

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1114

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 6, 2017, the Oregon Employment Department (the Department) served two notices of two administrative decisions concluding that the employer discharged claimant, but not for misconduct (decision # 134927), and suspended claimant, but not for misconduct (decision # 133826). The employer filed timely requests for hearing. On August 23, 2017, ALJ R. Frank conducted a consolidated hearing, and on August 25, 2017 issued Hearing Decisions 17-UI-91215, affirming decision # 134927, and 17-UI-91213, affirming decision # 133826. On September 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-91213 and 17-UI-91215. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1113 and 2017-EAB-1114).

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.

FINDINGS OF FACT: (1) Asplundh Tree Expert Co. employed claimant as an apprentice tree trimmer from January 12, 2017 to May 19, 2017.

(2) The employer required claimant to maintain a minimum separation distance between himself, or any conductive object, and power lines to avoid potentially deadly electrocution. The employer notified claimant of the expectation, trained him on it, and claimant understood it.

(3) On May 17, 2017, claimant was working from an elevated bucket to trim trees adjacent to a power line. Claimant was inexperienced at the task and was receiving instructions and training from his foreman, who was standing on the ground directing him. While claimant was working, a rubber hose attached to the saw he was using touched a power line, violating the minimum separation distance the employer required between claimant or a conductive object and the power line.

(4) The foreman reported the incident to the employer. Effective May 17, 2017, the employer suspended claimant for three days while it investigated what had happened and interviewed witnesses. The employer ultimately determined that claimant had violated the minimum separation distance on May 17th, and on May 19, 2017 discharged claimant for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer suspended and discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer suspended or 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

Suspension. The employer suspended claimant for the primary purpose of investigating what had happened on May 17th and interviewing witnesses about that incident. In other words, the suspension was to investigate whether a policy violation had occurred, not to discipline claimant because he had, in fact, violated a policy. Accordingly, the suspension was not for misconduct.

Discharge. The employer discharged claimant because he violated policy by allowing the rubber hose attached to his saw to touch a power line while he was trimming trees adjacent to the power line. There is no dispute that claimant allowed the rubber hose to touch the power line, or that when he did so he violated the employer's policy. However, given claimant's inexperience at his job, the fact that he was still apprenticed, that the foreman was actively instructing claimant about how to do his job at the time the incident occurred, and the unlikelihood that an individual would intentionally or consciously act in a manner that created a substantial risk that he could suffer a deadly electrocution, it appears more likely than not that the policy violation was inadvertent and probably occurred as the result of claimant's lack of job skills and experience working as a tree trimmer. Lack of job skills or experience are not misconduct.

We therefore conclude that the employer suspended and discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his suspension or discharge.

DECISION: Hearing Decisions 17-UI-91213 and 17-UI-91215 are affirmed.

J. S. Cromwell and D. P. Hettle.

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. 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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