

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1289**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145453). Claimant filed a timely request for hearing. On November 4, 2016, ALJ Vincent conducted a hearing, and on November 10, 2016 issued Hearing Decision 16-UI-70954, concluding claimant voluntarily left work without good cause. On November 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Franz Bakery employed claimant from mid-July 2016 until July 23, 2016.

(2) The employer hired claimant to work as a "sanitor," a janitorial job that paid \$15.00 per hour. Claimant worked eight hours for the employer in orientation, and three hours as a sanitor. During those eleven hours he concluded the job was not what he thought it would be. He contacted other supervisors in the course of his work and learned that the employer's production workers were members of a union and were paid approximately \$26.00 per hour. Claimant customarily worked as a journeyman painter in a shipbuilding yard and had been earning significantly more than \$15.00 per hour until he was temporarily laid off work by his regular employer. The higher paying production work at the employer's facility had greater appeal to claimant than the sanitor work.

(3) On July 23, 2016, claimant told his supervisor and a human resources person that he was interested in transferring to a production job. The human resources person with whom claimant spoke agreed claimant could transfer to production the production department by reapplying for production work. Claimant's supervisor seemed upset that claimant wanted to transfer and said he was concerned that his department would have to spend money to train claimant when he planned to transfer to a different department. The supervisor told claimant, "I'm going to have to send you home because it doesn't make any sense for me to – to train you when you're going to go across the hallway in production." Audio recording at ~ 8:10. Claimant was surprised by the supervisor's comment because he "was more than willing to work the job until we could make the transfer." *Id.* The supervisor then sent claimant home. Audio recording at ~ 14:35. Claimant was unwilling to argue with "the boss," and since claimant intended to continue working for the employer regardless of the position, he left as instructed. *Id.*

(4) Claimant repeatedly attempted to reapply for a production position as instructed by the human resources employee but despite his efforts was unable to complete an application process. Claimant did not resume working for the employer as a sanitor or in any other position after July 23, 2016.

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

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is 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).

The ALJ concluded that claimant voluntarily quit work, but did not explain in his decision the basis for that conclusion. *See* Hearing Decision 16-UI-70954 at 2. The ALJ appears to have decided that claimant quit work during the hearing after the following exchange about the events of July 23, 2016:

ALJ: So you stopped working that day?  
Claimant: Yeah, they sent me home. They sent me home.  
ALJ: Okay, the reason you stopped working is so you could reapply for a new job if it became available.  
Claimant: Exactly, exactly.

Audio recording at ~ 9:30. The ALJ then advised claimant of the law that applies when individuals voluntarily leave work to seek other work, making it more likely than not that that exchange was the basis of the ALJ's conclusion that claimant quit work. In context, however, claimant's testimony was not that *he* chose to stop working such that the work separation was a voluntary leaving. Rather, he merely asked to transfer from one job to another within the employer's business. It was the employer's human resources person who instructed claimant to reapply for the production position, after which it was his supervisor who involuntarily "sent [claimant] home" and was not willing to let him continue training as a sanitor. Audio recording at ~ 9:35, ~ 14:35. Claimant also provided unrefuted testimony that he "was more than willing to work until they – you know – bridged me to the production side" but was not allowed to do so, was surprised by the employer's decision to not allow him to work anymore, and had attempted to retain or regain his employment by reapplying for production work. Audio recording at ~ 14:35. The unrefuted evidence in this record is, therefore, that claimant was willing to continue working for the employer, in any capacity the employer chose – including as a sanitor – but he was not allowed to do so, making the work separation a discharge under OAR 471-030-0038(2), not a voluntary leaving.

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.

On this record it appears that the employer discharged claimant because he expressed a desire to transfer from his sanitor position to a higher paying position in the production department. The employer

required that claimant reapply for the production department rather than transferring him, and was not willing to allow claimant to continue working as a sanitor until he was hired into the production position because of the cost and effort associated with training him for the sanitor job he did not want and intended to leave as soon as he could. Although the employer's decision to discharge claimant rather than continue training him for the sanitor position he intended to leave might have sensible from a business perspective, claimant's desire for higher paying work and request to transfer was not a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of an employee. On this record, there is no evidence to suggest that claimant's discharge was for misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-70954 is set aside, as outlined above.<sup>1</sup>

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, 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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<sup>1</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.