

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0342**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 75626). Claimant filed a timely request for hearing. On November 4, 2014, ALJ S. Lee conducted a hearing at which the employer failed to appear, and on November 17, 2014 issued Hearing Decision 14-UI-28837, concluding the employer discharged claimant, not for misconduct. On December 1, 2014, the employer filed a request to reopen the November 4, 2014 hearing. On December 23, 2014, the Office of Administrative Hearings (OAH) scheduled a hearing for January 9, 2015. On January 9, 2015 ALJ S. Lee issued Hearing Decision 15-UI-31620, dismissing the employer's request for a reopening for failure to appear at the January 9, 2015 hearing. On January 28, 2015, the employer filed another request for a reopening. On March 5, 2015, ALJ S. Lee conducted a hearing, and on March 13, 2015 issued Hearing Decision 15-UI-35122, allowing the employer's request for a reopening, and again concluding the employer discharged claimant, not for misconduct. On March 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

No party appealed that portion of Hearing Decision 15-UI-35122 allowing the employer's request for a reopening. EAB therefore limited its review to whether claimant is disqualified from receiving benefits based on her work separation from the employer.

**FINDINGS OF FACT:** (1) Fortuna Chinese Restaurant employed claimant as a bartender from June 1, 2013 to August 27, 2014.

(2) The employer scheduled claimant to work from 3:00 p.m. to 10:00 p.m. on Tuesdays, Thursdays, Fridays and Saturdays. The employer expected claimant to report for work as scheduled. If claimant was unable to report for work as scheduled, she was expected to notify the employer. Claimant understood the employer's expectations.

(3) Claimant missed work on several occasions in early to mid-August 2014, and last performed services for the employer on Saturday, August 23. As she was preparing to leave for work on Tuesday, August 26, claimant discovered that her ex-boyfriend had punctured all four tires on her vehicle. Claimant did

not have money for public transportation, and had no access to a vehicle or telephone until her mother returned home at 5:30 p.m. Claimant immediately contacted the employer, explained why she was late, and offered to come in to work. The employer's owner told claimant she was not needed.

(4) Claimant was concerned that the owner was irritated with her for failing to report for work on time or notify the employer she would be late August 26. On Wednesday, August 27, claimant telephoned the owner and asked if she was working on Thursday, August 28. The owner told claimant that there was no job for her. On August 28, 2014, claimant again telephoned the owner and asked if work was available. The owner hung up on claimant.

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

The first issue in this case is 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). An individual is separated from work when the employer-employee relationship is severed. *Id.*

At hearing, the employer's owner initially testified that claimant did not report for work or contact the employer on or after August 26, 2014. Transcript at 12. Claimant testified that she telephoned the owner on August 26, explained why she was late and offered to come in. Transcript at 15-16. Claimant further testified that she telephoned the owner on August 27 and was told there was no job for her, and that the owner hung up on her when she telephoned again on August 28 and asked if work was available. Transcript at 16-17. The employer's owner then testified that she did not remember whether claimant telephoned her on August 26, and that when claimant telephoned her about whether she still had a job, the owner told claimant that that "up to you because in America, you have the freedom," and "as an employee you have the freedom. It's up to you." Transcript at 21.

We find it more likely that the employer terminated claimant's employment for failing to report for work on time or notify the employer that she would be late on August 26, especially after claimant already had missed work on several occasions in August 2014, and less likely that claimant abandoned her job for no apparent reason. We therefore found facts in accordance with claimant's testimony regarding the events resulting in her work separation. Based on those findings, we conclude that as of August 27, 2015, claimant was willing to continue to work for the employer for an additional period of time, but was not allowed to do so by the employer. The work separation therefore 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to report for work on time or notify the employer that she would be late on August 26. However, claimant failed to report for work on time because her ex-boyfriend punctured all four tires on her vehicle, and she did not have money for public transportation. Claimant did not notify the employer that she would be late because she did not have access to a telephone until her mother returned home 2.5 hours after claimant's shift started. Claimant therefore violated the employer's expectations due to exigent circumstances beyond her reasonable control, and not because she consciously engaged in conduct she knew or should have known would probably result in her failure to report for work on time or notify the employer that she would be late. When claimant's mother arrived home, claimant telephoned the employer, explained why she was late, and offered to come in to work, demonstrating that she was not indifferent to the consequences of her actions. Claimant therefore did not violate the employer's expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-35122 is affirmed.

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

**DATE of Service:** May 14, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.