

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1397**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71910). The employer filed a timely request for hearing. On November 14, 2017, ALJ Griffin conducted a hearing, and on November 17, 2017 issued Hearing Decision 17-UI-97162, affirming the Department's decision. On December 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Rory & Ryan II, LLC employed claimant from September 25, 2015 until August 22, 2017 as a maintenance person at the Inn at Cross Keys Station, a hotel located in Madras, Oregon.

(2) During his employment, the employer issued to claimant only two warnings for minor infractions. Before August 21, 2017, the employer did not plan to discharge claimant and claimant did not think that his job was in jeopardy.

(3) On August 21, 2017, the path of totality for a total solar eclipse passed over Madras, a small town. Approximately 100,000 people were in Madras that day to view the eclipse. The employer's hotel was extraordinarily busy. Claimant reported for work at the hotel shortly before 8:00 a.m. on August 21, 2017. Upon claimant's entry to the hotel, the employer's owner told claimant to change a burned out light bulb over the registration desk. Claimant responded that he was not yet on duty and planned to have some coffee, after which he would change the lightbulb. An angry back-and-forth between claimant and the owner ensued. Both claimant and the owner became very upset. Claimant ultimately

changed the lightbulb. At that time, claimant was concerned that the owner was angry enough to fire him.

(4) After changing the lightbulb, claimant approached the employer's general manager to discuss what had just occurred between him and the owner. Claimant was still upset as a result of the confrontation with the owner. As claimant tried to explain what had happened, the general manager commented that he did not like claimant's attitude. The general manager then told claimant to go home for the day. The general manager intended only that claimant would take a "breather" for one work day and expected claimant to return to work the next day. Transcript at 16. Claimant did not understand that the general manager's comment related only to taking a one day hiatus from work to collect himself. Claimant was concerned that after he might be discharged after he left the workplace on August 21, 2017 and management and the owner considered what actions to take, if any, in response to his confrontation with the owner. Claimant responded "okay" to the general manager's statement that he should go home and said nothing more. Transcript at 19. Claimant did not tell the general manager that he intended to quit work. Claimant then went to the maintenance room to retrieve some of his tools and left the workplace. It was not unusual for claimant to take some tools home with him when he left the workplace.

(5) After leaving the workplace on August 21, 2017, claimant drove down a hill and passed an off-site location where the assistant general manager was checking in guests to the hotel. Because claimant liked the assistant general manager and thought he probably was going to be discharged soon as a result of his argument with the owner, he stopped to speak briefly to speak with the assistant general manager, who continued checking in cars. Claimant commented to the assistant general manager, "It was nice working with you" and shook his hand. Transcript at 8. At that time, the assistant general manager knew nothing about claimant's interactions earlier that day with the owner and the general manager. Although claimant never told the assistant general manager that he was quitting work or intended to notify him that was he was, the assistant general manager assumed that claimant was expressing this intention to him. The general manager then commented to claimant, "I wish I had time to give you an exit interview." Transcript at 8. Claimant then drove off. The interaction between claimant and the assistant general manager was brief and took only between 30 and 60 seconds.

(6) On August 22, 2017, claimant reported for work before the scheduled start of his shift. Upon his arrival, claimant encountered the assistant general manager before clocking in. The assistant general manager stopped claimant and told claimant he needed to consult with the general manager before allowing claimant to clock in. The assistant general manager called the general manager, told the general manager his recollection of what claimant had stated to him the day before and then told the general manager that he was under the impression claimant had quit the day before. The general manager told the assistant general manager to deny claimant access to the workplace since he thought that claimant had quit work the day before. The assistant manager told claimant that he "was not working there [anymore]." Transcript at 9. Claimant told the assistant general manager that he wanted to retrieve some personal items from the workplace, including some keys on a keyring and a notepad. Claimant was allowed to do so.

(7) On August 22, 2017, the employer discharged claimant by refusing to allow him to report for work.

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

The employer contended that claimant quit work on August 21, 2017, while claimant contended that the employer discharged him on August 22, 2017. As a consequence, the first issue this case presents is the nature of claimant's work separation. 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) (August 3, 2011). 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).

It was not disputed that at no time on or after August 21, 2017 did claimant tell anyone that he was quitting or intended to quit. Transcript at 11, 12, 24, 25. The employer's contention that claimant quit on August 21, 2017 rested on one vague comment that claimant made to the assistant general manager on August 21, 2017, claimant's handshake with assistant general manager, claimant's failure to respond to the assistant general manager's comment about an exit interview and claimant's removal of some tools from the workplace that day. Transcript at 10-12, 34. Viewed in the context of claimant's concerns that the employer was going to fire him in the near future based on his argument with the owner earlier in the day on August 21, 2017, it is plausible that claimant's comments to and handshake with the assistant general manager were not intended to announce that he was resigning so much as to express goodwill toward the assistant general manager in the event he was discharged in the near future. That claimant's comment to the assistant general manager was at best ambiguous as regards an intention to resign is further strengthened by the fact that immediately preceding the making of that comment, claimant had met with the general manager, and it would have been expected that if claimant had decided to quit he would have expressed that intention to the general manager rather than to the general manager's assistant.

As well, it is plausible and cannot be ruled out that claimant's failure to respond to the assistant general manager's comment about conducting an exit interview of claimant was due to, among other things, to the press of the ongoing business of checking in guests off-site with which the assistant general manager was dealing with on August 21, 2017, and his inability to engage in any other than the most brief of conversations with claimant. In addition, while claimant took some tools home with him on August 21, 2017, that occurrence was not necessarily emblematic of claimant's removal of all personal items from the workplace, as would be expected if claimant intended to leave work after that day, since the employer did not dispute that claimant sometimes took tools home from work with him, the general manager did not know what tools claimant did or did not to take home with him on August 21, 2017. The assistant general manager also testified that as of August 22, 2017, claimant still had not removed some personal keys from the workplace, when it would be expected that, if claimant had quit work the previous day, he would not have left behind items as important as keys. Transcript at 10, 15-16. Finally, that claimant reported for work on August 22, 2017 is strong evidence that, however the employer interpreted his behavior and statements on August 21, 2017, he had not subjectively intended to quit work that day. While the assistant general manager might have thought that claimant had quit on August 21, 2017, the circumstances surrounding claimant's comments and actions to him on that day, indicate that they were, at best, were ambiguous and uncertain expressions of claimant's intentions.

On the undisputed evidence in this record, claimant's comments to and actions toward the assistant general manager on August 31, 2017 did not express his intention to quit work. The first clear, unequivocal and definite manifestation of an intention to sever the work relationship was when the

employer refused to allow claimant to report for work on August 22, 2017. Claimant's work separation was a discharge on August 22, 2017.

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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer presented no reasons for having discharged claimant. Although the employer refused to allow claimant to continue working for it on August 22, 2017 based on its belief that claimant had resigned on August 21, 2017, the balance of the evidence in this record does not suggest it is more likely than not that the employer's erroneous belief was attributable to a willful or wantonly negligent violation of the employer's standards by claimant. On this record, 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-97162 is affirmed.

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

**DATE of Service:** January 9, 2018

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.