

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0260**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110241). Claimant filed a timely request for hearing. On February 17, 2016, ALJ Lee conducted a hearing at which the employer did not appear, and on February 19, 2016 issued Hearing Decision 16-UI-53319, affirming the Department's decision. On March 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Commercial Fitness Equipment employed claimant as a service technician from April 1, 2013 until December 21, 2015.

(2) Claimant had a volatile and difficult relationship with his wife. Claimant's wife periodically had episodes when she was unable to control her emotions and reactions. Sometime around 2011, claimant's wife called and asked claimant to pick up her children, who were also his stepchildren, because she felt a strong desire to give them sleeping pills and then kill them and herself by driving the family car into a river. When claimant arrived at the family home, his wife and the children were missing. Claimant contacted law enforcement who located his wife with the children. The children were removed from the family home until claimant's wife received a mental health evaluation. The children were ultimately returned to the custody of claimant's wife.

(3) Shortly before claimant started work for the employer in 2013, claimant and his wife moved to Eugene, Oregon from Milwaukie, Oregon, a suburb of Portland. On November 15, 2015, claimant and his wife separated and claimant left the family home. By this time, claimant and his wife had a young daughter of their own. When claimant moved out, he had nowhere to stay because he had made few friends in Eugene. Claimant's wife was very upset and angry because claimant had left their home, and she wanted him to return.

(4) Shortly after November 15, 2015, claimant began staying in a local hotel. However, claimant's wife located claimant and let the air out of the tires of the car that claimant was using, which was parked at

the hotel. Because his wife had discovered where he was staying, claimant needed to change locations. Claimant asked the employer's owner if he could temporarily stay and sleep in the workplace. The owner allowed him to do so and claimant moved from the hotel into the workplace. Sometime later, claimant's wife discovered he was spending nights at the workplace. One night, claimant's wife came to the workplace to talk to claimant and he went outside to speak with her. During their conversation, claimant's wife became enraged and tried to drive over him. Some days later, claimant's wife returned to the workplace, again with the purpose of seeing claimant. Claimant refused to talk to her and claimant's wife became angry and threatened to break all the windows at the workplace if claimant did not speak with her or return home. After these events, claimant mentioned to the employer's owner and the owner's wife, who was the employer's human resources person, he was considering moving back to Milwaukie because he had nowhere to stay on any stable basis. Claimant did not tell either of them that he was quitting or that he had decided to move to Milwaukie.

(5) Sometime in approximately late November or early December 2015, one of claimant's coworkers arranged for him to rent an apartment from the coworker's parents-in-law that was adjacent to their residence and located above their garage. Claimant rented the apartment for \$400 per month and moved in, but did not tell his wife that he had moved again or the location where he was staying. Claimant was afraid his wife would cause a disturbance on the property of the coworker's relatives. Claimant's wife discovered he was no longer staying at the workplace and became very angry because she did not know where he was staying. Sometime after claimant moved into the apartment, claimant's wife went to the workplace to discover where claimant was living. Claimant's wife learned about the coworker who assisted claimant in renting the apartment and obtained his telephone number. Claimant's wife called the coworker, and when she could not reach him, left a message. In the message, claimant's wife accused the coworker of destroying her marriage because the coworker had helped claimant establish a residence outside of the family home. Claimant's wife went on to state other things in the message that resulted in the coworker becoming concerned that claimant's wife would physically confront him in front of his children. Claimant's wife also told the coworker in the message that she intended to create some type of "scene" or physical altercation that would result in claimant's arrest. Transcript at 16. Shortly thereafter, claimant became aware that the employer's owner had learned of his wife's most recent behavior from his coworkers.

(6) On approximately Tuesday, December 8, 2015, claimant called the owner to apologize for his wife's behavior and its disruptive effects. Claimant could not reach the owner and left a voicemail message for him. Claimant did not tell the owner that he was quitting in the message he left or that he had decided to move to Milwaukie. The owner replied by text message stating that his wife would speak with claimant on Wednesday morning, December 9, 2015 about the situation. Sometime after claimant received the text message from the owner, claimant became aware the employer was interviewing people to replace him.

(7) On Wednesday, December 9, 2015, claimant met with the owner's wife at the workplace. The owner's wife told claimant that the employer did not want any disruptions from claimant's wife to impact the workplace and "you're having trouble with your wife [and] she needs to stay away from the office." Transcript at 7, 20. Claimant interpreted this statement to mean that the employer no longer wanted him to work for it due to his wife's behavior. The owner's wife then told claimant she was willing to backdate a two week resignation notice from claimant to Monday, December 7, 2015, and handed to claimant a resignation notice she had prepared for him stating that his last day was going to be

December 21, 2015. Transcript at 7, 24. However, claimant had never told the employer he intended to resign or to give a two week notice since his living arrangements had stabilized after his separation when he rented an affordable apartment from his coworker's relatives. Transcript at 19, 20, 21. Claimant signed the resignation notice the employer's wife had prepared for him since he concluded "they're trying to get rid of me" and to "clear their hands of it [his wife's behavior]" based on the statements the owner's wife made to him, the already-completed resignation notice she presented to him and his knowledge that the employer was already interviewing people to replace him. Transcript at 20, 24. On Friday, December 11, 2015, the employer hired a replacement for claimant

(8) The employer discharged claimant effective December 21, 2015.

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

In Hearing Decision 16-UI-53319, the ALJ concluded that claimant's work separation was a voluntary leaving and not a discharge. The ALJ reasoned that, although claimant never told the employer he was leaving, "claimant was invited to quit" when the employer presented to him the resignation notice it had prepared, and the "onus" was on him to object or protest that he did not want to leave and, presumably, by failing to do so, he acquiesced to the employer's characterization of the separation by signing the resignation notice. Hearing Decision 16-UI-53319 at 3. Based on this conclusion, the ALJ further concluded that claimant was disqualified from benefits because he did not show good cause for leaving. We disagree with the ALJ's characterization of the work separation and her conclusion that claimant was disqualified from benefits.

While claimant did sign the resignation notice proffered by the employer, we disagree with the ALJ that the employer's attempt to characterize the work separation as a voluntary leaving should be considered dispositive because claimant signed that notice. Regardless of the parties' characterization of it, the nature of the work separation is determined by applying the standards set out in OAR 471-030-0038(2) (August 3, 2011). That regulation provides that claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). 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 employer did not appear at the hearing, and claimant's testimony about the separation was un rebutted. Claimant's testimony was clear that he never told the employer he had made a decision to leave, never gave a two week notice of an intention to quit and was willing to continue working for the employer. Transcript at 7, 19, 21, 24. It was not unreasonable for claimant to conclude as he did that, by presenting to him for his signature a resignation notice that was already completed and already interviewing people to replace him, the employer was unwilling to allow him to continue working. Transcript at 24. On the facts present in this record, although the employer tried to characterize the separation as a voluntary leaving through its pre-prepared resignation notice, the employer's unwillingness to allow claimant to work after December 21, 2015, when claimant was willing to do so, demonstrates that claimant's work separation was a discharge effective December 21, 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 did not appear to present evidence during the hearing, the only discernible motivation for it to have discharged claimant was the behavior of claimant's wife in and around the workplace after November 15, 2015. Transcript at 24. There was no evidence that claimant condoned his wife's behavior or did anything with the intention of motivating her to disrupt the workplace. There is no evidence that claimant willfully or with wanton negligence violated the employer's expectations, or that claimant engaged in misconduct.

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

**DECISION:** Hearing Decision 16-UI-53319 is set aside, as outlined above.

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

**DATE of Service:** March 30, 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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