

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1512**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 142638). The employer filed a timely request for hearing. On August 4, 2015, ALJ Shoemake conducted a hearing at which claimant did not appear, and on August 6, 2015 issued Hearing Decision 15-UI-42660, concluding claimant voluntarily left work without good cause. On August 11, 2015, claimant filed a request to reopen the hearing to allow her to present evidence on the work separation. On August 11, 2015, ALJ Triana conducted a hearing, and on September 17, 2015 issued Hearing Decision 15-UI-44478, denying claimant's request to reopen and leaving Hearing Decision 15-UI-42660 undisturbed. On September 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On October 20, 2015, EAB issued Appeals Board Decision 2015-EAB-1124, reversing Hearing Decision 15-UI-44478 and remanding the matter for further proceedings. On November 3, 2015, the employer filed a petition for judicial review of Appeals Board Decision 2105-EAB-1124. On November 19, 2015, ALJ Seideman conducted a hearing pursuant to Appeals Board Decision 2015-EAB-1124 and on December 7, 2015 ALJ Holmes-Swanson issued Hearing Decision 15-UI-48921, reversing decision # 142638 and concluding the employer discharged claimant but not for misconduct. On December 21, 2015, the employer filed an application for review with EAB.

**FINDINGS OF FACT:** (1) Mobile Pet Grooming employed claimant as a pet groomer from January 9, 2014 until May 16, 2015.

(2) Before she worked for the employer, claimant had known the employer's owner and the owner's mother for several years, and previously owned a grooming business with the mother. When claimant

returned to Oregon in 2013, after living in Florida for ten years, the employer offered claimant a job. Claimant accepted.

(3) As a condition of being hired in 2012, the employer required claimant to sign an “independent contractor agreement.” The agreement stated that claimant would have the status of an independent contractor, rather than an employee, when she worked for the employer, that she would have no taxes withheld from paychecks and that she would not be entitled to unemployment insurance, worker’s compensation, or other employment-related benefits.

(4) On August 16, 2014, claimant was bitten at work by a cat she was grooming. The wound to claimant’s finger was severe and she was unable to work for a period of time. As time passed and the wound healed, claimant was gradually able to perform more work for the employer. By February 2015, claimant’s finances were strained because she had previously been unable to work as a result of the injury and was not then working the hours she had before the injury. In approximately February 2015, claimant consulted with a representative at a WorkSource Oregon office. The representative told claimant that it appeared she was actually an employee of the employer and was entitled to receive benefits. In February 2015, claimant filed a claim for unemployment benefits. Around February 16, 2015, the employer became aware claimant had claimed those benefits. Later in February 2015, the mother of the employer’s owner commented to claimant that she had “opened a can of worms” for the employer when she claimed unemployment benefits. Transcript at 40. Claimant perceived the mother was “upset” because she had pursued benefits. Transcript at 40.

(5) Sometime in approximately March 2015, claimant filed a claim for worker’s compensation benefits arising from her injury due to the cat bite. On May 14 or 15, 2015, the employer’s owner received a letter informing her that claimant had filed a worker’s compensation claim. This letter was the employer’s first notice of that claim.

(6) May 16, 2015 was claimant’s first work day after the employer had been notified of her worker’s compensation claim. That day, after performing some grooming work off-site, claimant drove the employer’s van to the site of the grooming shop. As claimant prepared to empty trash and dispose of dirty towels that had accumulated in the van, she was met by the employer’s owner. The owner was upset because claimant had filed the worker’s compensation claim. The owner told claimant she was “fired” and, when claimant protested, the owner said to her “you just quit” and “it’s my and my mom’s word against yours.” Transcript at 17. When claimant tried to remove her grooming tools from the van, the owner would not allow her to do so, told her to get her car and that the owner would remove the tools from the van. Claimant did as instructed and the owner placed her tools outside the van. Claimant retrieved her tools and left. On May 16, 2015, the employer discharged claimant.

(7) Later on May 16, 2015, when claimant arrived home, she spoke to an acquaintance who was at her residence house-sitting her dog. The acquaintance observed that claimant was upset. Claimant told her acquaintance that she had been just been “fired” and she “couldn’t understand what in the heck they had done, and why they’d done it.” Transcript at 59.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. The employer contended that claimant inexplicably stated that she was quitting work on May 16, 2015 and claimant testified that the employer's owner was angry that day after learning that claimant had filed a claim for worker's compensation benefits and told her she was discharged. Transcript at 5, 14, 17, 44. OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining whether a work separation should be considered a voluntary leaving or a discharge. If the claimant could have continued to work for the employer for an additional period of time at the time of the work separation, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If 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 separation was a discharge. OAR 471-030-0038(2)(b).

The testimony by and on behalf of both parties about the work separation was irreconcilable. However, the employer's version provided no reason for why claimant would abruptly and suddenly quit work on May 16, 2015, when it was undisputed that she worked as she was able throughout the period of her recovery from cat bite. Claimant's version, that the owner discharged her in anger, made sense because it was not disputed that the owner had just learned claimant had filed a worker's compensation claim, and as a matter of common sense, by this claim and her previously filed unemployment claim, claimant was jeopardizing the employer's characterization of its employees as independent contractors, apparently for various cost-savings purposes. Viewed against this backdrop, the employer had a reason for discharging claimant, while there was no reason for claimant to have quit. The employer's version of claimant's quitting is also questionable because it is unusual for an employer to gather the belongings and tools of an employee who has just quit, which the employer did, while an employer generally does so when it has involuntarily discharged an employee. As well, the testimony of claimant's witness is entitled to significant weight about what the employer's owner stated to claimant on May 16, 2015 since that witness was not a party to this matter, was relatively disinterested in its outcome, and claimant made her statement to the witness just after the conversation with the owner that led to the work separation on May 16, 2015 and before the nature of the work separation was in dispute. The testimony of that independent witness corroborated claimant's version of the conversation leading to the work separation. The preponderance of the reliable evidence in this record shows, most likely, that claimant's work separation was a discharge on October 1, 2015.

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) (August 3, 2011) 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Since the employer's position at hearing was that claimant voluntarily left work, it did not present any evidence about the reasons it discharged her. No reasons for claimant's discharge are discernible from the record, other than that she had filed a worker's compensation claim. It is not a willful or a wantonly negligent violation of an employer's reasonable standards for a claimant to file a claim for public benefits that she believes in good faith that she entitled to receive. The employer did not contend or assert that claimant principally or solely sought worker's compensation benefits for the ulterior motive

of harming the employer or that claimant was willful or wantonly negligent in claiming those benefits. Although the employer discharged claimant, it did not demonstrate that it did so for misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-48921 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** January 20, 2016

**NOTE:** 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.

**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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