

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0327**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92312). Claimant filed a timely request for hearing. On March 1, 2016, ALJ Shoemake conducted a hearing, and on March 3, 2016 issued Hearing Decision 16-UI-54251 affirming the Department's decision. On March 22, 2016 claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Banks Rocks Products, Inc. employed claimant from December 15, 2014 until sometime after October 9, 2015. Claimant was an equipment operator in the employer's logging operation.

(2) Sometime before October 9, 2015, the employer purchased new tires for claimant's pickup truck to enable him to use the truck for work.

(3) On October 9, 2015, while at work in the field, claimant had a verbal argument with a coworker. After the argument, claimant left the field in his pickup, intending to drive down the mountain to "cool off." Audio at ~5:18. Proceeding down the mountain, claimant encountered his supervisor who was driving up the mountain and both stopped. Claimant told the supervisor he and the coworker had argued and he was leaving for a short period to calm himself. The supervisor asked claimant to follow him up to the job site to discuss what had happened with the coworker. Claimant told the supervisor he was too upset to return to the job site and see the coworker. The conversation continued and claimant began raising safety concerns he had in the field. The supervisor told claimant to give him the employer's "rigging," which claimant had in his truck. The rigging was necessary for the logging that was ongoing. The supervisor did not tell claimant that he was discharged. Claimant assumed that, by asking him for the rigging, the supervisor did not want him to return to work immediately or that day, but did not think the supervisor had discharged him. Claimant thought the supervisor would not discharge him because he had not worked off the employer's purchase of the new tires for his pickup. Claimant gave the

supervisor the rigging, and their conversation ended. Claimant proceeded to drive home. Claimant never told the supervisor that he was quitting work.

(4) On approximately October 10 or 11, 2015, claimant called and spoke with his supervisor by telephone. Claimant explained how the October 9, 2015 argument with his coworker had come about. Claimant then raised some concerns he had with work. The supervisor mentioned to claimant he would “like to get some work out of [claimant] because [he] bought the new tires [for claimant’s truck]” and he was going to give claimant some work where he “didn’t have to deal with people.” Audio at ~11:51, ~14:05. The supervisor stated he would call claimant shortly about some tree girdling work and then he would find other work for claimant to perform. Audio at ~21:39.

(5) After October 10 or 11, 2015, the supervisor did not communicate with claimant again. Claimant tried many times to reach the supervisor over the next couple of weeks and left several messages. Because the supervisor did not return these calls, claimant concluded he was discharged. The employer discharged claimant sometime after October 10, 2015, when it failed to communicate with claimant for an unreasonably lengthy period.

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

In Hearing Decision 16-UI-54251, the ALJ concluded claimant voluntarily left work when he did not return to the work site on October 9, 2015 after he left to “cool off” and did not report for work on October 10, 2015. Hearing Decision 16-UI-54251 at 2. The ALJ considered claimant’s behavior on those days to demonstrate that he was not willing to continue working for the employer. The ALJ found claimant’s testimony “unpersuasive” that his supervisor told him on October 10 or 11, 2015 that he would find claimant other work to perform, which would indicate a work separation did not occur on October 9, 2015. Hearing Decision 16-UI-54251 at 2. Having found the work separation was a voluntary leaving, the ALJ further concluded claimant was disqualified from benefits because he did not show good cause for leaving work when he did. Hearing Decision 16-UI-54251 at 3. We disagree with the ALJ and conclude that the work separation was a discharge. We also disagree that claimant was disqualified from benefits as a result of the work separation.

**The Work Separation.** If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, 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 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).

Neither party contended that claimant told the employer in some many words that he was quitting or that the supervisor ever clearly told claimant he was discharged. Audio at ~14:23, ~20:48. While claimant testified extensively about his conversations with the supervisor on October 9 and October 10 or 11, 2015, the only knowledge the employer’s witness, the employer’s corporate secretary, had about the relevant events and conversations was what she was told after-the-fact by the supervisor. Audio at ~18:08, ~20:22; ~20:48. Claimant’s first-hand information is entitled to more weight about the work separation than the hearsay information of the secretary, particularly since claimant’s account made sense and the corporate secretary did not pretend that the information she had received was comprehensive.

Based on claimant's testimony, his behavior in not returning to the work site on October 9 or 10, 2015 was, at best, an objectively ambiguous manifestation of his intentions. Claimant testified that he did not report to the work site on either of those days because he thought the supervisor wanted him to stay away, and the supervisor's conversation with him on October 10 or 11, 2015 makes sense only if the supervisor did not, as of that time, consider him to have quit work. Based on this sequence of events, we disagree with the ALJ's conclusion that claimant voluntarily left work on October 9, 2015. Although claimant might have left the work site on October 9, 2015, and stayed away on October 10, 2015, the supervisor's behavior during the phone conversation on October 10 or 11, 2015 confirmed that claimant's actions on those days did not sever the work relationship and it survived them. Claimant's work separation was a discharge, which occurred when the supervisor failed to communicate with claimant for an unreasonably lengthy period of time after October 10 or 11, 2015.

**The 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) (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. 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 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).

On this record, since the employer ratified claimant's employment after he left the workplace on October 9, 2015 and failed to report for work on October 10, 2015, it does not appear that the employer discharged him for that behavior or the argument he had with the coworker on October 9, 2015. Because the employer maintained throughout the hearing that claimant voluntarily left work on October 9, 2015, it did not present any reasons why the supervisor failed to contact claimant after October 10 or 11, 2015, let alone any that constituted misconduct. Even if the supervisor changed his mind after October 10 or 11, 2015 and did not want claimant to return to work, claimant did nothing after that conversation or afterward that was a willful or a wantonly negligent violation of the employer's standards. Indeed, he tried repeatedly to contact the supervisor about the tree girdling work, and he was not otherwise indifferent to the employer's interests in any way. On this record, there was insufficient evidence to establish that the employer discharged claimant for misconduct.

Although the employer discharged claimant, it did not do so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-54251 is set aside, as outlined above.

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

**DATE of Service:** May 2, 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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