

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0131**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85028). Claimant filed a timely request for hearing. On January 12, 2016, ALJ Wyatt conducted a hearing, and on January 20, 2016 issued Hearing Decision 16-UI-51384, concluding the employer discharged claimant, but not for misconduct. On February 3, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Subway Hillsboro 1, LLC employed claimant from April 1, 2015 to August 20, 2015.

(2) Claimant believed she performed managerial duties for the employer without benefit of managerial pay. She was considering quitting work at some point in the future if the employer expected her to continue performing those types of duties without giving her a raise. Claimant mentioned to two coworkers that she would leave work at some point in the future if the employer denied her request for a raise.

(3) At approximately 3:00 p.m. on August 20, 2015, claimant asked an owner, Anil, for a \$.75 per hour raise. Claimant had previously experienced times when she had to wait a long time for responses from the owners, and asked Anil if he could let her know within the hour whether he and the other owner would consider her request. Anil did not tell claimant whether or not she could have a raise during the call, but said he would talk to the other owner.

(4) Anil called the other owner, Meera, regarding claimant's request for a raise. Although claimant did not intend to quit immediately if Anil denied her request, Anil believed that claimant had threatened to

quit at 4:00 p.m. if he did not agree to give her a raise. Anil told Meera that claimant about the threat. Anil and Meera were concerned that if claimant walked off the job, the business would be left understaffed. Meera found another employee to cover the rest of claimant's August 20, 2015 shift.

(5) Shortly before 4:00 p.m., Meera called claimant and denied her request for a raise. Meera did not ask claimant to stay at work and finish her shift. Meera told claimant to leave her key, said that another employee would complete her shift, and directed claimant not to return to work her other scheduled shifts. Based on Meera's instructions, claimant left work and did not work after August 20, 2015.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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 argued that claimant quit work based on claimant's alleged threat to walk off the job at 4:00 p.m. if the employer did not agree to give her a raise. In support, Anil, an owner, said that claimant told him and two coworkers that she would walk off the job. Claimant denied quitting and instead alleged that the employer discharged her by asking her to leave work after denying her request for a raise. Claimant testified that, while she asked Anil for an answer about the raise by 4:00 p.m., she did not tell Anil she would walk off the job at that time if she did not receive one. In addition, claimant testified that, although she told those two coworkers that she would quit at some point in the future if she did not get a raise, she did not tell them she would quit at 4:00 p.m. on August 20<sup>th</sup>. Absent a reason to disbelieve either claimant or Anil, their testimony about claimant's alleged threat is no better than equally balanced.

The first unambiguous indication that the employment relationship ended occurred during claimant's conversation with Meera shortly before 4:00 p.m. Although the parties are in dispute over some of what each said during the conversation, there is no dispute that Meera had called another employee to work the rest of claimant's shift before calling claimant, never asked claimant if she planned to walk off the job mid-shift, never asked claimant to work the remainder of her August 20<sup>th</sup> shift or her other scheduled shifts, told claimant to leave her key, told her that another employee would complete her shift, and told claimant not to return to work the rest of her scheduled shifts and told her she could pick up her paycheck the following Monday. Given that those events occurred at a time when claimant had not told Meera that she was walking out mid-shift or quitting work immediately, we conclude that it is more likely than not that claimant was willing to continue working for the employer for some additional period of time, but the employer would not allow her to do so. The work separation is therefore 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. The employer has the burden of persuasion in a discharge case. *See accord Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer testified that claimant quit work, and, therefore, did not provide any specific reasons for discharging her. On this record, however, it is more likely than not that the employer discharged claimant because she allegedly threatened to quit if she did not receive a raise by 4:00 p.m. The employer might have perceived a threat even though claimant did not make or intend to make one, and threatening to walk off the job mid-shift if the employer failed to meet an employee's demands for a raise might be considered disqualifying misconduct. For the reasons already explained, however, the evidence about whether claimant made such a threat is no better than equally balanced. The preponderance of the evidence therefore fails to show that claimant made any threats to the employer. Merely requesting a raise without a threat of consequences to the employer cannot be reasonably construed to constitute misconduct. Because the employer has not shown that claimant's discharge was for misconduct, claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 16-UI-51384 is affirmed.

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

**DATE of Service:** February 24, 2016

**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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