

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0396**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 23, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 145618). The employer filed a timely request for hearing. On April 9, 2018, ALJ Schmidt conducted a hearing, and on April 11, 2018 issued Order No. 18-UI-107086, concluding claimant voluntarily left work without good cause. On April 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** The ALJ wrote in Order No. 18-UI-107086 that “Exhibit 1 was admitted into evidence.” However, the documents that were marked as Exhibit 1 do not include all the documents the ALJ described. We have reviewed the record and identified the entirety of claimant’s submissions to OAH, remarked them as EAB Exhibit 1, and enclosed them with the copies of this decision mailed to the parties. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

**FINDINGS OF FACT:** (1) Employer’s Resource employed claimant as a maintenance worker from June 20, 2017 to January 15, 2018.

(2) In the mid-1990s, claimant underwent treatment for emotional trauma. Prior to claimant’s employment he was also diagnosed with service-connected post-traumatic stress disorder (PTSD). Claimant’s conditions and symptoms were manageable; however, when confronted with an emotionally charged situation claimant had difficulty making decisions.

(3) On January 12, 2018, claimant learned that his supervisor had sent text messages to a contractor in which she wrote that claimant “is stalking me.”<sup>1</sup> She wrote, “I want u 2 keep the door locked when u r here. Starting 2 day. Please.” and that she “can’t stand him,” he “is a stalker and creep,” that she had “no

<sup>1</sup> Unless otherwise noted, all citations in the findings of fact are to EAB Exhibit 1.

where 2 turn. I am trapped,” “[h]e is watching every move I make,” and is a “[c]reep stalking me.” Claimant immediately suffered anxiety and had a panic attack because of the accusations.

(4) Claimant quickly sent text messages to his regional manager about the situation. He wrote, “im [sic] beign [sic] sexually profilled [sic] and harrassed [sic] by my supervisor” and “I will not be there monday [sic] morning untill [sic] we clear this up.”

(5) Thereafter, claimant made approximately 14 calls to the employer’s offices and sent many text messages to the regional manager. On January 13, 2018, claimant sent a text message that stated, “Last request before we talk again i need janets [sic] phone number.” On January 14, 2018, claimant sent a message that stated, “Last time I’m going to ask....” The regional manager told claimant to report to work on Monday.

(6) On January 15, 2018, claimant did not report to work as scheduled. Claimant sent a text message stating that he had called and left another message, and “I’m not refusing to work, I’m refusing to be put in a one on one situation with my female supervisor.” Claimant felt vulnerable and unsafe, and lacked the ability to do anything about it.

(7) On January 16, 2018, claimant did not report to work as scheduled; however the employer would not have allowed claimant to work had he reported to work that day. Transcript at 7. Claimant sent text messages asking for the regional manager’s supervisor’s number, and wrote, “i need to know that I’m calling the right phone number and that some one other than you knows whats [sic] going on....thank you.” The regional manager replied, “Are you resigning? If so, please send me a letter of resignation.” Claimant replied, “no I’m not resigning for the tenth time.”

(8) On January 16, 2018, the regional manager sent claimant a letter describing claimant’s behavior since January 12<sup>th</sup> as “increasingly erratic.” The regional manager recaptured communications she and claimant had had since then, and the status of the regional manager’s investigation, and wrote that the information claimant had provided “did not excuse you from work,” that she “do note see any indication of harassment either sexual or otherwise,” and that claimant needed to provide additional information about the supervisor’s text messages and his witness or she “can only conclude that you do not have any of the items you claim to have.” The regional manager also wrote, “your failure to come to work has not been approved, and until I see something to verify your claims are true, your continued failure to be at work will constitute your abandonment of your job duties and result in termination.”

(9) On January 17, 2018, claimant sent additional text messages, at least one of which included a request for the phone number for human resources. Around that time he sent additional messages, “Just called asked for clarification on employment status, will you answer that,” “Thank you sending a letter stating your position, 8 days after my initial complaint its most helpful. [] asked how i would like to address my final check...send it in the mail if I’m terminated and i will return my keys.” On January 18, 2018, claimant wrote, “I will mail the keys back if my employment is terminated.”

(10) On January 19, 2018, claimant sought medical treatment and was told that his panic attack on January 12<sup>th</sup> was PTSD-related, and was prescribed medications for trauma, depression and anxiety.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. We conclude that the employer discharged claimant, but 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 on January 16, 2018, because although he “stated that it was never his intention to quit,” “[b]ecause claimant never came back to work, did not make efforts to seek accommodations for his concern and continue working, and on January 16, 2018 told Employer to send its communications with his check rather than in a way that would facilitate a discussion, he appears to have been expressing an intent to sever the employment relationship that day.” Order No. 18-UI-107086 at 3. We disagree.

As a preliminary matter, we have reviewed the transcript of testimony and EAB Exhibit 1 and cannot locate evidence that claimant told the employer to “send its communications with his check.” The employer’s witness testified that she had asked for claimant’s email address, “And he goes: ‘No. It was my check.’ And then it – I asked him if he had resigned . . . His answer is: ‘No.’ I think my message got through to [] finally. Thank you.” Transcript at 28-29. The employer’s witness then testified, “I have no clue what that’s about.” Transcript at 29. In other words, immediately after making reference to a “check” claimant clarified to the employer that he had not quit and that he was continuing to communicate with people about his situation, and the employer had “no clue” what claimant’s text message meant. The evidence therefore fails to show that claimant refused to communicate with the employer, nor does it show that claimant asked for his check, much less his final paycheck, or that he intended to sever the employment relationship through his January 16<sup>th</sup> text messages.

The evidence shows that claimant did not return to work after January 12<sup>th</sup> due to his concerns about working with a female supervisor who had accused him of stalking her and being a “creep” to a contractor, and instructed the contractor to keep the door locked against him. Between January 12<sup>th</sup> and January 18<sup>th</sup>, however, claimant continually expressed a willingness to keep working and tried to resolve his concerns through repeated calls and text messages to the employer; claimant offered to return his keys only if the employer had terminated him. The record therefore fails to show that claimant voluntarily left his employment on January 16<sup>th</sup> or any other relevant time.

The evidence also shows, however, that the employer would not have let claimant continue working for it after January 16<sup>th</sup>. Although the employer’s letter of January 16<sup>th</sup> implied that continuing work remained available for claimant, the employer’s witness testified, “Would we have considered letting him come back to work on the 15<sup>th</sup>? Yes. [] Anything further than that, no considering the text messages and the things he, um, said in them.” Transcript at 7. The employer’s witness’s testimony therefore established that, while claimant was at all relevant times willing to work for the employer for an additional period of time, the employer would not allow him to do so as of January 16<sup>th</sup>. The work separation was, therefore, a discharge, effective January 16, 2018.

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. 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant on January 16, 2018, in part because he “abandoned his job” by missing two days of work. Transcript at 5. While there is no dispute that claimant missed two days of work on January 15<sup>th</sup> and January 16<sup>th</sup>, when he was discharged, he did not abandon his job. He was at all relevant times in contact with his supervisor, notifying her both that he would not be at work and of the reasons he was missing work, and repeatedly stating that he was not quitting his job.

To the extent claimant’s absences might still have violated the employer’s expectation that he report to work, the employer’s expectation was not reasonable under the circumstances described. Claimant had been accused of potentially criminal behavior by a coworker, told the employer his refusal to work was to avoid being “put in a one on one situation with” his accuser, and was instructed nonetheless to report to a work situation that would likely have put claimant at significant risk of further accusations. The employer’s witness testified that “we definitely could have found someone” “that could have been there – been on property” so claimant did not have to be alone with his accuser. Transcript at 33. However, the employer was fully aware of claimant’s concerns and did not take steps to “find someone” to be on the property with claimant. Under those circumstances, it was not reasonable to expect claimant to ask for more assistance from the employer, as the assistance he had already requested was not forthcoming, he had been told to stop texting the regional manager, and he had been told to report to work. It was also not reasonable to expect claimant to report to the workplace and put himself at risk.

The employer also discharged claimant, in part, because of the volume of his text messages between January 12, 2018 and January 16, 2018 and the things he said in them. The employer’s witness described the text messages as “erratic,” had told claimant to stop contacting her “all weekend long . . . when our corporate office was closed so I couldn’t talk to our H.R. person. And the manager was off for the weekend.” Transcript at 7, 9. While the witness objected to claimant having issued an “ultimatum” in one text message and stopped replying to his messages because they “don’t make any sense to me,” the overall tone of the messages was respectful, and included requests for information and phone numbers and greetings such as “Goodnight” and “Have a good weekend.” *See* Transcript at 8, 31, 32. The volume of messages, although futile given that it was the weekend and the regional manager was unable to investigate claimant’s complaint, were not unreasonable given claimant’s fear of reporting to work in a one on one situation with his accuser and the regional manager’s insistence that he do so or face possible discharge from his employment. Given the circumstance, the urgency and repeated nature of claimant’s text messages and calls to the employer were not unreasonable. The volume and content of claimant’s text messages does not appear to have been willful or wantonly negligent misconduct.

Finally, to the extent the employer discharged claimant because he ignored the regional manager's instruction to stop texting her over the weekend, the discharge was not for misconduct. There is no dispute that the manager instructed claimant to stop texting, nor is there a dispute that claimant continued to send text messages. Given claimant's mental state at the time, however, his failure to follow that instruction does not appear to have been the result of willful or wantonly negligent conduct on his part. Claimant had a long-standing mental health condition that caused him to have difficulty when confronted with emotionally charged situations, he had service-related PTSD, and, when he saw the text message accusing him of stalking it triggered a panic attack and episode of PTSD that required him to undergo medical treatment and receive medications for trauma, depression and anxiety a week after the episode. Given that claimant's episode was triggered January 12<sup>th</sup> and was still acute enough to require medication and treatment a week thereafter, it is more likely than not that between January 12<sup>th</sup> and January 16<sup>th</sup>, at the time he ignored the regional manager's instruction to stop sending her text messages, claimant was experiencing panic, anxiety, depression, impaired judgment and difficulty making decisions, all of which likely impacted his behavior during the relevant period. Given those circumstances, the record fails to establish that claimant willfully ignored the manager. It is more likely than not that claimant was not fully conscious of his conduct, was not aware of how it was being perceived, and/or was not cognizant of what the consequences of his conduct were at the time. His conduct therefore was not willful or wantonly negligent, and was not disqualifying misconduct.

For the reasons explained, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 18-UI-107086 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service:** May 23, 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.

---

<sup>2</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.