

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1374

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 90723). The employer filed a timely request for hearing. On November 6, 2017, ALJ Amesbury conducted a hearing, and on November 8, 2017 issued Hearing Decision 17-UI-96425, affirming the Department's decision. On November 28, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

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). The employer's argument also contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) White Lightning Electric, Inc. employed claimant as journeyman electrician from approximately March 19, 2015 until August 17, 2017. The employer assigned claimant to perform the electrical work on jobs for builders with whom the employer contracted.

(2) The employer expected claimant would not communicate or deal directly with homeowners on the projects to which he was assigned, but would refer them to the builder. The employer also expected claimant to deal reasonably with builders on the jobs to which he was assigned. Claimant understood the employer's expectations.

(3) On approximately August 16, 2017, claimant was assigned to perform electrical work on a remodeling project. The builder on that project had asked claimant to connect some items to electrical wiring that had previously been installed in a wall to which some cabinetry was affixed. Claimant thought the wiring had not been correctly installed and asked the builder to remove the cabinets so he could re-install the wiring. The builder refused to do so. As a result, claimant proceeded to cut holes in the sheetrock that comprised the walls and, using those holes, "fished" the wire through the walls behind

the installed cabinets to make his corrections. Audio at ~20:18. During the interaction between claimant and the builder, claimant might have been “a little grouchy” when the builder refused to remove the cabinets and expressed that he thought that claimant did not need to correct the way in which the wiring in the walls had been installed. Audio at ~21:51.

(4) Later in the day on approximately August 16, 2017, the builder spoke with a representative of the employer. The builder told the representative that neither the homeowner nor the builder wanted claimant to remain on the job any longer since claimant had “said some stuff to the homeowner that the homeowner didn’t like.” Audio at ~10:32.

(5) On August 17, 2017, an employer representative called claimant and told him he was discharged because the builder with whom he had been assigned to work was not willing to work with him any longer, and several other builders had previously expressed that they were also unwilling to work with claimant.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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. The employer carries the burden to show claimant’s misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is no reason to disbelieve the employer’s testimony that the builder with whom claimant worked on August 16, 2017 and many other builders had refused to work with claimant again. However, to disqualify claimant from benefits, the employer must show that claimant willfully or with wanton negligence violated its standards. It is not enough for the employer merely to show that others did not want to work with claimant any longer and that, as a result, the employer would likely not be readily able to find new work assignments for him in the future. In connection with the present case, the employer must accordingly show that the behavior of claimant that caused the builder to refuse to allow claimant to continue working on its projects constituted a willful or wantonly negligent violation of the employer’s reasonable standards of which claimant was aware. We turn our attention to claimant’s alleged behavior on August 16, 2017.

With respect to the employer’s allegation that claimant said something to the homeowner that the homeowner found objectionable, claimant did not dispute that he knew the employer expected him not to speak directly with homeowners, but to refer all homeowner inquiries or concerns to the builder. Audio at ~14:03. However, claimant denied ever speaking with or even meeting the homeowner on whose project he was working on August 16, 2017. Audio at ~20:58, ~22:00. Claimant’s first-hand evidence about whether or not he spoke with the homeowner is entitled to greater weight than the second-hand hearsay evidence that the employer’s witness presented at hearing on the same issue. Audio at ~10:43. In light of claimant’s rebuttal to the employer’s allegation, the employer failed to show that claimant spoke with the homeowner at all and, as a result, it failed to show that claimant

violated its standards, either by speaking with the homeowner or by what claimant said to the homeowner.

With respect claimant's behavior during his interaction with the builder about the wiring in the wall behind the cabinets or removing the cabinets, the employer did not establish that claimant's behavior was sufficiently extreme that it violated standards of which claimant should reasonably have been aware as a matter of common sense. The employer's witness candidly testified that, since he was not present, he did not know if claimant used "foul language" or was otherwise offensive in his behavior toward the builder and, although the builder had told the employer's hearing witness what claimant had said to him, the witness was unable to recall at the hearing the substance of what the builder had said to him. Audio at ~11:20. Given the dearth of specific and concrete evidence that was presented by the employer, the employer failed to show that anything about the way in which claimant interacted with the builder violated any employer standards of which claimant should have been aware. On this record, there is insufficient evidence to support a determination that claimant violated the employer's standards willfully or with wanton negligence, or that claimant engaged in misconduct in his alleged interactions with the homeowner or the builder on August 16, 2017.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-96425 is affirmed.

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

DATE of Service: January 5, 2018

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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