

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0275**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 134906). Claimant filed a timely request for hearing. On March 13, 2018, ALJ M. Davis conducted a hearing, and on March 15, 2018 issued Hearing Decision 18-UI-105234, concluding the employer discharged claimant, not for misconduct. On March 19, 2018 the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Cosmetic Dental Specialties employed claimant as a delivery driver from June 21, 2017 to January 19, 2018.

(2) On January 19, 2018, claimant had to pick up a delivery from a dentist office in Sandy, Oregon. When claimant arrived at the Sandy location to pick up the delivery it was not at the designated area. While at the Sandy location, claimant left his supervisor voicemail messages and sent him pictures to notify him that he was unable to find the delivery. On two or three previous occasions, claimant had not been able to find the delivery at this same location.

(3) When claimant returned to the office on January 19, his supervisor was upset with him. Claimant's supervisor told him that they were going to have to let him go. Claimant was willing to continue to work for the employer.

(5) Claimant's supervisor reported to the employer that on January 19, 2018 claimant quit work by walking out of the office before the end of his shift.

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

At hearing, the employer argued that claimant voluntarily left work, but claimant argued that he was discharged. 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a).

At hearing, claimant testified that when he returned to the office on the January 19, 2018 from the Sandy, Oregon location, the supervisor yelled at him and told him they were going to have to let him go. Audio Record at 8:15. The employer’s owner testified that the supervisor reported to her that claimant walked out on January 19, without completing his route. Audio Record at 15:30 to 17:00. However, the owner did not witness the exchange between claimant and the supervisor, and did not see claimant “walk out.” Audio Record at 15:40. Absent a showing that claimant was not a credible witness, his testimony based on first-hand knowledge has more probative value than the owner’s hearsay evidence. We therefore found facts in accordance with the claimant’s testimony, which shows that, as of January 19, 2018, claimant was willing to continue to work for the employer, but the employer did not allow him to do so. The work separation therefore is a discharge. We next address whether claimant is disqualified from receiving benefits as a result of his 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for his failure to pick up a delivery in Sandy, Oregon, on January 19, 2018. Claimant testified that on January 19, 2018, and on two or three other occasions the delivery at the Sandy location had not been in the designated area and that on all of those occasions he contacted his supervisor. Although claimant failed to pick up the delivery on January 19, 2018, the record does not show that he willfully failed to do so, or that he consciously engaged in conduct that he knew or should have known would probably result in his failure to do so. Absent such a showing, the employer failed to establish that claimant’s discharge was for misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 18-UI-104591 is affirmed.

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

**DATE of Service:** April 10, 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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