

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0343**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85936). Claimant filed a timely request for hearing. On March 4, 2016, ALJ Menegat conducted a hearing, and on March 10, 2016 issued Hearing Decision 16-UI-54810, affirming the Department's decision. On March 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Northwest Technologies, Inc. employed claimant from January 24, 2008 to December 15, 2015 as a press brake operator in the employer's metal manufacturing plant.

(2) The employer expected claimant to perform the duties he was assigned, including occasional work at its powder coating plant, located eight miles from its metal manufacturing plant.

(3) The employer sent claimant to work at the powder plant on December 10 and 11, 2015. When claimant reported to work on Monday, December 14, 2015, the employer assigned claimant to the powder plant again on December 14 and 15. Claimant told a human resources representative at the powder plant that he was dissatisfied with having to commute there, and she recommended he contact his supervisor at the metal plant.

(4) On December 15, 2015, at the end of his shift, claimant called his supervisor and asked him if there was an alternative to working at the powder plant for the next three days because it was inconvenient for claimant due to the additional driving distance. The supervisor told claimant the only available work for him was at the powder plant. Claimant told the supervisor he wanted to speak with human resources at the metal plant, and was returning there to do so before they left for the day. The supervisor spoke with human resources and, when claimant arrived, told claimant he could either work at the powder plant or take three days of paid vacation time. Claimant was dissatisfied with that option because he had planned to take vacation time the following week. He told the supervisor he wanted to discuss the matter with human resources. The supervisor told claimant he was suspended for the next three days for insubordination. Claimant asked to speak with human resources again, and the supervisor told him to

leave the premises. Claimant repeated that he wanted to talk to human resources. The supervisor refused, and discharged claimant for allegedly being insubordinate.

(5) Claimant told his supervisor he wanted to speak with the employer's president or human resources before he left, and moved his vehicle to a public road off the premises. Claimant spoke with the employer's president, and the president supported the supervisor's decision to discharge claimant. Claimant did not return to work.

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

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. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly being insubordinate by refusing on December 15, 2015 to work at the powder coating plant on December 16, 17 and 18, 2015 or take paid vacation time for those three days. In Hearing Decision 16-UI-54810, the ALJ found facts in accordance with the employer's evidence and concluded that claimant "was not willing to work at the [powder plant]," and that claimant "stated he was just not going to work."<sup>1</sup> Based on those findings, the ALJ concluded claimant's actions on December 15 were a willful disregard of the employer's interests and disqualifying misconduct.<sup>2</sup> We disagree with the ALJ's implicit credibility finding in favor of the employer's evidence and the ALJ's factual findings, and conclude the employer failed to meet its burden to show the final incident was misconduct.

The employer's supervisor testified that claimant called him from the powder plant on December 15 and refused to continue working. Transcript at 14. However, at hearing, claimant denied that he refused to work and testified that he returned to the metal manufacturing plant that day to discuss potential alternatives with human resources, and repeatedly requested the opportunity to do so when the supervisor told him his only two options were to work at the powder plant or take paid vacation time for rest of the week. Transcript at 19-20. The evidence is, at best, equally balanced between the parties as to whether claimant refused the two options the supervisor gave him or, as claimant asserted, only requested to be given the opportunity to discuss an alternative with human resources. Absent a reasonable basis on this record for concluding that claimant was not a credible witness, we find his sworn testimony at least as persuasive as the employer's evidence. The employer therefore failed to show by a preponderance of evidence that claimant consciously engaged in insubordinate conduct by refusing to work or use vacation time instead of working at the powder plant. Moreover, although the supervisor described claimant's conduct during his conversation with claimant as insubordinate, "irate"

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<sup>1</sup> Hearing Decision 16-UI-54810 at 2.

<sup>2</sup> *Id.* at 4.

and “volatile,” the employer offered no corroborating evidence of claimant’s communication style to show he behaved in an insubordinate manner or that the supervisor was justified in discharging claimant due to his demeanor that day rather than allowing him to speak to human resources. Transcript at 6, 15.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-54810 is set aside, as outlined above.<sup>3</sup>

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

**DATE of Service:** May 4, 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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<sup>3</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.