

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1376**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105845). Claimant filed a timely request for hearing. On November 15, 2017, ALJ L. Lee conducted a hearing, and on November 22, 2017 issued Hearing Decision 17-UI-97551, concluding the employer discharged claimant, but not for misconduct. On November 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Pacific Appliance Parts employed claimant from approximately 2005 until September 29, 2017, last as an account manager. Claimant sold parts to the employer's customers.

(2) In October 2016, two of claimant's coworkers who worked adjacent to claimant complained about the noise emanating from claimant's work area, the condescending attitude that claimant displayed when advising them about how to approach employment-related tasks, and the way in which claimant intruded into discussions the coworkers had with other employees. The employer spoke with claimant and asked him to close his office door and focus more closely on his work tasks.

(3) The employer expected claimant to display a reasonable attitude when interacting with coworkers and not to undermine them or their work efforts. Claimant understood this expectation as he reasonably construed it.

(4) On August 4, 2017, the employer issued a final written warning to claimant for having raised the middle finger of a hand in an obscene gesture directed at the receptionist when he was in the presence of the director of sales and another coworker. Claimant had been frustrated at the receptionist for having directed to him a complicated sales call from a customer with only two minutes remaining in the work day. The warning advised claimant that similar behavior in the future could lead to his discharge.

(5) On September 18, 2017, the employer held a training session at which an employee from the employer's purchasing department made a presentation to the sales staff, which included claimant, about

the process by which the employer determined the parts it would purchase for its inventory. Claimant had held the same position in purchasing as the presenter before he was transferred back to the position of account manager due to issues with his performance while in the purchasing department. During the presentation, it was brought up that sometimes not enough parts were purchased and placed in inventory to meet orders. Claimant then mentioned in front of the entire sales team and the employer's chief operating officer (COO) that such a problem had not occurred when he was in purchasing.

(6) On September 20, 2017, claimant was explaining to one of the employer's customers that the employer needed to charge the customer more for parts it had ordered than the price shown on the employer's price list because the listed had been inaccurate. Claimant explained to the customer that the employer had failed to load the most recent price list from one of the manufacturers which supplied its parts, with the result that the purchase price listed when the customer ordered the parts had not reflected the increased cost to the employer of obtaining those parts. It was the COO's responsibility to keep the employer's price list current. Claimant was able to reach an agreement with the customer to pay an additional amount for the parts it had purchased. Shortly thereafter, the customer contacted the COO about the explanation that claimant had provided.

(7) On September 29, 2017, the employer discharged claimant for his poor attitude, including specifically that by the comment he made during the training session on September 18, 2017 he deliberately undermined and implicitly belittled the abilities of the presenter in front of the sales team and the COO, and by the comment he made to the customer on September 20, 2017 he disparaged the work performance of the COO in front of a long-standing and important customer.

**CONCLUSIONS AND REASONS:** 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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discussed three incidents at hearing as showing misconduct on claimant's part: his behavior on August 4, 2017, on September 18, 2017 and on September 20, 2017. At hearing, the employer's witness appeared to testify that the proximate cause of claimant's discharge was his behavior only during the incidents on September 18, 2017 and September 20, 2017. Transcript at 6-8, 18. A memorandum that the employer presented to summarize the relevant facts surrounding claimant's discharge also indicated that claimant was discharged due to the incidents on September 18, 2017 and September 20, 2017. *See* Exhibit 1 at 2. Additionally, the August 4, 2017 incident occurred in the presence of the COO, was presumably known to the employer for several weeks before claimant was discharged and, as evidenced by the employee warning notice issued to claimant on that day, the

employer decided that it would not discharge claimant based on that incident. *See* Exhibit 1 at 6. On this record, the proximate cause of claimant's discharge was his alleged behaviors on September 18, 2017 and September 20, 2017, and not his alleged behavior on August 4, 2017. The initial misconduct analysis therefore will focus on the incidents on September 18 and 20, and not the incident on August 4.

With respect to claimant's behavior on September 18, 2017, while the employer set out with specificity what claimant allegedly said during the training session, it provided no context for claimant's comment that no problems existed with purchasing sufficient parts for inventory when he was in the purchasing department. It is not apparent to us that such a neutral comment was intended to or did impliedly belittle, undermine or insult the presenter or the presenter's abilities. As well, the employer did not rule out that claimant's comment was made in good faith and intended merely to direct the presenter's attention to past practices in the purchasing department as a reference to show how the inventory problem that was under discussion might be remedied. On this record, the employer did not meet its burden to show that claimant's behavior in making the comment on September 18, 2017 was a willful or wantonly negligent violation of the employer's reasonable standards.

With respect to claimant's behavior on September 20, 2017, while the employer contended that claimant blamed the COO for the error in the employer's listed price, claimant contended that he never identified the COO as responsible party for the error in the price list. Transcript at 18, 19, 21, 40-41. As to this disputed issue, claimant's first hand evidence about what he said to the customer and whether he identified the COO as the employer representative responsible for the error in listed price is entitled to greater weight than the third hand hearsay evidence (from the customer to the COO to the employer's hearing witness) that the employer's witness presented at hearing. Accepting claimant's testimony as correct, it is difficult to see how claimant providing an honest explanation about how the employer's error occurred in the context of negotiating a new price with the customer, when claimant did not identify the COO as the source of the error, was a willful or wantonly negligent act. The employer did not meet its burden to show that the comment claimant made to the customer on August 20, 2017 was a willful or wantonly negligent violation of the employer's standards.

Although the employer discharged claimant, it did not show that it did so for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Hearing Decision 17-UI-97551 is affirmed

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

**DATE of Service:** January 2, 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](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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.