

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0735**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 15, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits because of the work separation (decision # L0005111466). The employer filed a timely request for hearing. On September 23, 2024, ALJ Frank conducted a hearing, and on October 2, 2024, issued Order No. 24-UI-268094, affirming decision # L0005111466. On October 17, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Laundry Mill, LLC employed claimant as a laundry technician from January 21, 2020, through April 12, 2024. Claimant's work involved "operating heavy laundry machinery [and] pushing/pulling heavy bins with laundry in them." Exhibit 1 at 32.

(2) On October 18, 2023, claimant left work early due to foot pain and sought treatment at a hospital emergency department. Claimant was also experiencing pain in her right shoulder. On October 19, 2023, claimant provided the employer with a doctor's note excusing her from work until October 23, 2023. On October 24, 2023, claimant provided an additional doctor's note excusing her from work until November 6, 2023. On November 6, 2023, claimant provided an additional doctor's note excusing her from work until November 13, 2023. The employer excused claimant's absences during this period.

(3) On November 13, 2023, claimant again sought treatment for her foot in an emergency department due to a lack of insurance coverage for standard outpatient treatment of that condition. Claimant advised the employer that day that while she remained unable to work, the emergency department doctor was unable to continue providing notes excusing her from work due to the emergency nature of the treatment and had suggested to claimant that she seek a longer-term leave of absence from the employer. The employer then determined that claimant had exhausted her entitlement to protected leave and placed claimant on "On Call Status," meaning that she would not be scheduled to work any shifts on an indefinite basis. Exhibit 1 at 11. Claimant also continued to receive treatment for her shoulder pain.

(4) On November 17, 2023, claimant told the employer that a foot surgery had been scheduled for December 13, 2023. The employer did not schedule claimant for shifts during the intervening period. On December 15, 2023, claimant told the employer that she had not undergone surgery as planned for financial reasons. Claimant further advised that she could not return to work without surgical intervention unless the work could be performed while seated. The employer told claimant that her work could not be performed with that limitation but suggested that she apply to other jobs with the employer that were sedentary. Claimant was also precluded from performing work that required she raise her arm at or above shoulder level.

(5) From December 19, 2023, through December 27, 2023, the employer attempted to contact claimant by phone on several occasions to offer her shifts performing her usual work. Claimant's phone was not in service, and the employer was unable to contact her. From December 28, 2023, through April 8, 2024, the employer did not attempt to contact claimant.

(6) On April 9, 2024, the employer left a voicemail for claimant and sent her an email stating that they needed to discuss her ability to return to work by April 11, 2024, or they would consider claimant to have resigned. On April 11, 2024, the employer sent a second email with the same information. Claimant did not contact the employer by April 11, 2024.

(7) On April 12, 2024, the employer sent claimant a letter stating that she had separated from employment effective that day due to her failure to respond to their previous messages. Claimant did not work for the employer thereafter. Claimant remained unable to perform her usual work due to her shoulder and foot problems.

**CONCLUSIONS AND REASONS:** Claimant was discharged, 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 an 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 employer asserted that claimant had voluntarily resigned by having failed to respond to the employer's messages by the close of business on April 11, 2024. Transcript at 5. However, it is unclear from the record whether claimant received those messages or why she failed to respond. According to the employer's account of the last time both parties communicated, which was in December 2023, they each understood that claimant was physically incapable of performing her usual work and that the employer was only willing to offer claimant her usual work, unless she applied for and received a transfer to another job. Claimant denied that there was "no contact" with the employer "for the first four months of 2024," but could provide no specifics regarding any communications during this period. Transcript at 18-19. It is therefore reasonable to infer from claimant's having taken no action to sever the employment relationship that claimant desired to maintain the relationship and return to work when her medical condition allowed, or her work assignment was modified. The employer, however, moved to sever the employment relationship when claimant failed to respond to messages between April 9, 2024, and April 11, 2024, after nearly four months of what claimant likely construed as an indefinite leave of absence, during which claimant had not been scheduled for work and the employer had no record of

contact with claimant. Therefore, the employer did not allow claimant to continue to work for them after April 12, 2024, due to claimant's continued absence and failure to respond to messages. Accordingly, the work separation was a discharge that occurred on April 12, 2024.

**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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she continued to be absent from work due to physical limitations that prevented her from performing her usual job. To the extent that the employer also discharged claimant because she failed to timely respond to the April 9, 2024, and April 11, 2024, messages, they have not shown that this was a willful or wantonly negligent violation of a reasonable expectation. The record does not reveal why claimant failed to respond to the messages, or whether she had even received them. The record also does not show that the employer made claimant aware of any specific expectation about maintaining communication once they stopped scheduling her for shifts and she became unable to provide periodic doctor's notes for financial reasons. Therefore, the employer has not met their burden to show that claimant's failure to respond was willful or a conscious decision made with indifference to the consequences of her inaction.

Similarly, the employer has not met their burden to show that claimant's continued absence from work amounted to misconduct. The employer failed to rebut claimant's testimony that at the time of her discharge she remained restricted from standing, walking, or raising her right arm at or above shoulder level, which were requirements of her usual work for the employer. *See* Transcript at 19. While the employer's witness suggested that the employer had other jobs that could be performed with claimant's limitations, the record does not show that the employer scheduled or attempted to schedule claimant for any shifts of this type. Instead, claimant was encouraged to seek out and apply for such jobs, if any were vacant and she were found to be "qualified" for them, then "go through an interview process" to determine whether a transfer would be approved. Transcript at 16. However, as claimant had not been placed in such a job by the time of her discharge, she remained absent from work due to physical ailments that made the only work available to her impossible to perform. Accordingly, to the extent claimant was discharged for absenteeism, it was not for misconduct pursuant to OAR 471-030-0038(3)(b).

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

**DECISION:** Order No. 24-UI-268094 is affirmed.

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

**DATE of Service:** November 6, 2024

**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 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  
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