

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1295**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 153749). The employer filed a timely request for hearing. On October 25, 2017, ALJ Comstock conducted a hearing, and on October 26, 2017 issued Hearing Decision 17-UI-95514, concluding that claimant voluntarily left work without good cause. On November 7, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc. employed claimant from May 1, 1995 to September 19, 2016, last as safety manager.

(2) Prior to September 2016, claimant and the plant manager agreed claimant could take a 4-week vacation starting September 16, 2017. Claimant had a health condition and wanted time off work, in part, to try to find a different job. Claimant thought he and the plant manager mutually understood that claimant planned to return to work in mid-October at the end of the four week period. At all relevant times hereto, claimant had no plans to retire from his job with the employer. The employer required that retiring employees complete a "formal written notice," and claimant did not. Transcript at 11.

(3) Managers, the office manager and others came to believe that claimant was going to retire. Claimant was not forthcoming about any retirement plans and would not provide anyone with a retirement date. He rejected all overtures to throw a party for him or take him out for dinner and drinks to celebrate a retirement. Over time the employer came to believe that claimant planned to retire on September 16<sup>th</sup> when in fact he did not.

(4) Although claimant had planned to start his vacation on September 16<sup>th</sup>, he had some duties to attend on September 19<sup>th</sup> and reported to work for a partial day. When he finished his work, he left before the end of his usual shift, taking with him a computer that belonged to the employer's business and keys to the facility. He did not make a point of telling anyone goodbye before he left.

(5) After leaving work on September 19<sup>th</sup>, claimant began his four-week vacation. He used some of his time to seek employment elsewhere, but if hired by another employer he intended to return to work and give the employer two weeks' notice before quitting.

(6) At some point between September 19<sup>th</sup> and his return to work date in mid-October, claimant used the work computer he had taken home to attempt to log in to the employer's system but found he had been designated "inactive." Transcript at 21. Around that time, the employer paid claimant for all six and one-half weeks of his vacation time rather than for the four weeks he was taking off work. Thereafter, claimant repeatedly called the plant manager and left messages asking to speak with him, and contacted the plant manager by email. The plant manager did not respond to claimant's attempts to contact him.

(7) On October 10, 2016, claimant's plant manager completed an employee change notice on claimant's behalf, dated it, and checked a box stating that claimant had retired.

(8) On approximately October 17, 2016, another manager at the employer's business called claimant to ask about a key, and why claimant was not returning to work. During the call the manager told claimant that there had been a conversation about claimant coming back during which the plant manager told the other managers that claimant was not returning and "was let go" for "job seeking" while he was away from work. Transcript at 22.

(9) On the day of what he thought was supposed to be his scheduled return in mid-October, claimant went to the workplace intending to meet with the plant manager. He delayed his arrival because he knew he was inactive in the system, did not know his status, and thought he would need to talk to the plant manager before resuming work. An office worker stopped him at the front door. Claimant asked to speak with the plant manager, but the office worker said he was not available. Claimant asked to have the plant manager call him. Transcript at 25. Claimant was not allowed to return to work, and the plant manager did not call claimant.

(10) Claimant logged back in on the employer's computer to see if anything had been changed and found that all of his information was "wiped out." Transcript at 25. Claimant continued to call and email the plant manager, but the plant manager would not see or speak with him.

(11) When he was unable to reach the plant manager, claimant emailed a human resources person. Claimant told her that he was inactivated, did not know if he was suspended or terminated, did not know what was going on, and that he was unable to reach the plant manager. Claimant told her that he wanted to be working. She called him back and said she would look into it, but did not contact claimant again.

(12) Claimant did not perform services or work for the employer at any point after leaving on September 19, 2016. As of the date of the hearing, claimant still had his company computer and a key to the employer's facility. At all relevant times hereto, claimant has not applied with the employer to draw his retirement pay.

**CONCLUSIONS AND REASONS:** We agree with the Department, and not the ALJ, that the employer discharged claimant, 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 left work because although it was “undisputed that claimant completed no documentation to demonstrate that he was quitting” and “insists that he was merely leaving the employer for a four week vacation,” his testimony was outweighed by the fact that “it was common knowledge that claimant was retiring” and that claimant “determined the date of the work separation.” Hearing Decision 17-UI-95514 at 2. In reaching that determination, the ALJ found it “necessary to evaluate the reliability of the witness testimony.” *Id.* at 3.

In evaluating the testimony, the ALJ found “no evidence in this record that the employer was trying to push claimant out.” *Id.* We disagree. Claimant’s testimony, based upon statements he heard from another manager, suggested that the plant manager did let him go because he was looking for another job. The fact that claimant’s alleged retirement was processed without any of the usual paperwork, and that the plant manager who told other managers he had discharged claimant filled out a “retirement” form during claimant’s time away from work, while not conclusive, suggest the possibility that the plant manager might, in fact, have “push[ed] claimant out.”

The ALJ found that the employer’s purchase of a going away gift “would be highly unusual if claimant was merely going on vacation.” *Id.* However, the record does not suggest that the employer purchased the gift as part of any official retirement process, only that the office manager purchased it, and we find it highly unusual that the main concern the office manager expressed about the difficulty he had getting claimant to name a retirement date was that he had wanted to plan a party and buy a gift, and mentioned that “as well we needed to work on getting coverage for his position,” as though that was an afterthought. Transcript at 49-50. We find it even more unusual that claimant, who was supposed to have somehow made it clear he was choosing to retire, would be as reluctant to talk about retiring or name a retirement date as claimant was alleged to have been; that claimant’s retirement was apparently processed without the formal written notice the employer required; that despite having supposedly made it clear he was retiring that the employer’s witnesses could not specify exactly what claimant said, or how or when he made it clear, that he was leaving; that an individual who was clearly retiring would have been allowed to leave with the employer’s computer, access to its network, and keys to the plant; and that a manager leaving work for retirement after over 20 years of employment would have left work without having sought out any coworkers to say goodbye or provide final instructions.

The ALJ found that claimant asking the employer’s office manager at a hearing held over a year after the work separation “if he was aware of claimant’s medical condition as a reason that he wanted to leave the employer” was “inconsistent with claimant’s position that he” did not quit his job. Hearing Decision 17-UI-95514 at 3. We disagree. Claimant established that he intended to take four weeks of vacation time in part because of a medical condition and to look for other work. Claimant’s inquiry to the office manager appeared on this record as intended to question whether the office manager was sufficiently

informed about claimant, his employment, his condition, and his intent to establish whether or not claimant took four weeks off work as vacation or left work on September 19<sup>th</sup> with the intent to retire. We do not view such questioning as representative of an inconsistency in claimant's testimony or his position on the nature of the work separation.

The ALJ also found it significant that claimant identified "October 24, 2017" [*sic*] as his return to work date even though October 24<sup>th</sup> was five weeks after he left on vacation, when claimant said he was only taking four weeks off work. Hearing Decision 17-UI-95514 at 3. We disagree. Claimant consistently and adamantly testified that he intended to return to work four weeks from September 19, 2016. The fact that claimant could not identify what that four-week date was, and misstated the date as October 24<sup>th</sup>, does not establish anything but that he did not know which date in October 2016 was four weeks from September 19, 2016, nor does it otherwise undermine the reliability of his testimony. It is also notable that over a year since claimant's employment ended claimant had still not collected or attempted to collect retirement pay based upon his employment with the employer, further suggesting that claimant did not leave work to retire, and that despite claimant's inability to name his planned return to work date, he did not leave work on September 19<sup>th</sup> with the intent to retire.

Claimant alleged he did not retire or intend to retire, and only requested vacation leave. Although the employer had no record of claimant's request in its system, that is not significant because the employer customarily "scrubbed" electronic information after employees left work. *See* Transcript at 51. Although the employer alleged the office manager gave claimant a retirement gift, claimant was equally adamant that he refused the gift and left it at the workplace, and neither party is less credible than the other as to the gift. We also note that claimant credibly testified that a named manager reported that the plant manager told the managers that claimant was terminated for looking for other work; the employer did not refute that the plant manager said that to managers, nor did the employer refute that the named manager reported the statement to claimant. For the reasons explained, we found claimant's testimony reliable.

The employer's evidence was not particularly reliable, however. The employer established that the only individuals to whom claimant would have officially communicated his retirement were the plant manager at the time, who was no longer employed, the human resources person at the time, who did not testify, and claimant's "formal written notice" that he was retiring or quitting, which he did not give and the employer did not have. In fact, the only official form suggesting claimant retired was one that the plant manager completed, not on claimant's last day, and not at the date claimant planned to return to work, but, rather, closer in time to when claimant alleged the plant manager told other managers that claimant had been terminated. One witness characterized the way claimant's employment ended as "a bizarre situation" that was atypical, and the employer's witnesses could not say whether claimant received a final paycheck or retirement package. Transcript at 7, 13. Although two employer witnesses alleged that claimant said he was retiring and named a date, their testimony also established that there were rumors and a lot of uncertainty about claimant's purported retirement, and that claimant was "tightlipped" and hard to "nail down" about his retirement. One employer witness testified that "we had planned a little small going away thing here in the office for him"; the other employer witness testified that claimant adamantly did not want any such celebration and none was planned. *Compare* Transcript at 8, 49-50, 54. We also note that there were signs that the employer's witnesses were conferring amongst each other about the testimony they were providing during the hearing, further suggesting that

the witnesses might have lacked recall or that their evidence might not be as reliable as claimant's. *See* Transcript at 14, 54.

In sum, the preponderance of the reliable evidence in this case suggests that claimant did not have a subjective intent to quit work when he left on September 19<sup>th</sup>, and took the employer's computer and a key to the plant with him when he left, suggesting he intended to return at some point, and when he was inactivated in the employer's system he made repeated calls and emails to the plant manager and human resources person attempting to return to work, and even went to the employer's facility at one point to try to speak with the plant manager about returning to work. The preponderance of the evidence suggests that claimant was at all relevant times willing to continue working for the employer but, as evidenced by the employer filling out a form saying claimant "retired," inactivating claimant in the system, paying out his accrued leave, and refusing to communicate with him, that the employer would not allow claimant to continue working. The work separation was, therefore, more likely than not 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. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The evidence developed at the hearing does not suggest that claimant's discharge was the result of any willful or wantonly negligent violations of the standards of behavior the employer had the right to expect of claimant. In the absence of evidence of willful or wanton negligence, misconduct has not been shown, and claimant's work separation is not disqualifying for purposes of unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-95514 is set aside, as outlined above.<sup>1</sup>

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** December 5, 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 owed may take from several days to two weeks for the Department to complete.

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