

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1410

*Modified
No Disqualification*

PROCEDURAL HISTORY: On July 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 80138). The employer filed a timely request for hearing. On August 1, 2014, ALJ Vincent conducted a hearing, and on August 11, 2014 issued Hearing Decision 14-UI-23136, affirming the Department's decision. On August 27, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) On December 19, 2013, claimant filed an initial claim for benefits. The base year for that claim is July 1, 2012 through June 30, 2013. Claimant worked for one employer in the base year with total base year wages of \$1,000 or more, and equal to or in excess of one and one-half times the wages in the highest quarter of the base year.¹

(2) Claimant worked for Dabella Exteriors LLC (the employer) from March 31 through July 3, 2014. Claimant worked for the employer as a direct seller, soliciting contracts for home improvements, including roofing and windows, of private homes. His remuneration consisted of commissions.

¹ We take notice of these facts, which are contained in Employment Department records. 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. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain in the record.

(3) In or about June 2014, measured the pitch of a potential customer's roof incorrectly, which caused him to miscalculate the roof's square footage. Claimant's error caused the employer to agree to replace the customer's roof for approximately \$5,000 less than it would cost the employer.

(4) When the employer discovered claimant's error, its field manager told claimant to contact the customer and try to convince him to accept less expensive roofing materials, or pay an additional \$5,000 for the new roof. Claimant contacted the customer, explained his error, and asked if he could meet with the customer to "go over some options." Transcript at 30. The customer became angry and threatened to complain to the Better Business Bureau.

(5) The employer discharged claimant for causing the employer to agree to replace the customer's roof for approximately \$5,000 less than it would cost the employer, and for allegedly contacting the customer after being told not to do so.

CONCLUSIONS AND REASONS: Claimant did not work for the employer in subject employment. However, claimant qualifies for benefits under ORS 657.150(2)(a)(A). The employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving benefits under ORS 657.176(2).

To qualify for benefits an individual must have worked in subject employment in the base year with total base year wages of \$1,000 or more and have total base year wages equal to or in excess of one and one-half times the wages in the highest quarter of the base year. ORS 657.150(2)(a)(A). Subject employment does not include service performed by individuals soliciting contracts for home improvements including roofing, siding and alterations of private homes to the extent that the remuneration consists of commissions, or a share of the profit realized on each contract. ORS 657.087(1).

An individual who qualifies for benefits under ORS 657.150(2)(a)(A) is subject to disqualification as a result of a work separation if the individual has been discharged for misconduct connected to work. ORS 657.176(2). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a) (August 3, 2011). An employment relationship exists even in circumstances where the work performed is not subject employment. *Id.* 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In written argument, as at hearing, the employer asserted that claimant is disqualified from the receipt of benefits because, under ORS 657.087(1), he did not work for the employer in subject employment. We agree that under ORS 657.087(1), claimant did not work for the employer in subject employment. However, claimant did not work for the employer during his base year, and Department records show he

worked in subject employment during his base year with total base year wages of \$1,000 or more, and equal to or in excess of one and one-half times the wages in the highest quarter of the base year. Claimant therefore qualifies for benefits under ORS 657.150(2)(a)(A). The remaining issue is whether claimant is disqualified from receiving benefits under ORS 657.176(2) based on his “work” separation from the employer, as the term “work” is defined under OAR 471-030-0038(1)(a).

The employer discharged claimant, in part, for causing the employer to agree to replace a customer’s roof for approximately \$5,000 less than it would cost the employer,. However, the employer failed to show claimant consciously measured the pitch of the customer’s roof incorrectly, or consciously engaged in other conduct that he knew or should have known would probably cause him to miscalculate the roof’s square footage. Absent such a showing, the employer failed to establish misconduct.

The employer also discharged claimant for allegedly contacting the customer after being told not to do so. At hearing, the employer’s president testified that its field manager told claimant not to contact the customer. Transcript at 17. However, the field manager did not testify at the hearing, and claimant testified that the field manager told him to contact the customer. Transcript at 29. Claimant’s first-hand testimony outweighs the employer’s hearsay evidence to the contrary. Absent a preponderance of evidence showing claimant contacted the customer after being instructed not to do so, the employer again failed to establish misconduct.

In sum, claimant did not work for the employer in subject employment. However, claimant qualifies for benefits under ORS 657.150(2)(a)(A). The employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving benefits under ORS 657.176((2).

DECISION: Hearing Decision 14-UI-23136 is modified, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: October 2, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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