

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0397**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 74153). The employer filed a timely request for hearing. On March 16, 2015, ALJ Clink conducted a hearing, and on March 19, 2015, issued Hearing Decision 15-UI-35458, concluding that claimant voluntarily left work without good cause. On April 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments submitted by claimant and the employer to the extent they were relevant and based on the hearing record.

**FINDINGS OF FACT:** (1) R.A. Murphy Construction employed claimant as the director of business development from August 12, 2013 through November 14, 2014.

(2) When claimant began working for the employer, he and the employer's owner established goals that claimant was expected to meet. The owner believed that claimant had not made adequate progress in meeting these goals during the first several months of claimant's employment. Sometime in September 2014, the owner met with claimant to discuss claimant's continued work for the employer. Claimant told the owner that he wanted to pursue self-employment venture, working as a consultant for Josephine and Jackson counties and private investors. He and the owner agreed that claimant would continue to perform work for the employer for the next few months, although they established no specific date on which claimant's employment would end.

(3) After his September meeting with the employer's owner, claimant worked to develop his self-employment venture and also worked to develop business for the Rogue Valley Technical Park, an industrial park owned by the employer. Transcript at 34-35. Claimant reported the following hours worked on the Rogue Valley Technical Park project during the following weeks: 37 hours during the week ending October 25, 2014; 40 hours during the week ending November 1, 2014; 37.5 hours during

the week ending November 8, 2014; and 39 hours during the week ending November 15, 2014. Transcript at 36.

(4) The employer paid claimant his full salary through November 14, 2014. On November 24, 2014, claimant submitted a time card for work performed after November 14. The employer's owner refused to pay claimant for that time because he believed that claimant was spending too much time developing his own self-employment venture. Transcript at 11. The owner asked claimant if he would cover the office phones during a staff meeting on November 25, and also asked claimant if he would attend Monday morning construction meetings. Claimant refused to accept this work because he believed the employer would not pay him for it. Transcript at 40. Claimant performed no work for the employer after November 24, 2014.

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

We first consider the nature of claimant's 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 "employee" is a person "employed for remuneration" under ORS 657.015, and not someone who volunteers to serve without pay. The employer ended the employment relationship when, on November 24, he stopped paying claimant for his work. Because claimant was no longer an employee of the employer, he did not reasonably expect (and the employer did not clearly establish that he offered) payment for the tasks the employer asked claimant to perform after November 24—answer phones and attend weekly meetings.<sup>1</sup>

The ALJ concluded, however, that claimant quit his job because he stopped working for the employer and instead pursued a self-employment venture. According to the ALJ, the employer had continuing work available that claimant did not want to perform. Hearing Decision 15-UI-35458. We disagree. Contrary to the ALJ's assertion, a substantial portion of claimant's time during his last month of employment was spent working on the Rogue Valley Technical Park, a project that benefitted the employer. Transcript at 34-35. The employer, and not claimant, ended the employment relationship on November 24, 2014, when the owner refused to continue paying claimant for work claimant had been performing for the employer's benefit. Claimant's work separation was therefore a discharge.

We next consider whether claimant is disqualified from receipt of unemployment benefits as a result of this 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

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<sup>1</sup> Claimant testified that he denied the employer's request that he cover phones during a November 25 staff meeting because "I wasn't [sic] employee anymore. I wasn't going to do that." Transcript at 28.

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.

The employer discharged claimant because he believed that claimant was spending too much time developing his own business as a self-employed consultant and not enough time performing work for the employer. As discussed above, the record does not support the employer's belief: during the last month of his employment, most of claimant's work was spent on a project that benefitted the employer. Even if the employer was correct in his assumption regarding claimant's work on his self-employment venture, claimant's actions were not misconduct. Approximately two months before the employer discharged him, claimant talked with the employer's owner about plans to develop his own business. The owner raised no objection to claimant's plan, and he and claimant agreed that that claimant would eventually stop working for the employer. Because claimant's development of his own business was undertaken with the employer's knowledge and apparent approval, it did not constitute a willful or wantonly negligent disregard of the employer's interests.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of benefits on the basis of this work separation.

**DECISION:** Hearing Decision 15-UI-35458 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, *pro tempore*, not participating.

**DATE of Service: June 1, 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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