

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0082**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121121). Claimant filed a timely request for hearing. On January 13, 2015, ALJ Wyatt conducted a hearing, and on January 15, 2015 issued Hearing Decision 15-UI-31891, concluding the employer discharged claimant, not for misconduct. On February 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

**FINDINGS OF FACT:** (1) Ricks Car Wash employed claimant from April 1, 2009 to November 2014 as an office manager.

(2) On November 2, 2014, claimant told the owner she was unable to work that week because her father was in the hospital.

(3) On November 5, 2014, claimant told the owner she needed additional time off work, and asked if she could take family medical leave. The owner told claimant, "take as much time as you need," and that the owner would "check into" family medical leave. Audio Record at 11:29 to 11:49.

(4) On November 9, 2014, claimant's father died. On November 10, 2014, claimant told the owner her father had died and she needed additional time off from work. On November 11, 2014, the owner sent claimant a text asking if claimant planned to return to work, or if the employer should find a replacement. On November 13, 2014, claimant answered the owner's text stating, "I'm going to need four more weeks off." Audio Record at 22:44 to 23:11. The owner responded to claimant with a text message stating, "Guess I better figure things out." Audio Record at 26:38 to 26:55. Claimant planned to return to work on Monday, December 15, 2014.

(5) On or about December 1, 2014, the Employment Department told claimant the employer reported she had quit her job. Claimant sent the owner a text message stating she had not quit. The owner confirmed she had told the Employment Department that claimant had left work without notice.

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

The first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) provides that the work separation is a quit if the employee could have continued to work for the same employer for an additional period of time. 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) (August 3, 2011). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Here, the employer’s owner testified that claimant left work without notice because she did not arrange for time off work and “just left work on [October 31] and didn’t let me know any plan.” Audio Record 24:00 to 24:36. The employer’s assertion is not supported by the record. It is undisputed that the employer knew the reason for claimant’s absence from work, and that claimant told the owner she needed additional time off work on November 5 and 13. The record shows claimant was willing to continue the employment relationship throughout her leave of absence, and that the employer severed the relationship by informing the Employment Department on or about December 1, 2014 that claimant had left work without notice. Because the employer did not allow claimant to continue the employment relationship for an additional period of time after December 1, 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) 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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer asserted that claimant quit her job and accordingly did not provide a reason for discharging her. Based on the record, we assume the employer was dissatisfied with claimant’s absence from work since October 31, and her lack of communication with the employer during her absence. Claimant’s requests for time off from work, and her response to the employer’s November 10 text message show she was not indifferent to the employer’s interest. Moreover, the owner’s statements to claimant during her leave appeared to give claimant permission to continue her leave from work. Thus, the record fails to show claimant knew or should have known that continuing her leave of absence or failing to communicate further with the employer probably violated the employer’s expectations.

Absent such a showing, we cannot find misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-31891 is affirmed.

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

**DATE of Service:** March 11, 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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