

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0084**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 123620). Claimant filed a timely request for hearing. On January 23, 2015, ALJ Murdock conducted a hearing at which the employer failed to appear, and on January 27, 2015 issued Hearing Decision 15-UI-32355, affirming the Department's decision. On February 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Schneider National Carriers Inc. employed claimant as a commercial truck driver from April 3, 2013 to November 3, 2014.

(2) In late October 2014, the claimant and the employer agreed that claimant would take one week off from work. Claimant believed the employer expected him to return to work on November 7, 2014.

(3) On November 3, 2014, one of the employer's dispatchers telephoned claimant, who was out-of town, and asked him why he was not at work, and if he was coming in to work. Claimant explained to the dispatcher that he was scheduled to be off work until November 7. Later that day, another dispatcher telephoned claimant and asked him was he was not at work, and if he was coming in to work. Claimant again explained the he was scheduled to be off work until November 7. The dispatcher told claimant he was terminating claimant's employment.

(4) The employer terminated claimant's employment for failing to report for work on November 3, 2014.

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

The first issue in this case is that nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) provides 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 Hearing Decision 15-UI-32355, the ALJ found as fact that, on November 3, 2014, the second dispatcher told claimant he was “expected at work that day,” that claimant “argued with the dispatcher that he would return to work on November 7,” that the dispatcher told claimant he “would terminate” claimant’s employment, and that claimant did not object or contact the manager who approved his time off from work.<sup>1</sup> Based on those findings, the ALJ concluded that the work separation is a voluntary leaving because continuing work was available to claimant on November 3, 2014, that it was claimant who was unwilling to return to work, and that his failure to object to his employment being terminated for not returning to work could be considered an agreement to sever the employment relationship, and therefore a voluntary leaving.<sup>2</sup>

However, the record fails to support the ALJ’s findings that the dispatcher told claimant to report for work on November 3, and that claimant refused to do so until November 7. At hearing, claimant’s undisputed testimony was that the dispatcher asked him why he was not at work and if he was coming in, that claimant explained he was scheduled to be off work until November 7, and that the dispatcher told claimant he was terminating claimant’s employment. Audio Record at 16:00. Claimant’s testimony shows that he was willing to continue the employment relationship after November 3, but was not allowed to do so by the employer. The work separation therefore is a discharge. The fact that claimant did not ask the employer to rescind the discharge does not amount to an agreement to sever the employment relationship, or therefore a voluntary leaving from work.

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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

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<sup>1</sup> Hearing Decision 15-UI-32355 at 1-2.

<sup>2</sup> *Id.* at 3, citing *Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998).

The employer discharged claimant for failing to report for work on November 3, 2014. However, the record shows claimant believed he was not expected to return to work until November 7, 2014. To the extent claimant erred in that belief, he erred in good faith. Good faith errors are not misconduct.

**DECISION:** Hearing Decision 15-UI-32355 is set aside, as outlined above.

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

**DATE of Service:** March 16, 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 Court of Appeals website at [courts.oregon.gov](http://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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