

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1254**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 90310). Claimant filed a timely request for hearing. On October 20, 2016, ALJ Vincent conducted a hearing, and on October 21, 2016 issued Hearing Decision 16-UI-69685, affirming the Department's decision. On November 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on information in the record. See OAR 471-041-0090 (October 29, 20060).

**FINDINGS OF FACT:** (1) Dermatology & Laser Associates of Medford employed claimant as a receptionist from September 9, 2003 until July 19, 2016.

(2) On July 19, 2016, the employer's chief operating officer (COO) held an office meeting for all front office staff after the end of the regular work day. At that meeting, the COO addressed, among other things, acceptable staff behavior. Claimant raised some issues she had with the behaviors of certain newly hired employees. Claimant and the COO both became upset with each other. After some further discussion, the COO told claimant that she needed to consider whether the employer was the "right team" for her. Transcript at 24. The COO also told claimant that she needed to "think about whether this [her current position] was the position that she wanted to continue in." Transcript at 25. Claimant was angry with the COO, picked up her purse and stated, "Fine, I'm done here." Transcript at 24. The COO then told claimant, "I accept this as your resignation." Transcript at 25; Exhibit 1 at 3, 4, 6, 7. Claimant continued trying to speak with the COO, but the COO told claimant several times that she needed to leave the building. Transcript at 25, Exhibit 1 at 3, 4, 6, 7.

(3) After the COO told claimant to leave, claimant immediately went to the office of one of the physicians to discuss what she perceived to have been the COO's accusatory behavior at the meeting. Ultimately, claimant met with three of the physicians. One of the physicians told claimant that her complaints should properly be raised with the human resources department and not with them. That

physician then left and later returned. Upon her return, that physician told claimant to turn in her office keys. Claimant complied and left the workplace.

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

In Hearing Decision 16-UI-69685, the ALJ concluded that claimant voluntarily left work on July 19, 2016 and that she did so without good cause. It appears that the ALJ based the determination that the work separation was a voluntary leaving on the fact that claimant left the office meeting after the COO announced to claimant that she would consider such an action to be a resignation. Hearing Decision 16-UI-69685 at 2. We disagree with the ALJ's decision that the separation was a voluntary leaving, and find that it was a discharge. We further conclude that claimant is not disqualified from benefits because the employer did not discharge her for misconduct.

OAR 471-030-0038(2) (August 3, 2011) sets forth the standard 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).

While claimant indeed left the office meeting after the COO told her that would be considered a resignation, that claimant did so did not necessarily establish that she wanted or intended her departure from the meeting signify that she was quitting. At best, claimant's leaving the meeting under these circumstances was an ambiguous expression of her intentions in connection with her continued employment. First, the COO ultimately told claimant to leave rather than her exit having been purely volitional. Transcript at 25, Exhibit 1 at 3, 4, 6, 7. Second, after claimant left the meeting, the employer's witness did not dispute that she immediately went to meet with some of the physicians to protest what the COO had done during the office meeting and how the COO had treated her. Most reasonably construed, claimant's actions were not those of a person who was quitting work since she was seeking assistance from physicians whom she believed had the authority to help her, which she would not have done if she was not willing to continue working for the employer. Finally, claimant did not turn in her keys and leave until the physicians refused to help her and one of the physicians instructed her to do so. The physician's statement was the first objective manifestation of an unequivocal intention to sever the employment relationship. On this record, claimant's work separation was a discharge since the employer expressed its unwillingness to allow claimant to continue working.

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) 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).

As best can be discerned from the record, the reason for claimant's discharge was her behavior during the office meeting on July 19, 2016. The employer presented no evidence about its behavioral expectations of claimant in such a meeting. While the interaction between claimant and the COO during that meeting was not amicable, nothing about it suggests that claimant's behavior was outside the bounds of reasonableness. The employer's witness did not contend that claimant's behavior during the meeting was insubordinate, abusive or in any other way violated a standard of which claimant should have reasonably been aware. On this record, there is insufficient evidence to conclude that claimant's behavior was willful or wantonly negligent, or that it constituted misconduct.

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

**DECISION:** Hearing Decision 16-UI-69685 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** December 9, 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>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.