

**EMPLOYMENT APPEALS BOARD DECISION**  
**2023-EAB-0293**

*Affirmed*  
*Request to Reopen Allowed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective April 5, 2020 (decision # 131126). Claimant filed a timely request for hearing. On December 3, 2020, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for December 17, 2020 at 8:15 a.m. On December 17, 2020, ALJ Janzen conducted a hearing at which the employer failed to appear, and on December 18, 2020 issued Order No. 20-UI-157840, reversing decision # 131126 by concluding that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving benefits based on the work separation. On January 2, 2021, the employer filed a timely request to reopen the December 17, 2020 hearing.

On February 21, 2023, ALJ Janzen conducted a hearing, and on February 22, 2023 issued Order No. 23-UI-216830, allowing the employer's request to reopen, canceling Order No. 20-UI-157840, and reversing decision # 131126 by concluding that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving benefits based on the work separation. On March 8, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that the employer had good cause to reopen the December 17, 2020 hearing is **adopted**. The remainder of this decision addresses the work separation.

**WRITTEN ARGUMENT:** The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them 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 the employer's argument to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Bikini Hut LLC employed claimant as a “seamstress” from April 10, 2018 until May 20, 2020. Transcript at 19. Claimant typically worked part-time on Monday, Wednesday, and Friday of each week. Claimant worked on additional days, without pay, to prepare for a fashion show held by the employer on March 7, 2020.

(2) On March 16, 2020, the employer curtailed operations in response to Executive Order 20-12, which limited the ability to operate certain types of businesses during the COVID-19 pandemic. Claimant was placed on furlough until at least April 1, 2020, due to lack of work.

(3) On April 1, 2020, the employer extended the furlough for at least two additional weeks because they did not have work for claimant or money to pay her wages, but did not give claimant a specific date at which she could return to work.

(4) On Saturday, April 4, 2020, the employer called claimant to ask if she would help to make masks that day. Claimant declined because it was not one of her typical workdays and she did not think she would be paid for such work, likening it to the unpaid work she did in preparation for the fashion show. Claimant believed she remained on furlough and intended to return to her customary work when the employer allowed.

(5) On May 14, 2020, claimant began leaving messages for the employer inquiring if there were updates on when she could return to work.

(6) On May 20, 2020, the employer sent claimant an email stating that claimant would not be permitted to return to her position and that they would be outsourcing the sewing work claimant had previously performed. The email indicated that all of the employer’s employees remained on indefinite furlough at that time. Claimant did not return to work for the employer.

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

**Nature of the 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 record shows that claimant was laid off due to a lack of work on May 20, 2020 after having been placed on furlough on March 16, 2020. The record shows that both parties intended to continue the employment relationship during the furlough by considering claimant’s potential return to work after two weeks, then again after another two weeks, depending on whether work was available. When the employer called claimant on April 4, 2020, a day of the week which claimant did not typically work, to see if she would “come help out” making masks, claimant assumed it was unpaid work, based on her recent experience performing unpaid work for employer to assist in their fashion show. Transcript at 35-36. Claimant declined the offer because she believed the work was unpaid and continued to await a return to her customary paid work with the employer.

The employer contended in a May 20, 2020 email to claimant that they believed that claimant's refusal to assist in making masks on April 4, 2020 constituted claimant "not wanting to come back," thereby severing the employment relationship. Exhibit 5 at 5. However, the record does not demonstrate that the employer ever sought to clarify if that was claimant's intention. As April 4, 2020 was a Saturday, and therefore not a day claimant would normally have been scheduled to work, and the employer had represented just four days earlier that the employer did not have work for claimant or funds with which to pay her, claimant assumed that she could decline the employer's request to "help out" in a volunteer capacity on this occasion while she continued to await being recalled to her customary work. Under the circumstances, declining to participate in making masks on this single occasion did not manifest that claimant was refusing to return to her position. It can be inferred from the employer's failure to contact claimant thereafter or otherwise clarify her employment status that the employer continued to consider claimant to be on furlough. Claimant's calls to the employer, beginning May 14, 2020, to check the status of her potential return to work, demonstrated that claimant had not intended to sever the employment relationship on April 4, 2020. However, the employer's May 20, 2020 email response that they "had no employees at the moment" and that they intended to outsource claimant's sewing work to contractors or other businesses, possibly beginning "in late July," showed that the employer severed the employment relationship on that date since they no longer planned to recall her to work in the future. Exhibit 5 at 5. Accordingly, the work separation was a discharge that occurred May 20, 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). "[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 due to a lack of work caused by the COVID-19 pandemic and governmental orders intended to mitigate its impact. Despite the ongoing lack of work due to the pandemic, the employer contended that claimant's work separation was caused by her failure to report to work to make masks on April 4, 2020. However, as detailed above, the discharge occurred when the employer told claimant that she would not be recalled to work because her sewing work was to be outsourced. As such, the employer has not met their burden to show that they discharged claimant for misconduct. The record shows that the employer discharged claimant because their business was curtailed due to Executive Order 20-12, and in May 2020, they did not expect to have sufficient sewing work to allow claimant to ever return to her position, instead electing to outsource that work when business resumed in July 2020 or later. Claimant had no control over these circumstances, and therefore did not willfully or with wanton negligence violate the standards of behavior which an employer has the right to expect of an employee. Therefore, claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 23-UI-216830 is affirmed.

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

**DATE of Service:** April 18, 2023

**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.

**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.