

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0400**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80046). Claimant filed a timely request for hearing. On April 16, 2018, ALJ Scott conducted a hearing, at which the employer failed to appear, and issued Order No. 18-UI-107474, affirming the Department's decision. On April 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) McDonald & Wetle, Inc. employed claimant as a roofing apprentice from February 2016 to October 14, 2017. Claimant was a member of a closed union.

(2) Claimant developed concerns that coworkers on his assigned crew used alcohol and drugs at lunch and were impaired when they returned to work, which was unsafe. Claimant did not report his coworkers to the employer or request reassignment to a different crew because he was an apprentice and did not want to be a whistleblower.

(3) By October 14, 2017, claimant had decided to seek reassignment to a different employer through his union. Before claimant had taken any steps toward that end, claimant's supervisor sent claimant a text message telling him to go to the closed union and find a different assignment. Claimant did so. The supervisor did not tell claimant why he had decided to end claimant's assignment with the employer.

**CONCLUSIONS AND REASONS:**

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 found as fact that claimant voluntarily left his job because of his coworkers' drug and alcohol abuse at work.<sup>1</sup> However, the ALJ's findings of fact omitted reference to the fact that although claimant testified that he was "going to" ask that the union reassign him, before he could do so his supervisor sent him a text message telling him, in essence, not to return to his assignment with the employer.<sup>2</sup> An individual is only considered to have quit a job if the individual "could have continued to work for the same employer for an additional period of time." In this case, claimant could not have continued to work for the employer because the employer had decided to end the employment assignment before claimant quit. At all relevant times, the employer would not allow claimant to continue working, making the work separation 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.

The employer discharged claimant, but did not explain to him the reasons for the discharge, and did not appear at the hearing to establish whether or not the discharge was for misconduct. 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). On this record, it does not appear that claimant's discharge was the result of willful or wantonly negligent behavior attributable to him as misconduct. Claimant's work separation therefore is not disqualifying.

**DECISION:** Order No. 18-UI-107474 is set aside, as outlined above.<sup>3</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.

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<sup>1</sup> Order No. 18-UI-107474 at 1.

<sup>2</sup> Audio recording at ~ 10:45.

<sup>3</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.