

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0484**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155930). Claimant filed a timely request for hearing. On April 15, 2015, ALJ R. Davis conducted a hearing, and on April 23, 2015 issued Hearing Decision 15-UI-37434, affirming the Department's decision. On April 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and claimant's written argument.

**FINDINGS OF FACT:** (1) R M Mechanical Inc. employed claimant from June 16, 2014 to September 25, 2014 as a pipefitter.

(2) On July 2, 2014, claimant injured his right index finger at work. On September 5, 2014, claimant's doctor released him to work, but restricted him to perform office work for no more than four hours per day. The employer expected claimant to perform available work that met the work restrictions set by his doctor.

(3) On July 5, 2014, the employer offered claimant office work for eight hours per day. Claimant refused to work eight hours because he was released to work no more than four hours per day. On July 10, 2014, claimant was released to work eight hours per day, and began to work eight-hour shifts.

(4) On September 25, 2014, the employer's project manager, engineer, and safety manager met with claimant, and gave him a letter offering him work in the field, and a release from his doctor stating he was released to perform work on level ground. Claimant had not seen the doctor's release before the

meeting, and was uncertain if he had been released by his doctor to perform work in the field. Claimant did not consider work in the field to necessarily be work on level ground because the field was gravel. Claimant refused to perform field work on September 25, 2014.

(5) The project manager told claimant that he had quit by not signing the job offer letter that day, and told claimant to turn in his badge.

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

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).

The employer asserted at hearing that claimant quit because the employer offered claimant a work agreement for work in the field on September 25, 2014, and claimant refused the work. Transcript at 6-7. We agree with the ALJ about the nature of the work separation and conclude that the employer discharged claimant. The record shows claimant refused to sign the work agreement because he wished to confer with his doctor about the work first, and not because he was unwilling to continue working for the employer. His awareness that the employer would discharge him if he refused to sign the agreement did not itself show intent on claimant's part to sever his employment relationship with the employer. When he refused to sign the new agreement, the employer would not allow him to continue working, and requested his badge from him. Because the employer would not allow claimant to continue working after September 25, 2014, the work separation was 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 Hearing Decision 15-UI-37434, the ALJ concluded that claimant's act of refusing to accept the field work on September 25, 2014 was a willful violation of the employer's policies, and could not be excused as a good faith error or isolated instance of poor judgment because claimant refused work on a prior occasion, and his refusal to work made a continuing employment relationship impossible.<sup>1</sup>

There is no dispute that claimant refused to perform the field work assignment, or that the employer's project manager told claimant that he had to agree to the new work assignment, or he would not be permitted to continue working for the employer. However, claimant testified that he told the employer

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<sup>1</sup> Hearing Decision 15-UI-37434 at 3.

he had to discuss the new assignment with his doctor because he had not yet discussed the work release with his doctor, his doctor previously told him he was not released to work in the field, and the release stated he was permitted to work on level ground, but did not explicitly release him to work in the field. Transcript at 24-28. The employer's witness asserted that claimant became belligerent and refused to work, and did not ask to speak with his doctor. Transcript at 17. Because the testimony from the parties about claimant allegedly refusing to perform any work was, at best, equally balanced, the preponderance of the evidence fails to show that claimant refused to perform work that complied with his work restrictions. Moreover, the employer's expectation that claimant immediately sign an agreement to perform work that might not comply with his work restrictions was not reasonable, and, notwithstanding claimant's knowledge that the employer planned to discharge him in the event he refused to agree to do the field work on September 25, claimant's refusal was not made out of a willful or conscious indifference to the employer's expectation, and, therefore, his conduct was not a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of him.

Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 15-UI-37434 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service: June 18, 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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<sup>2</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.