

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1238**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152243). Claimant filed a timely request for hearing. On October 18, 2016, ALJ Buckley conducted a hearing, and on October 20, 2016 issued Hearing Decision 16-UI-69569, concluding claimant voluntarily left work without good cause. On November 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Hertz Car Sales employed claimant as a salesperson from December 31, 2015 until July 5, 2016.

(2) The employer expected claimant to call in and notify his manager if he was not going to report for work on a particular day he was scheduled to work. Claimant understood the employer's expectation.

(3) The employer allowed employees to bring their own personal computers to the workplace to use at work since each employee did not a workplace computer assigned to them for their exclusive use. Claimant brought in his personal desk top computer to work. Claimant's computer included a monitor and a tower.

(4) On July 2, 2016, the general manager became irritated when claimant showed a customer some information he accessed about a vehicle from the employer's computerized inventory records. The general manager discussed this occurrence with claimant. The general manager perceived that claimant was upset at him. The general manager told claimant to take his computer with him and "go home and get yourself straight." Transcript at 8. Claimant told the general manager that he needed a couple of days off to think about what had happened. Transcript at 8. While claimant was disconnecting his computer in preparation for taking it home, the general manager approached him with a resignation notice that he had filled out for claimant to sign. The general manager said to claimant, "It sounds to me

like you're resigning." Transcript at 16. Claimant refused to sign the resignation, stated he was not quitting work and left the workplace.

(5) On July 3, 2016, claimant did not report for work. On that day, the general manager called claimant and asked him if he intended to resign. Claimant told the general manager that he still needed some days off to think about his options. The general manager did not tell claimant he needed to notify the employer of his decision by any particular day or when the employer next expected to report for work. On July 4, 2016, the employer was not open for business due to the Independence Day holiday and claimant was not expected to report for work.

(6) Claimant did not think he was scheduled to work on July 5, 2016 since the employer's work schedule for July 2016 had not been issued and it was the employer's usual practice to adopt the schedule for the previous month until it had issued the next month's schedule. Based on the June 2016 schedule, claimant would not work on July 5, 2016. On July 5, 2016, the general manager contacted the employer's chief financial officer (CFO) and told her he was not sure if claimant had intended to leave work on July 2, 2016. The CFO told the general manager, "Well, you need to call him [claimant] and if he's not coming back to work then it's a no call, no show." Transcript at 32. The general manager then called claimant. The general manager told claimant that by not showing up for work, "you're telling me you're quitting" and he insisted claimant had quit work when he left the workplace on July 2, 2016.

(7) On July 5, 2016, by insisting claimant had left work, the general manager was unwilling to allow claimant to continue working. On July 5, 2016, the employer discharged claimant.

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

In Hearing Decision 16-UI-69569, the ALJ concluded that by failing to report for work on July 3 and July 5, 2016, claimant expressed an unwillingness to continue working for the employer and his work separation was a voluntary leaving as of July 5, 2016. Hearing Decision 16-UI-69569 at 2-3. We disagree.

OAR 471-030-0038(2) (August 3, 2011) sets out the standards for determining whether a work separation was a voluntary leaving or a discharge. 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). 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).

Both parties agreed that as of the time claimant left the workplace on July 2, 2016 neither party had expressed an intention to sever the work relationship. While claimant was scheduled to work on July 3, 2016, the general manager agreed that on July 2, 2016 he had allowed claimant to take a "couple of days off" to consider his options and, as such, claimant's failure to report for work on July 3, 2016 did not signify an intention to quit work. Transcript at 8. Furthermore, the general manager's phone call to the CFO on July 5, 2016 corroborates that claimant had not manifested any intention to quit before that day. Despite making the call to the CFO, the general manager contended at hearing that he assumed claimant had quit by not reporting for work on July 5, 2016, which was three calendar days and the second work day after he had asked for "a couple of days" off from work to think about his options. Transcript at 10.

In addition, although the general manager initially testified that claimant was scheduled to work on July 5, 2016, he did not specifically rebut claimant's contention that, based on the prior month's work schedule, he was not scheduled to work on July 5, 2016 and therefore his failure to report for work on that day was not emblematic of an intention to leave work. Transcript at 27, 28, 37-39. As well, in light of the tenor of the general manager's phone call to claimant on July 5, 2016, and his insistence that claimant had quit as of that day, the general manager plainly evidenced that he was unwilling to allow claimant to continue working after July 5, 2016. Claimant's work separation was a discharge as of July 5, 2016.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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).

From the content of the general manager and the CFO's conversation on July 5, 2016, it appears the employer discharged claimant for failing to call to report his absence from work on that day. However, as discussed earlier, the employer did not establish that claimant was scheduled to work that day or, if he was, that it was reasonable to expect him to report his absence from work when the general manager had allowed on July 2, 2016 to take "a couple of days off." The employer failed to demonstrate that claimant violated its standards willfully or with wanton negligence when he failed to report an absence from work that day.

Although the employer discharged claimant it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-69569 is set aside, as outlined above.

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

**DATE of Service:** November 30, 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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