

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0017**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 135437). On August 24, 2016, decision # 135437 became final, without a request for hearing having been filed. On September 20, 2016, claimant filed an untimely request for hearing. On September 23, 2016, ALJ Kangas issued Hearing Decision 16-UI-67936, dismissing claimant's hearing request as untimely, subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days. Claimant timely responded to the appellant questionnaire. By letter dated October 6, 2016, the Office of Administrative Hearings cancelled Hearing Decision 16-UI-67936. On October 20, 2016, ALJ Triana conducted a hearing, and on November 8, 2016, issued Hearing Decision 16-UI-70785, concluding that claimant failed to show good cause for filing an untimely hearing request. On November 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

On November 28, 2016, EAB issued Appeals Board Decision 2016-EAB-1305, allowing claimant's late request for hearing and remanding the matter to the Office of Administrative Hearings for a hearing on the merits of claimant's hearing request. On December 13, 2016, ALJ Triana conducted a hearing, and on December 23, 2016, issued Hearing Decision 16-UI-73582, concluding that the employer discharged claimant for misconduct. On December 30, 2016, claimant filed an application for review with EAB.

Claimant failed to certify that he provided a copy of his 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.<sup>1</sup>

**FINDINGS OF FACT:** (1) From August 11, 2003 until September 30, 2015, the Lane Transit District employed claimant as a bus operator.

(2) The employer's policies concerning violence and harassment in the workplace prohibited employees from engaging in violent or threatening behavior. Transcript at 34. Claimant knew about and understood these employer policies because he received copies of them when he was hired, and had additional training on the policies in 2005, 2006, 2009 and 2013.

(3) On October 7, 2014, the employer conducted a training session for claimant and other bus operators. When the trainer made a "hard stop," *i.e.*, braked abruptly and forcefully, to demonstrate the problems caused by such stops, claimant fell and hit the bus fare box. Claimant suffered bruised ribs and a broken finger as a result of this accident, and was unable to work for a few weeks.

(4) On November 3, 2014, claimant was released to return to work in a light duty assignment. In March 2015, claimant was released to work as a bus driver for two hours of his eight hour shift. The amount of time claimant was released to work as a bus operator during his eight hour shift was gradually increased until June 1, 2015, when he was released to work as a bus driver for all eight hours of his shift. While performing his light duty work, claimant often complained to his supervisor that he was suffering severe headaches. The headaches did not incapacitate claimant or cause him to behave oddly, however. Transcript at 30-31.

(5) Claimant filed a worker's compensation claim regarding his injury. The claim was settled sometime in 2016.

(6) Sometime after the accident, claimant began experiencing memory lapses, light-headedness, and disorientation. In addition, he began to have episodes he characterized as "brain seizures" that disrupted his sleep. In August 2015, he had brief episode, lasting approximately one minute, in which he was "talking nonsense" and threatening his wife and family. Transcript at 58. His wife was disturbed by this episode, and called the employer to report claimant's strange behavior. *Id.*

(7) Also in August 2015, claimant consulted a doctor about his behavior. The doctor told claimant that the symptoms he was experiencing resulted from a concussion he suffered in the October 2014 accident. The doctor referred claimant to a specialist, but did not restrict claimant from driving a bus. Transcript at 43.

(8) On September 3, 2015, claimant reported to work, despite having a severe headache. During his shift, claimant parked his bus at a transit station, located in the median of Franklin Boulevard, one of the main thoroughfares in Eugene, Oregon. Claimant then contacted the employer's dispatcher and said he

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<sup>1</sup> The ALJ admitted Exhibit 4, which included a video recording submitted by the employer, into evidence at the hearing. EAB was unable to view the video, however, the inability to view the video did not materially affect this decision because the ALJ also admitted an audio recording of the incident into evidence, and we were able to review it.

was a suicide bomber who was going to blow up the bus. Exhibit 4. The employer's managers arrived on the scene, evacuated all passengers from the bus, and called the police. Claimant was subsequently arrested and removed from the bus. Part of Franklin Boulevard was shut down, and the employer's administration building was evacuated, while bomb squads checked for explosive devices. No such devices were found.

(9) Claimant does not remember making any threats on September 3. His only memories of that day are of the "excruciating headache" he had when he reported for work and "sitting in [a] jail cell" after his arrest. Transcript at 37 and 39.

(10) After conducting an investigation into the incident, the employer discharged claimant on September 30, 2015. The employer discharged claimant because of the threats he made on September 3.

(11) Claimant was eventually convicted of interfering with public transportation, a Class A misdemeanor under ORS 166.116.

(12) After his discharge, claimant consulted two doctors. Both found that he suffered from post-concussion syndrome. One doctor concluded that there may be a psychological explanation for claimant's unusual behavior because depression and anxiety can follow a concussion. Exhibit 2, 11/24/15 letter. The other doctor found that claimant's post-concussion syndrome best explained his memory loss and unusual behavior. Exhibit 2, 11/15/15 letter.

**CONCLUSION AND REASONS:** We disagree with the ALJ and conclude that 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 connected with work. 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.

The employer discharged claimant for threatening to blow up the bus he was driving on September 3, 2015. Claimant knew that the employer's policies prohibited him from making violent threats while on the job. Claimant had no memory of making these threats, more likely than not due to a mental or physical condition caused by a concussion. Because claimant was not conscious of his September 3 conduct, it did not constitute misconduct.

In Hearing Decision 16-UI-73582, the ALJ agreed that "claimant was not conscious of the threats he made" on September 3, 2015. Hearing Decision 16-UI-73582 at 4. The ALJ found, however, that prior to September 3, 2015, claimant was aware of medical issues that caused him to make "significant threats" against his family members. The ALJ then concluded that claimant's intentional failure to

inform the employer of the health issues that caused his September 3 conduct was wantonly negligent. We disagree.

The record does not support a conclusion that prior to September 3, claimant knew, or should have known, that he was suffering from health issues that would cause him to become violent while performing his job duties. Although claimant had one brief episode where he spoke unintelligibly to his wife and threatened her, he had consulted a doctor about this incident and other problems he was experiencing. The doctor never restricted claimant from driving a bus. Although claimant had a severe headache when he reported for work on September 3, he had suffered these headaches before and they had neither incapacitated him nor caused him to behave oddly. In a discharge case, the employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, the employer failed to meet its burden to demonstrate that claimant engaged in wantonly negligent behavior by deliberately refusing to inform the employer about health problems he knew or should have known would cause him to threaten violence.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-73582 is set aside, as outlined above.

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

**DATE of Service: January 30, 2017**

**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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