

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1861

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 72253). Claimant filed a timely request for hearing. On November 13, 2014, ALJ Vincent conducted a hearing, and on November 24, 2014 issued Hearing Decision 14-UI-29198, affirming the Department's decision. On December 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) North Powder Café employed claimant as a line cook from August 9 to September 15, 2014.

(2) On August 30, 2014, claimant performed services for the employer for five hours. That day, the employer's owner told claimant she was going on vacation, that the employer had no work available for claimant while she was gone, and that she would put him back on the schedule when she returned.

(3) Claimant lived within walking distance of the employer's café. From August 30 through September 12, claimant walked to the café twice per week to determine when the employer had work available for him. The owner was never there, claimant was not on the work schedule, and other employees had no information on when the owner would return, or when employer would have work available for him.

(4) On September 15, 2014, claimant again walked to the café to determine when the employer had work available for him. The owner was there, and asked claimant why he had not called her. Claimant asserted that she should have called him. The owner mistakenly concluded that claimant was quitting and gave him his final paycheck, noting on the check that it was for claimant's "last five hours." Audio Record at 13:09.

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

At hearing, claimant testified that the employer's owner terminated his employment. Audio Record at 8:00. The employer's owner testified that claimant quit. Audio Record at 15:00. In Hearing Decision 14-UI-29198, the ALJ found as fact that claimant quit work on September 15, 2014 based on his prior finding that "[w]ork remained available to claimant on that date but he did not accept it."<sup>1</sup> In his opinion, the ALJ asserted that because claimant and the owner were equally credible witnesses on the events resulting in claimant's work separation, the evidence is "essentially in equipoise" as to whether claimant quit his job, and claimant therefore failed to meet his burden of proof to show that he did not.<sup>2</sup> However, the nature of the work separation is a matter of law on which no party has the burden of proof. OAR 471-030-0038(2)(a) (August 3, 2011) states that 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. 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). An individual is separated from work when the employer-employee relationship is severed. *Id.*

In this case, claimant demonstrated that he was willing to work for the employer for an additional period of time by walking to the employer's café twice per week from August 30 through September 15, 2014 to determine when the employer had work available for him again. Contrary to the ALJ's findings, the employer's owner testified only that work was available for claimant on September 15, and not that she him offered work, or that he refused such an offer. Audio Record at 17:00-17:30, 18:30-19:30. The owner instead testified that she determined claimant was quitting work because he stated he had medical issues to take care of, and did not ask about work. Audio Record at 18:30-20:00. However, claimant denied making that statement, and testified that he told the owner he was available for work. Audio Record at 20:00-21:30. The record therefore fails to show claimant indicated he was quitting work before the owner gave him his final paycheck, noting that it was for his "last five hours." Absent such a showing, we conclude that the owner severed the employment relationship, and not claimant. Because claimant was willing to continue working for the employer for an additional period of time but was not allowed to do so by the employer, the work separation is a discharge, and not a voluntary leaving.

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) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to

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<sup>1</sup> Hearing Decision 14-UI-29198 at 2.

<sup>2</sup> *Id.*

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. 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). Here, the record shows that the employer discharged claimant because its owner mistakenly concluded that claimant was quitting, and not because claimant violated 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. The employer therefore discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-29198 is set aside, as outlined above.<sup>3</sup>

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service:** January 20, 2015

**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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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<sup>3</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.