

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1431**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 142519). Claimant filed a timely request for hearing. On December 6, 2016, ALJ Logan conducted a hearing, and on December 9, 2016 issued Hearing Decision 16-UI-72622, affirming the Department's decision. On December 23, 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) Greenleaf Juicing Company employed claimant from May 18, 2016 until sometime shortly after July 16, 2016.

(2) Sometime after claimant was hired and trained, the employer assigned claimant to its location on SE Grand Avenue in Portland, Oregon. That location was newly established and claimant did not work many hours per week. Sometime shortly before June 17, 2016, the employer assigned claimant to its location on SW Moody Avenue in Portland. June 17, 2016 was the last day claimant worked at the employer's SE Grand Avenue location.

(3) Sometime around June 17, 2016, claimant learned of a temporary employment opportunity producing a television commercial. Claimant had a background in film and television production. Sometime shortly after, claimant spoke to the manager of the employer's SW Moody Avenue location and informed him that he had wanted to accept the temporary job, but was willing to continue working for the employer after the work on the commercial was completed. The manager told claimant he was "all right" with claimant taking this temporary hiatus and to "check back with him after the other job [producing the commercial] was finished" for work at the SW Moody Avenue location. Audio at ~7:20.

(4) After June 18, 2016, the employer did not assign any work shifts to claimant. On July 5, 2016, claimant began working on the television commercial and completed that work on July 16, 2016.

(5) After July 16, 2016, claimant contacted the manager of the SW Moody Avenue location about working, but the manager told him there was “no longer a need for him to come in” to work at that location. Audio at ~9:16. Claimant also contacted the manager at the employer’s SE Grand Avenue location, but she told him that business at that location was still slow and she did not have any shifts that he could work. After July 16, 2016, the employer did not assign any work shifts to claimant.

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

In Hearing Decision 16-UI-72622, the ALJ concluded claimant’s work separation was a voluntary leaving and not a discharge. The ALJ reasoned that claimant quit his position with the employer to accept the short-term job producing the television commercial and that the length of the “gap” between when he last performed work for the employer and when he began working on the commercial “establish[ed] that claimant’s contact with the employer after the commercial was not a continuation of work, but a request to be hired.” Hearing Decision 16-UI-72622 at 3. The ALJ then concluded claimant was disqualified from benefits since he did not show good cause for leaving work. Hearing Decision 16-UI-72622 at 3-4. For the reasons that follow, we disagree that claimant’s work separation was a voluntary leaving, conclude it was a discharge and conclude that claimant is not disqualified from benefits because the employer did not demonstrate that claimant’s discharge was for misconduct.

OAR 471-030-0038(2) (August 3, 2011) sets out the standard for characterizing a work separation. If claimant could have continued to work for the employer for an additional period of time, the work 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 is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

In this case, the only first-hand evidence about claimant’s discussions with the manager of the SW Moody Avenue location was from claimant. The employer’s witness at hearing was not a participant in those discussions and did not appear to have even a hearsay account of them, other than his “understanding” that claimant went on a vacation between June 17, 2016 and July 5, 2016 and thereafter accepted a production job in film. Audio at ~16:20, ~16:52, ~17:00. Claimant’s first-hand account of what was said during his discussions with the manager has greater weight than the “understanding” of the employer’s witness, presumably based on hearsay information from someone. We therefore found facts in accordance with claimant’s account of those discussions.

When claimant spoke with the manager shortly after June 17, 2016, the reliable evidence shows that he was not unwilling to continue working for the employer, but only that he requested a short time away from that work to enable him to work on the television commercial. From claimant’s account of the manager’s response, the manager did not appear to have considered his request to be a notice that he was leaving work or tantamount to it. While there might have been a time gap between when claimant last worked for the employer and when his work on the commercial began, it was not sufficiently lengthy to support the ALJ’s inference that claimant must necessarily have intended to quit work when he spoke to the manager after June 17, 2016. There was no manifestation of an intention to sever the work relationship either from claimant or the manager in their discussion. The discussion is most reasonably construed as the manager allowing claimant to take a short break from work while still preserving the employment relationship. There is insufficient evidence in the record to support the conclusion that

claimant voluntarily left work. The first party to unequivocally express an intention to sever the work relationship was the employer, through the manager of the SW Moody Avenue location, when he told claimant after the work on the commercial was completed that he did not have a position available for him. Claimant's work separation was, therefore, a discharge.

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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It was not misconduct for claimant to take a short period of time away from work with the permission of the manager of the location where claimant was assigned to work. There is no other reason discernible from this record explaining why the employer might have discharged claimant. The employer therefore failed to show that it discharged claimant for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-72622 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service: January 23, 2017**

**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.