

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1492**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit working for the employer without good cause (decision # 73445). Claimant filed a timely request for hearing. On November 29, 2017, ALJ Scott conducted a hearing, and on December 5, 2017 issued Hearing Decision 17-UI-98241, concluding the employer discharged claimant not for misconduct. On December 26, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Closets To Go, Inc. employed claimant from June 2014 until October 7, 2017 as an office manager and salesperson in the showroom.

(2) The owner expected claimant to refrain from leaving the showroom unattended when she left work. The owner also expected claimant to complete her shift and refrain from leaving work before the end of her shift.

(3) On October 6, 2017, at 1:30 p.m., claimant tried to call an onsite coworker to let her know she was leaving for lunch, but was unable to reach her. Claimant paged the owner who was in the employer's warehouse, and then left for lunch. The owner walked to showroom and saw that claimant had already left for lunch, leaving the showroom unattended before he arrived. When claimant returned at about 2:00 p.m., the owner was waiting in her office and yelled at claimant that he needed to talk to her before she left work that day. Claimant told the owner she had a doctor's appointment after work, and asked if they could talk "right now." Transcript at 7. The owner responded no, and that he wanted to talk to her before she left work, and left her office. Claimant perceived the owner's interaction with her as aggressive.

(4) Claimant was upset by the interaction, felt "shaky," confused and emotional, and began to cry. *Id.* Claimant felt she could not attend to customers in her emotional state and attempted to contact the director to report that she needed to leave work. When the director did not answer her telephone, claimant called the employer's director of professional services, who worked at the same location as claimant, and explained that she felt "attacked" by the owner, was too upset to work, and had to leave

work. Transcript at 8. Claimant did not say she was quitting work. Claimant left work to “gather herself” and “regroup.” Transcript at 65. Claimant was not able to return to work that day because she continued to cry, felt “distraught” and unable to focus, and developed a migraine. Transcript at 8. Claimant planned to return to work for her next scheduled shift on Monday, October 9, 2017.

(5) On October 7, 2017, the owner sent claimant a text message stating, “So just to be clear because you abandoned your job yesterday in the middle of a busy workday you are no longer employed at Closets To Go. I will have [the accountant] prepare your final paycheck and have it ready for you Monday afternoon. If you prefer I can mail it.” Claimant responded that the owner should mail the check to her.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant not for misconduct.

**Nature of the Work Separation.** The standard for characterizing a work separation as a discharge or a voluntary leaving is set out in OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time at the time of the work separation, the 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 was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Claimant left the workplace on October 6, 2017 because she was distraught, shaking and crying from her interaction with the owner and felt unable to interact with customers in that condition. Claimant told the employer’s director of professional services that she was leaving because she was too upset to work, and it is undisputed that claimant did not say she was quitting. Given claimant’s lack of express intent to sever the work relationship when she went home on October 6, the first unambiguous manifestation of an objective intention to end the work relationship was on October 7, when the employer sent claimant the text message stating claimant was “no longer employed” by the employer, and that it would have her final paycheck ready for her the next work day. Claimant had planned to return to work on October 9 but the employer’s text message stated she could not do so. Moreover, it is understandable that claimant did not contact the employer to clarify her intentions in leaving work on October 6 after she received the employer’s text message because the employer’s text was not, on its face, based on a misunderstanding on the employer’s part. The employer’s reference to claimant “abandoning her job” could have been interpreted by claimant as merely abandoning her shift rather quitting. Claimant’s work separation therefore was a discharge on October 7, 2017.

**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) (August 3, 2011) 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-

030-0038(3)(b). In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To the extent the employer discharged claimant for leaving work when she became upset during her shift on October 6, the employer did not discharge claimant for misconduct. The record shows that the employer expected claimant to refrain from leaving the showroom unattended. However, in claimant's distraught condition, she was not able to assist customers in the showroom. Moreover, claimant spoke with the employer's director of professional services, who worked onsite, before she left work. The employer did not show that notifying the director of professional services was inadequate notice that she had to leave work under the circumstances or that doing so probably violated the employer's expectations. Because the record does not show claimant knew or should have known that she probably was violating the employer's expectations by leaving work when she was too upset to work, her conduct in leaving work on that occasion was not willful or wantonly negligent. Claimant did not return to work later in her shift because she was still distraught, and because she was ill with a migraine. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). To the extent claimant was discharged because she did not return to work, the discharge was not for misconduct.

To the extent the employer discharged claimant because it mistakenly concluded she had quit work, the employer did not discharge claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

**DECISION:** Hearing Decision 17-UI-98241 is affirmed.

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

**DATE of Service:** February 2, 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.

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