

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1302

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 71124). The employer filed a timely request for hearing. On November 6, 2017, ALJ Griffin conducted a hearing, and on November 7, 2017 issued Hearing Decision 17-UI-96321, concluding claimant's discharge was for misconduct. On November 13, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

As a preliminary matter, the ALJ made a special "credibility determination" concluding that claimant's testimony was less reliable than that of the employer's witnesses. We disagree. The ALJ stated that "[c]laimant's recitation of [a manager] "climbing over the table" at him pointing her [*sic*] angrily at him with no inkling of provocation from claimant is logically incredible," and that it struck the ALJ that "claimant would be the one to have become irritated and left the meeting." Hearing Decision 17-UI-96321 at 2. However, claimant never claimed during the hearing that the manager was "climbing over the table" at him or "pointing," nor did he characterize any irritation displayed by the manager as unprovoked. Rather, claimant said that during a tense meeting the manager leaned over the table toward him and lectured him in an intimidating way about a meeting subject, which was not refuted. Additionally, we note that claimant did not dispute that he was the one who became emotional and left the meeting, and, in fact, specifically acknowledged that he had.

The ALJ also concluded that "[h]uman experience demonstrates that it is logically incredible to believe that a person outside of claimant's chain of command would excuse him from a series of meetings which he traveled from Oregon to Kansas to attend." *Id.* However, claimant did not allege that he was excused from attending the meetings, much less that he was excused by the vice president. His actual testimony was that he announced to the vice president that he intended not to attend the meetings, and why, and that she did not say or suggest that he should attend the meetings or would be in trouble if he failed to attend the meetings. Transcript at 35-36. Furthermore, claimant testified, and the employer did not refute, that claimant was not actually told he was required to attend particular meetings in Kansas, suggesting that claimant's purpose in traveling to Kansas was not exclusively or specifically to attend the meetings, much less that claimant felt he needed to be excused from attending such meetings.

The factual basis upon which the ALJ hinged the credibility determination in this case is not supported by evidence in the record. We therefore find that claimant's testimony was not lacking in credibility, and considered both parties' evidence equally credible when reaching this decision.

FINDINGS OF FACT: (1) Garmin USA employed claimant as a field service engineer from January 5, 2009 to July 25, 2017.

(2) Claimant's job duties included resolving complex technical issues and providing advanced customer service to customers. Claimant understood that the employer expected him to resolve customers' problems or make arrangements to have them resolved by someone else. Claimant's job required a significant amount of travel to customers' locations and required that claimant make and keep appointments with customers at their locations. Claimant developed long-term relationships with the customers he served and thought he had a lot of discretion as far as how best to resolve their issues.

(3) Claimant had a variety of concerns about his working conditions, including travel and his hours. The employer received several customer complaints, including that claimant had refused to help a customer in the future. Claimant discussed the complaint with a manager, and told the manager that he wanted to quit, retire, and resume working for the employer as a contracted consultant as he had prior to becoming employed in 2009. They agreed to discuss things further at the employer's headquarters in June.

(4) The employer received other customer complaints about claimant.¹ One complained that claimant failed to attend two customer appointments, but claimant was not aware of having missed any appointments. Another complained that claimant said, "Well, if you know so much why do [*sic*] you just call Garmin instead of talking to me." Transcript at 17. Claimant had not said what the customer alleged, he had instead suggested the customer speak with someone else because, despite claimant's repeated attempts to inform the customer about the problem and how to fix it, the customer continued to question him, and claimant did not have the ability to help the customer further.

(5) Claimant subsequently traveled to the employer's headquarters. The employer wanted claimant to meet with some managers about claimant's and the managers' concerns. The meeting was very brief; the employer considered claimant aggressive and belligerent, and claimant thought one of the managers behaved inappropriately. He felt unnerved and threatened, packed his belongings and left the meeting over the managers' objections.

(6) At headquarters, the employer had planned a variety of sales meetings and expected claimant to attend some of them; claimant believed based upon prior sales meetings that he had the discretion to attend or miss the meetings. Claimant met with a vice president about the brief meeting he had left, during which he told her he intended to miss the meetings and was not told he was required to attend them. Managers and a vice president asked to meet with claimant about the brief meeting that had occurred, but claimant declined the meetings stating that he had to attend to other work obligations.

(7) On July 25, 2017, the employer discharged claimant based upon his behavior and attitude.

¹ The sequence in which the customer complaints appear in this decision is not significant because neither party put the dates upon which the alleged interactions occurred into evidence. While the employer suggested that it received the complaints in the order in which the incidents appear in these findings, the record does not establish when the conduct underlying the complaints actually occurred, or in what sequence.

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 him. In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that claimant was discharged for misconduct, reasoning that claimant was wantonly negligent when he told a customer to "call someone else" after having been warned about refusing to fix a customer's problem, and his conduct was not an isolated instance of poor judgment because he had previously refused to fix a customer's problem, because of his "abrupt termination" of the meeting at headquarters, and because of his failure to attend the sales meetings. Hearing Decision 17-UI-96321 at 5. We disagree that those incidents amounted to misconduct.

The record fails to establish that it is more likely than not that claimant, in the manner the employer alleged, told a customer call someone else, thereby providing unacceptably poor customer service. The employer did not establish the dates upon which the customer service incidents and warnings occurred; therefore, contrary to the ALJ's findings, the record fails to show that claimant received a warning about the alleged customer service refusal prior to the incident in which he was alleged to have told a customer to call someone else for help. In addition, claimant disputed that the incident occurred as the employer alleged and agreed with the ALJ's characterization of his interaction with that customer as having "suggested that he reach out to somebody else at Garmin who might be able to explain it to him in a better or different way so that he would understand." Transcript at 28. There is insufficient evidence in this record to show it is more likely than not that claimant knew or should have known that suggesting a customer reach out to someone who might be able to explain things better than he would probably violated the employer's expectations.

The record fails to show that claimant acted willfully or in conscious disregard of the employer's expectations when he terminated the meeting at headquarters. The employer alleged that claimant became unusually aggressive during the meeting; claimant denied having done so and alleged that one of the employer's managers became unusually aggressive. The evidence about which party, if either, misbehaved at the meeting is equally balanced, and therefore fails to show that claimant engaged in misconduct with respect to leaving the meeting. In any event, claimant credibly testified that he felt unnerved and threatened and left the meeting; although the parties disagree about the events of the meeting, the fact that claimant subsequently complained to a vice president about how one of the managers behaved suggests that claimant genuinely felt threatened during the meeting. Leaving a meeting at which one feels unnerved and threatened by another individual's behavior does not amount to willful or wantonly negligent misconduct.

Likewise, the employer alleged that claimant was supposed to attend sales meetings at headquarters. At the time, however, claimant had never previously been required to attend particular meetings, did not know that he was required to attend them, and, after informing a vice president of his intent to miss the meetings, was not told that he did not have the discretion to make that decision. Although claimant failed to attend any sales meetings at headquarters, the record fails to show that claimant did so with the intent to violate the employer's expectations, or that he knew or should have known that failing to attend the meetings under those circumstances would amount to a violation of the employer's expectations.

In sum, the evidence as to whether or not claimant knew or should have known he would violate the employer's expectations by leaving a meeting at which he felt unnerved and threatened, failing to attend sales meetings after having said he did not plan to attend any, and suggesting that a customer contact someone else after claimant had exhausted his abilities to help the customer was no more than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its burden, and misconduct has not been established. Claimant's discharge was, therefore, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-96321 is set aside, as outlined above.²

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

DATE of Service: December 12, 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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.