

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0293

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 105146). The employer filed a timely request for hearing. On February 18, 2016, ALJ Triana conducted a hearing, and on February 22, 2016 issued Hearing Decision 16-UI-53437, affirming the Department's decision. On March 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Asplundh Tree Expert Co. employed claimant, last as a journeyman tree trimmer, from October 4, 1999 to December 29, 2015.

(2) On December 23, 2015, claimant was working on a crew assigned to remove an uprooted tree. The tree had not fallen to the ground, and was suspended against another tree. Part of the removal plan involved separating the tree top from the rest of the tree then lowering the tree top to the ground. Claimant secured the tree top so it would not fall when cut. The general foreman made the cut, and then yelled to claimant and the other employees on the ground not to lower the top of the tree until the general foreman was on the ground.

(3) Claimant did not hear the general foreman's instruction and began lowering the tree, causing a branch to break and fall to the ground. Claimant and the other employees had to dodge the falling branch to avoid possible injury. When claimant moved, the tree top attached to the rope in claimant's hands also moved, he lost his grip on the rope, "and the rope just took off." Transcript at 28. The tree top suddenly fell to the ground; had it fallen on claimant or another employee, it could have caused severe injury or death.

(4) After the December 23rd incident, the employer reviewed claimant's safety record and, on December 29, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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.

Although the employer had concerns about claimant's safety record as a whole, the employer did not decide to discharge claimant until after the December 23rd incident. Therefore, that incident was the proximate cause of claimant's discharge, and the initial focus of the misconduct analysis.

On December 23, claimant created an unsafe situation for himself and his coworkers by failing to follow the general foreman's instructions with respect to lowering the top of the tree and losing control of the rope from which the tree top was suspended. There is no dispute in the record that, had the branch or tree top fallen in a different way, or had anyone not moved quickly enough, claimant's conduct might have resulted in significant injury or even death to himself and a coworker, nor is there any dispute that the employer had the right to make a business decision about continuing claimant's employment based on that consideration. However, the severity of the situation is not the sole factor in determining whether claimant's conduct was disqualifying misconduct for purposes of unemployment insurance. The record must also show that claimant acted with intent or with conscious indifference to the consequences of his conduct. Claimant testified about the events in the final incident:

I went to control the rope . . . I mean, my hands were wet and everything . . . And I was holding the rope. * * * And a branch broke out about 120 feet up in the air. * * * And I had the rope still and looked up and noticed that this branch was coming down to the ground. * * * So I moved off to the side so the branch wouldn't hit me. When I did that, I turned – I turned around and the – the tree top came down a little bit more. Well, with my hands being wet, I mean it was just – it happened so quick that I thought another branch was coming off and the rope just took off. The tree came down. There's no – no – no way that I'd been able to grab it. Nobody would have been able to grab it because it happened so fast. * * * The rope was real slippery.

Transcript at 28-29. Claimant further testified that did not hear any instructions to wait to lower the tree top to the ground and believed he was doing what he was supposed to do. Transcript at 31. On these facts, it does not appear that claimant disobeyed or violated any established plans or practices as far as deciding when to lower the tree top to the ground on the day in question. Nor does it appear that

claimant's conduct was patently unsafe. It appears, rather, that claimant began lowering the tree top to the ground when he did as the result of a missed communication, and, ultimately, the tree top fell because claimant was unable to control a slippery rope with wet hands. Neither of those events is attributable to claimant as misconduct.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-53437 is affirmed.

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

DATE of Service: April 5, 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. 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.