

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1535**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114611). Claimant filed a timely request for hearing. On December 15 and 18, 2015, ALJ Seideman conducted a hearing, and on December 21, 2015 issued Hearing Decision 15-UI-49806, affirming the Department's decision. On December 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Special Mobility Services, Inc. employed claimant from March 5, 2014 to October 19, 2015 as a bus driver.

(2) The employer expected claimant to refrain from engaging in insubordinate or other disrespectful conduct at work. Claimant understood the employer's expectations.

(3) October 15, 2015, claimant became upset when his supervisor, the driver supervisor, yelled at claimant to give him some paperwork claimant was holding, and then grabbed the paperwork from claimant's hands. Claimant considered his supervisor's actions to be aggressive and hostile. Exhibit 7 at 4; Exhibit 12. Claimant asked his supervisor's superior, the operations manager, if he would meet with him to discuss the incident.

(4) On October 16, 2015, claimant met with his supervisor and the operations manager. Claimant's supervisor told claimant he understood claimant wanted to discuss the October 15 incident, but that he would not do so until they first discussed an "action plan" to address some of claimant's behavior at work. Transcript at 9. The supervisor told claimant he would discuss the action plan with claimant on October 20, 2015, and that, until that time, claimant was to refrain from going into his and the operations manager's offices "for any reason." Transcript at 10. The supervisor told claimant to take any problems, safety issues, or requests for time off to the operations coordinator, or to leave a note for her if she was not available so claimant's supervisor or the operations manager could address it. Claimant was

upset that the supervisor had begun a disciplinary action and had refused to discuss the October 15 incident on October 16.

(5) Claimant contacted OSHA (Occupational Safety and Health Administration) and BOLI (Bureau of Labor and Industries) about his supervisor's conduct on October 15 and 16. BOLI recommended to claimant that he avoid direct contact with his supervisor without a witness present.

(6) Claimant understood from the employer's handbook and the employer's complaint procedure that he was permitted to consult with higher management if he had a workplace issue he could not resolve through his direct supervisor. *See Exhibit 10 at 4, 7.* The employer's program manager supervised both claimant's direct supervisor and the operations manager. After he finished his shift the evening of October 19, claimant saw the program manager in his office, which he shared with claimant's supervisor, and asked him if they could discuss a workplace matter. The program manager agreed to speak with claimant. Claimant complained about his supervisor's behavior toward him on October 15 and 16 and requested information that he needed for OSHA and BOLI complaints that he had filed. Claimant also complained that the employer had not repaired a previously reported cracked windshield he considered to be unsafe. Claimant thought the matter urgent because he would be off work the next two days, and the bus might be assigned to another driver.

(7) Claimant's supervisor entered the office area and saw claimant speaking with the program manager. The supervisor considered claimant's act of speaking with the program manager to be a violation of his instructions to claimant during their meeting earlier that day that claimant refrain from going into the supervisor's and the operations manager's offices, and that he direct any problems to the operations coordinator.

(8) The supervisor waited until claimant finished speaking with the program manager, and stood near the office doorway. As claimant walked out of the office, the supervisor asked claimant what he was doing. Claimant responded that he was speaking with the program manager. The supervisor told claimant he was getting a verbal warning. Claimant continued to walk down a hallway with an exit to the parking lot at the end. The supervisor followed claimant down the hallway and repeatedly insisted that claimant speak with him. Claimant considered the supervisor's demeanor to be hostile and aggressive. Claimant told the supervisor that he had filed a complaint with BOLI and OSHA, and that he refused to speak with the supervisor at that time. The supervisor told claimant he was going to issue to him a written warning. The supervisor did not say what conduct led to the verbal or written warnings, but told claimant he would discharge claimant if he left the building. As claimant left the building, his supervisor told him he was discharged. Claimant returned shortly thereafter and spoke with the program manager about what had just occurred.

(9) On October 19, 2015, the supervisor discharged claimant for allegedly insubordinate behavior because claimant complained to the program manager, and refused to discuss that conversation with his supervisor.

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

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 Hearing Decision 15-UI-49806, the ALJ found in accordance with the testimony of claimant's direct supervisor that he had given claimant multiple warnings for his attitude, that claimant's coworkers complained repeatedly about him, and that claimant essentially ignored him as the supervisor repeatedly and calmly warned claimant that he needed to speak with him during the final incident.<sup>1</sup> Based on those findings, the ALJ concluded that claimant's conduct during the final incident willful or wantonly negligent, and was not an isolated instance of poor judgment because it was "one of many" incidents of misconduct "over a short period of time."<sup>2</sup>

We disagree with the ALJ and conclude the employer failed to meet its burden to establish claimant violated the employer's expectations against insubordination. To the extent the employer discharged claimant for insubordination because he went into a manager's office and complained to the program manager instead of the program coordinator, we agree that claimant violated the supervisor's instructions by doing so. Claimant knew he had to go into a manager's office to speak with the program manager, and that his supervisor expected him to direct all his complaints to the program coordinator. However, the employer failed to show that claimant's act of meeting with the program manager exceeded a good faith error. The record shows claimant held an honest belief that meeting with his supervisor's superior to complain about him would be condoned by the employer because the employer's handbook permitted employees to complain to higher levels of management if a direct supervisor or manager did not resolve a problem, and because the program manager himself had given claimant permission to speak with him. Although claimant was incorrect when he assumed that the employer would not object to his conduct, he did not act with a lack of honesty. Therefore, his conduct did not exceed a good faith error. *Goin v. Employment Dept.*, 203 Or App 758 (2006). A good faith error is not misconduct for purposes of OAR 4710030-0038.

The employer also discharged claimant, in part, because he refused to comply with his supervisor's requests that he discuss the substance of his meeting with the program manager. The supervisor considered claimant's conduct as insubordinate. However, the record does not show claimant yelled, used foul language, or was argumentative or threatening toward his supervisor. The preponderance of the evidence shows claimant behaved in an objectively reasonable manner by telling the supervisor he had filed complaints about him, and would discuss matters further in that context. Moreover, the

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<sup>1</sup> Hearing Decision 15-UI-49806 at 2 to 3.

<sup>2</sup> *Id.* at 5.

supervisor was pursuing claimant down a hallway and behaving in a manner claimant construed as hostile and threatening. Under the circumstances, claimant was not acting contrary to the employer's wishes by refusing to discuss the complaint or allowing the situation to escalate. The employer failed to show by a preponderance of the evidence that claimant engaged in behavior that was insubordinate or that otherwise was a willful or wantonly negligent violation of the standards of behavior which the employer had the right to expect of claimant. Thus, the record fails to show the employer discharged claimant for misconduct.

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

**DECISION:** Hearing Decision 15-UI-49806 is set aside, as outlined above.<sup>3</sup>

Susan Rossiter and J. S. Cromwell

**DATE of Service: January 26, 2016**

**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>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.