

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0586

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80048). Claimant filed a timely request for hearing. On May 15, 2018, ALJ Wyatt conducted a hearing, and on May 21, 2018 issued Order No. 18-UI-109780, concluding claimant's discharge was not for misconduct. On June 8, 2018, 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 argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). We note that the employer's written argument included a copy of the materials the employer had submitted, and the ALJ admitted, into evidence as Exhibit 1. We considered Exhibit 1 when reaching this decision.

FINDINGS OF FACT: (1) Aqua Window Cleaning Specialists, LLC employed claimant as a laborer, last from September 26, 2017 to November 18, 2017.

(2) Claimant's last assignment was scheduled to end on November 30, 2017. During the course of claimant's assignment, the owner came to believe that claimant was unwilling or unable to perform the work to the company standards. The owner thought claimant "made specific demands" to work alone, work eight hours per day even when there was not enough work to fill an eight hour workday, and to be compensated for hours he had not worked. Exhibit 1.

(3) On November 10, 2017, claimant injured his head while at work. No one witnessed claimant's injury, and the owner did not observe any deficiencies in claimant's work performance or signs of injury. On November 13, 2017, claimant approached the owner about needing treatment but lacking insurance. The owner thought claimant was "angry, belligerent and menacing," and that he "yelled" at

the owner during the conversation. *Id.* The owner told claimant to go get medical treatment, and that he did not need medical insurance for treatment of an on-the-job injury. Claimant then left the work site.

(4) By November 13, 2017, the owner considered claimant to have “continued to make unrealistic demands and refused instructions to be examined and file an injury claim.” *Id.* The owner thought claimant’s “demands became increasingly more frequent and unreasonable,” to the extent that the owner decided not to hire claimant to work on additional projects after the assignment ended.

(5) Claimant returned to work after November 13th “and continued to work until the day he was, uh, provided the termination notice.” Transcript at 16. On November 14, 2017, claimant told the owner that he thought the owner owed claimant an apology for the owner’s behavior; the owner did not apologize. Transcript at 28. Claimant did not consider his behavior after November 13th “threatening” or “menacing,” and was not “in his [the owner’s] face” during their interaction. *Id.*

(6) By November 18, 2018, the owner concluded that “we had reached that point in the project where there was no more work for [claimant] to perform.” Transcript at 8. Given the owner’s decision not to continue to employ claimant in any additional projects thereafter, the owner notified claimant that his employment was terminated effective immediately.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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.

In a discharge case, the employer bears the burden to establish by a preponderance of the evidence that claimant’s discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In order to meet that burden, the employer must not only prove that the events that prompted the discharge to occur more likely than not did, in fact, occur, but also that claimant’s conduct was more likely than not attributable to claimant as willful or wantonly negligent behavior.

In this case, the witness the employer had testify during the hearing did not have firsthand evidence about the events the owner alleged in Exhibit 1 caused him to discharge claimant. The employer’s witness testified, for example, “I was not a witness to each of these claimed misbehaviors or . . . other than peripherally aware of the problems that [the owner] saw,” “I was not there physically to witness what had actually occurred physically,” “I was not in the proximity of either or both of them which is why I didn’t witness them because we were working, all of us, independently,” and “I was not present

for any of these . . . incidents.” Transcript at 8, 10, 14, 37. Therefore, the record evidence of the events that caused claimant’s discharge exists in the form of the owner’s statement in Exhibit 1.

In Exhibit 1, the owner alleged that claimant’s discharge met the definition of “misconduct” because he had “a history of insubordination,” had “argumentative, menacing and threatening behaviors on the job site,” his “use of materials or tools not supplied by” the employer, his “repeated demands for work hours outside of those scheduled by the employer,” and his “failure to consistently follow instructions.” Exhibit 1. The owner alleged claimant’s “consistent unwillingness or inability to perform work according to the company standards which were outlined in writing when he initially came to work” and of which he was reminded or counseled. *Id.* Although it is clear from the owner’s characterizations and conclusions about claimant’s behavior at work that the owner considered claimant to have violated company expectations, the owner’s description is not sufficiently detailed about what it is claimant actually did to cause him to make those characterizations and reach those conclusions. For example, the owner did not explain what claimant did that he considered insubordinate, or how claimant should have known that those actions would be considered insubordinate or a violation of the employer’s expectations. The owner did not explain what claimant argued about, or how he displayed menacing or threatening behaviors, on what date incidents of arguing, menacing or threatening occurred, to whom claimant displayed the behaviors, or how claimant should have known such conduct was unacceptable to the employer. The owner alleged claimant made “demands,” but did not explain why he considered claimant’s conduct to be “demanding,” how such demands” violated the employer’s expectations, or why claimant should have known that making them would violate the employer’s expectations.

The employer had the burden of proof in this case, which required the employer to provide specific, detailed allegations about what claimant did, on what date, who was present, what expectation he violated, how he violated it, and why he knew or should have known that his conduct was a violation. The employer presented testimony from a witness that did not have any firsthand observations. Although the employer also presented a written statement written by an eyewitness to claimant’s alleged conduct, the statement included primarily the owner’s conclusions and characterizations about what he observed and lacked the kind of details necessary to substantiate what had occurred. Although the employer likely had additional information about claimant’s work separation and the reasons behind the owner’s allegations about claimant’s behavior, the employer did not place that information in the evidentiary record, and, consequently, did not satisfy its burden of proof.

The evidence the employer submitted into the hearing record, considered in its entirety, therefore fails to show that claimant’s discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-109780 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: July 10, 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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