

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0405**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #155311). Claimant filed a timely request for hearing. On March 6, 2014, ALJ Monroe conducted a hearing, and on March 7, 2014 issued Hearing Decision 14-UI-11897, concluding the employer discharged claimant, but not for misconduct. On March 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Walts Towing employed claimant from August 26, 2013 to December 16, 2013 as a tow truck driver.

(2) Due to requirements imposed by the Oregon State Police, the employer required the employee performing claimant's job to reside in or near Myrtle Creek, Oregon, so the employee was able to respond to a tow request in that area within twenty minutes, 24 hours per day, for a five-day shift. Claimant was aware of the employer's expectation.

(3) On November 29, 2013, an altercation occurred at the residence of claimant and his wife, located in Myrtle Creek. Although the police escorted claimant from the residence, the police did not arrest claimant and no criminal charges were filed against him. Claimant's wife was the sole owner of the residence, and she no longer permitted him to reside at the residence.

(4) The employer was satisfied with claimant's work performance, and permitted him to miss work so he could look for housing in or near Myrtle Creek.

(5) Claimant was unable to find housing in or near Myrtle Creek due to his low income and a criminal conviction from 2007. He moved to live with his parents in Sutherlin, Oregon. Sutherlin was too far from Myrtle Creek for claimant to respond to tow calls in that area within twenty minutes.

(6) On December 16, 2013, claimant met with the employer's operations manager and told her he was unable to find a place to live near Myrtle Creek. The employer told claimant it had to hire a replacement

for him because it had nobody to take the tow calls in the Myrtle Creek area. Claimant told the employer he was available for work that did not have a residence requirement.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

The first issue in this case is to determine the 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) (August 3, 2011). 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)

When claimant met with the employer's operations manager on December 16, 2013, she told him the employer had to replace him because he had not been able to find housing near Myrtle Creek. Claimant was willing to continue working for the employer, but was not permitted to do so because he was unable to find housing in the Myrtle Creek area. Because claimant was willing to continue working for the employer for an additional period of time but was not allowed to do so, the work separation is a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) (August 3, 2011) defines wanton negligence, in relevant part, as 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.

The employer reasonably required claimant to live in the Myrtle Creek, Oregon area as a condition of his employment. Claimant was aware of that expectation. The record does not show that claimant engaged in conduct that he knew or should have known would result in his inability to return to his wife's house in Myrtle Creek. The record shows claimant had to leave his wife's house in Myrtle Creek "for the safety of all involved," but does not show claimant caused the altercation, or that he could have avoided it. Exhibit 1. The police did not arrest claimant or charge him for a crime due to the altercation. The record implicitly shows that claimant had to leave the house in Myrtle Creek, rather than his wife, because his wife was the sole owner of the house. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, the employer has not shown that it was more probable than not that claimant engaged in conduct that he knew or should have known would probably result in a violation of the employer's expectation that he live in the Myrtle Creek area.

That claimant was not able to find housing near Myrtle Creek was not attributable to claimant as willful or wantonly negligent conduct. Claimant sought housing in the Myrtle Creek area, but was unable to find housing because of his low income and criminal record.

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

**DECISION:** Hearing Decision 14-UI-11897 is affirmed.

Tony Corcoran and D. E. Larson;  
Susan Rossiter, not participating.

**DATE of Service:** April 1, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.