employer’s DC employee later failed to respond to claimant’s communications regarding the request when claimant discovered that the accommodation had not been included in the accommodation agreement. Despite the fact that claimant’s autism impaired her social interaction skills, and notwithstanding her efforts to achieve the writing accommodation, the record shows that rather than considering her accommodation request the employer instead expressed frustration toward claimant due to the “copious” nature of her written communications.

Similarly, the record shows that the employer repeated their “normal behavior” of not responding to claimant’s accommodation requests, when they first incorrectly responded to her mask accommodation request with a vaccine exception form, then failed to respond to her subsequent email attempting to clarify that she was only seeking a mask accommodation. The record shows that claimant’s respective accommodation requests were made in an attempt to alleviate the “stress” and “anxiety” caused by the symptoms she suffered due to her autism and that at least one of the requests – the mask accommodation – was supported by a doctor’s written recommendation. However, despite these attempts, the preponderance of the evidence shows that the employer repeatedly failed to consider her accommodation requests, let alone respond to claimant’s attempted communications related to them. Under such circumstances, where the employer did not respond to, or consider, her accommodation requests, the record shows that claimant faced a grave situation. Furthermore, the employer’s lack of responsiveness to claimant’s accommodation requests, coupled with their overt expression of frustration at the “copious” nature of her written communications (despite her unanswered request for a writing accommodation), supports the conclusion that claimant had no reasonable alternative but to quit because further efforts to seek alternatives from the employer would have likely been futile. Under these circumstances, no reasonable and prudent person who suffered from autism would have continued to work for the employer for an additional period of time.

Thus, because the employer discharged claimant, but not for misconduct, within 15 days prior to the date she planned to voluntarily leave work *with good cause*, ORS 657.176(8) does not apply to this case. Instead, this case is governed by ORS 657.176(2)(a) and, as discussed above, the record does not show that claimant’s discharge was for misconduct under that provision. As such, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Order No. 21-UI-182959 is affirmed.

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

**DATE of Service: February 10, 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](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.

## 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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