

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0215**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 6, 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 November 17, 2019 (decision # 140904). On August 26, 2021, decision # 140904 became final without claimant having filed a request for hearing. On May 16, 2022, claimant filed a late request for hearing. On October 13, 2022, ALJ Lucas conducted a hearing, and on October 18, 2022, issued Order No. 22-UI-205344, dismissing claimant's late request for hearing as late without good cause and leaving decision # 140904 undisturbed. On October 31, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

On December 27, 2022, EAB issued decision 2022-EAB-1091, reversing Order No. 22-UI-205344 by allowing claimant's late request for hearing and remanding the matter for a hearing on the merits of decision # 140904. On January 24, 2023, ALJ Lucas conducted a hearing, and on January 25, 2023, issued Order No. 23-UI-213690, affirming decision # 140904. On February 13, 2023, claimant filed an application for review with EAB.

**WRITTEN ARGUMENT:** EAB considered claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Riverside Ag Works employed claimant as an agricultural worker on a weeding and thinning crew on November 19, 2019 and November 21, 2019.

(2) The employer typically hired employees for positions such as claimant's by having them apply directly with a crew "foreman" who had authority to hire and discharge employees for that crew. Transcript at 8. When a foreman departed from a crew, that crew sometimes disbanded entirely and

sought employment with other crews or employers, or, if another foreman was assigned by the employer to replace the departing foreman, members of the crew could reapply for their positions with the new foreman. The need for workers on a particular crew varied on a daily basis.

(3) On November 19, 2019, claimant applied for work on a crew with a foreman he knew from previous work experience and was hired. Claimant performed work for the day. At the end of the day, the foreman departed the crew. Claimant did not work the following day.

(4) On November 21, 2019, a new foreman was assigned to replace the foreman who had departed on November 19, 2019. Claimant was hired by this foreman and performed work for the day. At the end of the day, this foreman also departed the crew. Some members of the crew, other than claimant, remained employed under a different foreman until December 2, 2019.

(5) Claimant did not work for the employer after November 21, 2019. Claimant believed that the crew's third foreman only selected certain members of the crew, other than him, to continue on in their employment after that date.

**CONCLUSIONS AND REASONS:** Claimant was discharged, but not for misconduct.

**Nature of work separation.** If an 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). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The order under review concluded that claimant voluntarily quit working for the employer when he failed to secure re-employment with the new crew foreman or one of the employer's other crews after November 21, 2019. Order No. 23-UI-213690 at 2. The record does not support this conclusion.

The parties disputed the nature of the work separation. The employer's witness, who did not have first-hand knowledge of claimant's employment or the separation, testified that the employer's records showed that claimant worked on the crew on November 19, 2019 and November 21, 2019, and that the crew foreman that hired claimant on each day also departed from the crew at the end of that respective day. Transcript at 18-19. She also testified that she was unsure of how many other employees on the crew continued to work for that crew until it disbanded on December 2, 2019, but said that "most of them" stayed after the second foreman's departure. Transcript at 20. She also stated that the employer had continuing weeding and thinning work available to claimant after November 21, 2019. Transcript at 20. The employer therefore contended that claimant had voluntarily quit the employment. Transcript at 17.

In claimant's testimony, he described the customary hiring and discharge practices of the employer, over which the crew foremen had complete authority. Transcript at 21-22. The employer's witness agreed with claimant's testimony that when a foreman left a crew, the employer did not contact the employees in that crew to offer them continuing work, but instead expected the employees to reapply for their jobs

with the new foreman or with another crew's foreman. Transcript at 21. As both parties agreed that the crew foreman departed at the end of the day on November 21, 2019, more likely than not, claimant was not offered continuing work by the employer after that day, even though claimant may have been re-hired by another foreman had he reapplied. Claimant could not recall whether he applied for other work with the third foreman or with other crews. Transcript at 25. Therefore, as of November 21, 2019, the record demonstrates that claimant was willing to continue working on the crew, but the employer denied him the ability to do so when the second foreman departed, leaving claimant with only the option to reapply for his position with a different foreman. Accordingly, the separation was a discharge that occurred on November 21, 2019.

**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 does not show that claimant violated the employer's standards of behavior or acted with willful or wanton disregard of the employer's interest. Instead, it can be inferred from the record that claimant was discharged as a matter of routine when the second foreman left, after which claimant either failed to reapply for his position, or reapplied but was not hired by the succeeding foreman. In either event, the employer has not proven by a preponderance of evidence that claimant was discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits as a result of the work separation.

**DECISION:** Order No. 23-UI-213690 is set aside, as outlined above.

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

**DATE of Service:** April 3, 2023

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



# 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**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  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.