

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0413**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121936). Claimant filed a timely request for hearing. On March 22, 2017, ALJ Lohr conducted a hearing and issued Hearing Decision 17-UI-79399, affirming the Department's decision. On April 4, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant did not explain why he was unable to present this new information during the hearing and otherwise failed to show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Pheasant Ridge RV Park employed claimant as a maintenance manager from July 1, 1992 until September 15, 2016. Claimant's wife was the general manager for the RV Park. Claimant and his wife were hired at the same time and the employer's owner had told both that they had been hired as a "team." Audio at ~12:53.

(2) Claimant was 67 years old. Claimant wanted to work for three more years before retiring, until he was 70, so he that could receive full Social Security retirement benefits. Claimant and his wife owned a home in Arizona that he and his wife had initially purchased for his wife's now-deceased mother. Claimant's wife had an autoimmune disorder that caused her develop lymphoma and shingles.

(3) In early 2015, claimant's wife mentioned to the employer's owner in passing that she and claimant were planning to retire, but they had not yet set a retirement date. In approximately June or July 2016,

claimant's wife began receiving treatment for her medical condition in Arizona. Claimant's wife thought the treatment she would receive in Arizona was superior to that in Oregon.

(4) By August 2016, claimant's wife had decided to quit work and told claimant that she wanted to move permanently to the house they owned in Arizona. Claimant opposed her decision and adamantly told her they could not afford to retire at that time, and that such a decision would mean he would receive \$400 less per month in Social Security benefits than if he worked three more years.

(5) On August 2, 2016, claimant's wife presented the employer's owner with a resignation letter stating that she and claimant would be leaving work effective September 15, 2016. The letter stated that claimant's wife was going to start medical treatment in Arizona in a program beginning on October 1, 2016. Exhibit 1 at 1. Claimant had not participated in drafting the letter and did not sign it. Claimant had known about the letter and had not read it before his wife gave it to the owner. Claimant did not want to leave work at the time stated in his wife's resignation letter.

(6) Shortly after August 2, 2016, the owner told claimant about the resignation letter that his wife had given in behalf of the wife and claimant. Claimant told the owner that he did not want to quit work. The owner responded that he needed a "team" to "do this job" and that, since claimant's wife was quitting, claimant's "job was done, too." Audio at ~14:32, ~15:32, ~16:35. Claimant interpreted the owner's statement to mean that the employer was unwilling to allow him to continue working after his wife left work.

(7) After August 2, 2016, claimant and his wife moved two vehicles to Arizona. Sometime after September 15, 2016, claimant and his wife moved to Arizona.

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

In Hearing Decision 17-UI-79399, the ALJ first concluded that claimant's work separation was a voluntary leaving. The ALJ reasoned that claimant's testimony that he was willing to continue living in Oregon and work for the employer was "not credible" since he and his wife "began making preparations for the move [to Arizona] prior to submitting their resignation." Hearing Decision 17-UI-79399 at 3. The ALJ therefore concluded that claimant left work to move with his wife to Arizona and that his wife's resignation letter was properly written on his behalf and applied to him as well as to her. The ALJ finally concluded that claimant was disqualified from benefits because he did not show good cause for leaving work to accompany his wife to Arizona. We disagree, conclude that claimant was discharged rather than having voluntarily left work and that since his discharge was not for misconduct, he is not disqualified from benefits.

OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining the nature of the work separation and whether it is properly considered a discharge or a voluntary leaving. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation is 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).

With respect to claimant's intention to quit, the "preparations" to move that the ALJ relied on to infer that intent was that claimant allegedly had taken a "fifth wheel" recreational vehicle and a restored automobile to Arizona prior to the date that claimant's wife submitted the resignation letter. Audio at ~29:09. Claimant disputed that the vehicles were moved before the submission of the resignation. Audio at ~30:33. Assuming that claimant took the vehicles to Arizona before his wife gave the resignation to the owner, however, there are many innocent reasons he might have done so, including that storage for such large items was more convenient, more secure or cheaper in Arizona than in Oregon. Absent evidence that claimant moved items to Arizona that were needed or used daily, the mere fact that he moved the two specified vehicles does not appear to be sufficient basis from which to reliably infer that claimant intended to leave work when the vehicles were taken to Arizona.

The employer's owner did not dispute that he was the person who first informed claimant that claimant's wife had submitted a resignation purporting to be on behalf of her and claimant, and the owner did not contend that claimant was not surprised about the letter or appeared to have had prior knowledge of his wife's intent to resign or that he was a party to the letter. Nor did the owner dispute that claimant told him he did not want to quit. Further, the owner did not deny that he told claimant that claimant's job was "done" if his wife was leaving since they both were hired as a "team." Audio at ~14:32, ~15:30. On the undisputed facts, it appears most likely that the owner was unwilling to allow claimant to continue working after his wife was no longer working for the employer and that claimant expressed to the owner his willingness to continue working when he stated that he did not want to quit. On the facts in this record, claimant's work separation was a discharge as of the date his wife left work, or on September 15, 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) 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 has the burden to show that claimant's misconduct caused the discharge. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The owner's unwillingness to allow claimant to continue working was due to claimant's wife decision to leave employment, which would break up their employment "team." However, claimant's wife unilaterally made the decision to quit, without apparently seeking claimant's agreement and without claimant's knowledge until he was informed of it by the owner. On these facts, claimant's discharge could not have been for misconduct since the events that led to it were not volitional acts attributable to claimant. The employer did not meet its burden to show that it discharged claimant for misconduct.

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

**DECISION:** Hearing Decision 17-UI-79399 is set aside, as outlined above.

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

**DATE of Service: May 16, 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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