

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1097**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83905). Claimant filed a timely request for hearing. On August 22, 2017, ALJ Micheletti conducted a hearing, and on August 25, 2017 issued Hearing Decision 17-UI-91259, affirming the Department’s decision. On September 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Odwalla, Inc. employed claimant as a warehouse worker and relief route driver from July 7, 2014 to June 5, 2017.

(2) The employer required claimant to treat everyone he encountered in the course of performing his work with respect, and avoid being rude or confrontational. Claimant understood the employer’s expectations based upon his knowledge of its policies and prior warnings for being rude to others.

(3) During the week of May 4, 2017, claimant delivered product to a grocery store. The store’s produce manager was upset that claimant was delivering too little product and yelled at claimant. Claimant asked the manager how much he needed, and explained that he was not the regular delivery driver. The manager did not respond except to tell claimant that he needed more product. Claimant later pulled the manager to the side to ask him again how much product he needed, and the manager replied that he should bring in what he wanted to bring in. Claimant said, “okay,” but then, “By the way, I would appreciate it if you wouldn’t talk to me like that. You know, you don’t have to yell at me to get your point across,” and “If I was your supervisor you wouldn’t talk to me like that, so why are you talking to me like I’m a dog on the street.” Transcript at 35. The manager responded that it was his department, he runs it, “and whatever I say that’s how it goes.” *Id.* Claimant then walked away, finished delivering product to the store, and left. Claimant was not combative during his interaction with the manager and did not raise his voice. The produce manager subsequently complained to the employer that claimant had been “very combative” and asked that claimant not be routed to deliver to that store in the future.

Transcript at 14. Claimant complained to the store manager about the produce manager's treatment of him, and the store manager replied, "Okay, thank you." Transcript at 41.

(4) During the same week, claimant delivered product to another grocery store. He initially entered the store through the front door, not understanding that the store's policy prohibited him from doing so. The store's manager confronted claimant about his entry and yelled at him that he was not allowed to use the store's front door and would need to use the receiving area door next time. Claimant did not interrupt the manager while she yelled at him, and when she finished telling him to use the receiving area door he responded, "Okay." Transcript at 39. She continued to "go[] off again" about other matters and claimant "just stood there" and said, "Okay." *Id.* At one point claimant said, "I don't know what else you want me to say. I said, okay." *Id.* Claimant did not yell back at the manager. The manager subsequently reported to the employer that claimant "was blatantly rude," had "stared at" her and been non-responsive to her, and that she did not want him delivering to her store in the future. Transcript at 15. Claimant complained to the assistant store manager about the manager's behavior; the assistant manager replied that she was "sorry you had to deal with that" and that she would "deal with that." Transcript at 41.

(5) Claimant did not feel that his behavior had been inappropriate and did not report the incidents to the employer. After the May 2017 incidents came to the employer's attention, the employer discussed the matters with claimant, at which time claimant reported to the employer that both managers had been "very loud and abusive to him initially" and "he was just replying to them" and "wasn't initiating this." Transcript at 16. The employer told claimant that at times he should just apologize, even if he was not in the wrong, to deescalate matters. On June 5, 2017, the employer discharged claimant because of his behavior.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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.

The ALJ concluded that claimant's discharge was for misconduct, reasoning that because two managers from different stores both complained about claimant it was "more probably true than not that claimant acted rudely toward these managers," and that although the managers treated him "in a brusque manner" that "claimant reacted in [a] rude and confrontational manner in response." Hearing Decision 17-UI-91259 at 4. The ALJ further reasoned that while claimant understandably felt "slighted," he "knew or should have known that the employer expected him to withstand the rude behavior by the managers and

complete his job in a professional manner,” and when he “chose to react rudely toward the managers, claimant acted with wanton negligence.” *Id.* We disagree.

As a preliminary matter, the employer’s evidence about what claimant was alleged to have said or done during the two May 2017 incidents was based entirely upon written statements the employer’s witness read into the record. The individuals who dealt with claimant on those two occasions were not present at the hearing to be examined or cross-examined about the incidents, and the individual who did testify on the employer’s behalf was not present at either incident and did not even learn about them until long after. In other words, the employer’s evidence of claimant’s misconduct is entirely based on the complaints of individuals whom claimant alleged yelled at him, treated him rudely, to the extent that claimant felt it necessary to complain about them to members of their own management teams. For those reasons, despite the fact that both individuals claimed claimant was rude and claimant had previous warnings for being rude, we do not consider the written statements the employer’s witness read into the record to constitute conclusive evidence about claimant’s conduct.

Claimant, the only eyewitness to the events at issue, testified credibly that although the produce manager yelled at him for what appears to have been a somewhat protracted period, in front of others, and refused to provide him with responsive answers that might have allowed claimant to fill the produce manager’s product needs, claimant did not yell at the produce manager and continued to engage him in a professional manner about his product needs despite the produce manager’s unprofessional treatment of him. Neither calmly asking someone who is yelling not to speak to him that way, nor telling the produce manager that his treatment made claimant feel like “a dog in the street,” constitute patently rude or unprofessional behavior that claimant knew or should have known to avoid. Considering the totality of the evidence, the record does not show that it is more likely than not that claimant treated the produce manager in a rude or unprofessional manner as the employer alleged, much less that he did so intentionally or with conscious disregard for the employer’s expectations.

Likewise, with respect to the store manager in the other incident, claimant did not yell at the manager or walk away while she was yelling at him; rather, he remained calm, listened to her, and did not yell back at her. Although the store manager alleged claimant refused to respond to her, the record establishes that claimant acknowledged the store manager’s statement that he was not permitted to use the front entrance to the store by stating, “Okay.” The fact that the store manager apparently wanted claimant to say more or acknowledge her statements in a different manner did not make claimant’s failure to do so misconduct, particularly where, as here, it appears that claimant did not understand how the store manager wanted him to respond. Considering the totality of the evidence, it is not more likely than not that claimant treated the store manager in a rude or unprofessional manner.

It appears likely on this record that various individuals reacted to claimant in a way that suggests his verbal or non-verbal behavior was easily perceived as rude. For such behavior to constitute misconduct, however, there must be evidence that claimant willfully or consciously acted in such a manner as to bring about that response. In this case, the record fails to show that he did. We therefore conclude that claimant’s discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 17-UI-91259 is set aside, as outlined above.<sup>1</sup>

**DATE of Service:** October 10, 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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<sup>1</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.