

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0269

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92324). Claimant filed a timely request for hearing. On February 22, 2017, ALJ Snyder conducted a hearing, and on February 24, 2017, issued Hearing Decision 17-UI-77680, concluding the employer discharged claimant, but not for misconduct. On March 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Haystack Farm & Feeds Inc. employed claimant as a truck driver from September 6, 2016 through December 16, 2016.

(2) The employer's owner expected its employees to refrain from insubordinate and disrespectful conduct towards supervisors. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On December 15, 2016, claimant inadvertently drove an employer truck in a manner that significantly damaged the trailer's brakes and wheels to the extent the trailer had to undergo extensive repairs. Because the damage rendered the truck-trailer inoperable, the owner sent claimant home until the truck-trailer unit was functional. Before the trailer was damaged, the owner had scheduled deliveries to Washington and Medford for December 16 and 17.

(4) During late morning on December 16, 2016, the owner sent claimant a text message that read, in relevant part, "if we get the trailer fixed we can go to Washington." Audio Record ~ 6:50 to 7:30. The owner did not ask claimant to respond but anticipated that he would. Claimant did not respond to the owner's text. At approximately 3:30 p.m. that afternoon, the owner called claimant and said, "hey we might have a load to go to Washington or Medford," to which claimant responded, "OK." Audio Record ~ 6:50 to 8:00. At the end of that conversation the owner asked claimant why he had not responded to or acknowledged his earlier text. Claimant responded, "Well, my house is the most important thing," explaining that he had been completing a home refinance application. Audio Record ~ 7:45 to 8:30. Claimant's response upset the owner but he kept that to himself.

(5) Later that same day, the owner learned the trailer would be inoperable until the next week and called claimant, without success, to tell him he would not be needed until then. A short time later, claimant texted him, "Do you need something?" Audio Record ~ 11:00 to 11:30. The owner reached him by phone and explained the reason for his call before stating that he had been "taken aback" by his previous response that his house "is the most important thing." Claimant then told the owner, "You don't rule my life," which angered the owner, who then stated, "You're right, but I rule my business. You're terminated." Audio Record ~ 8:45 to 9:30. The owner discharged claimant because he considered his response, "You don't rule my life," to be insubordinate and disrespectful.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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's owner discharged claimant for his statement, "You don't rule my life," which the owner believed was an insubordinate and disrespectful response to his inquiry. There was no dispute that claimant made the statement or that it violated the owner's apparently unstated expectation regarding how he expected to be talked to by employees. However, where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or indifference to, the consequences of an act, or a failure to act, where the individual acting or failing to act is conscious of his conduct and knew or should have known his conduct would or would probably result in violation of standards the employer had the right to expect of him.

The record fails to show that claimant refused an employer directive the entire day of December 16, 2016. Although claimant had not responded to the owner's morning text message, he had not been asked to do so. And, when the owner later told him by phone that a load "might" have to be delivered that day, claimant appropriately responded, "Ok." Finally, when the owner tried to reach him later, by phone, to tell him he would not be needed because the trailer would not be repaired, claimant sent a text message to him inquiring, "Do you need something?" Claimant's responses to the owner show that he was not indifferent to the employer's interests.

The final statement that caused the owner to discharge claimant, on its face, was not disrespectful. Although it may have been delivered in a tone the owner considered unacceptable, the evidence on that issue was not persuasive. Even though the owner stated that claimant made the statement with a raised

voice, there was little, if any, evidence regarding what conduct on the part of the owner may have prompted claimant to raise his voice at that moment. Audio Record ~ 9:00 to 9:30. And claimant explained his conduct at hearing, stating, “If I did make a mistake, it was just poor judgment. I didn’t realize what I was saying was wrong.” Audio Record ~ 23:25 to 23:40. Although claimant’s statement was sufficient to upset the owner and cause him to discharge claimant, the employer failed to show that his statement was either willful or tantamount to conscious indifference to the employer’s expectation regarding respectful behavior from employees. Accordingly, the employer failed to meet its burden to show that claimant’s December 16, 2016 statement constituted disqualifying misconduct.

The employer discharged claimant, but not for misconduct under ORS 657. 176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-77680 is affirmed.

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

DATE of Service: March 24, 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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