

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0235

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103644). Claimant filed a timely request for hearing. On February 22, 2017, ALJ Lohr conducted a hearing, and on February 23, 2017 issued Hearing Decision 17-UI-77593, affirming the Department's decision. On February 27, 2017, claimant filed a timely application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clear Signal Inc. employed claimant as a satellite television dish antenna technician from September 2006 to December 7, 2016.

(2) In November 2016, claimant informed one of the employer's client's customers that there was no place to move the customer's dish antenna to improve reception. After claimant left, the customer requested that another technician come out to verify that information. The employer's office manager contacted claimant, who asked the office manager to send another technician because the customer had become agitated. The office manager refused to send another technician. Claimant attempted to speak with the employer's general manager, but he was unavailable. The office manager ordered claimant to return and speak with the customer. When claimant returned, the customer was adamant about wanting to move the antenna, and when claimant explained why doing so would not improve reception, the customer became increasingly agitated.

(3) The customer complained to the employer's client that he was "uncomfortable" with claimant's behavior and "felt threatened" by his "demeanor," and that claimant was a "little aggressive" and "just seemed agitated." Transcript at 8-11. The employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 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. 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 17-UI-77593, the ALJ found that the employer discharged claimant because, in November 2016, one of its client's customers complained to the client that claimant had "acted aggressively" toward the customer and made "threatening gestures" that made the customer "feel unsafe."¹ According to the ALJ, claimant testified that he was "dealing with a difficult customer who continued to argue with him" about where to move a satellite television dish antenna.² However, the ALJ concluded that claimant was at least was at least wantonly negligent because he knew or should have known arguing with the customer was not acceptable, and that the employer established that claimant consciously engaged in conduct he knew or should have known violated the employer's reasonable standards of behavior.³

We agree with the ALJ that the employer discharged claimant because the customer complained to the employer's client. However, the employer's evidence consisted only of vague double hearsay information that the customer was "uncomfortable" with claimant's behavior and "felt threatened" by his "demeanor," and that claimant was a "little aggressive" and "just seemed agitated." Transcript at 8-11. Claimant testified that he merely informed the customer that there was no place to move the antenna to improve reception, and that after claimant left, the customer requested that another technician come out to verify that. Transcript at 27. According to claimant, he "begged" the employer's office manager to send another technician because the customer was "aggravated," but the office manager refused to do so. Transcript at 27. Claimant attempted to contact the general manager, but he was not available, and the office manager ordered claimant to return and speak with the customer. Transcript at 27-28. When claimant returned, the customer was adamant about wanting to move the antenna, and when claimant explained why moving the antenna would not improve reception, and the customer became increasingly aggravated. Transcript at 28-29.

Absent a basis for concluding that claimant was not a credible witness, his firsthand testimony regarding his behavior outweighs the employer's vague double hearsay information, and we therefore found facts in accordance with claimant's testimony. The record fails to show that claimant acted aggressively toward the customer, made threatening gestures, or became agitated. Nor does the record show that claimant argued with the customer other than by maintaining his professional opinion that there was no place to move the customer's antenna to improve reception, and explaining the basis for his opinion.

¹ Hearing Decision 17-UI-77593 at 2.

² *Id.* at 4.

³ *Id.*

Finally, the record fails to show claimant knew or should have known that doing so probably violated the employers' expectations regarding interactions with customers. The employer failed to establish that claimant violated those expectations, let alone that he did so willfully or with wanton negligence.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-77593 is set aside, as outlined above.⁴

DATE of Service: March 27, 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. 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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⁴ 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.