

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0188

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 28, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #92118). The employer filed a timely request for hearing. On December 31, 2013, ALJ Seideman conducted a hearing, and on January 7, 2014 issued Hearing Decision 14-UI-07966, concluding the employer discharged claimant for misconduct. On January 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Macy's West Stores, Inc. employed claimant from February 23, 2012 to July 31, 2013 as a sales associate on the cosmetics team.

(2) The employer expected sales associates to refrain from socializing with coworkers while working. A human resources manager discussed this expectation with claimant on April 8, 2013. Claimant understood the employer expected her to refrain from discussing matters that did not relate to work unless she was on a break.

(3) On occasion, sales associates had to communicate with each other while working about work-related matters such as sales items, problems with the registers, and work schedules.

(4) On July 20, 2013, a manager saw claimant and three other associates talking in a group while working. The manager told claimant and the other associates to refrain from discussing matters not related to work. Later, near closing time, the manager encountered claimant and three other associates discussing how to complete and turn in an employee survey. A manager had told claimant the survey was important and that she had to turn it in to a manager. Before claimant left her post to ask her coworkers about the survey, another associate agreed to cover claimant's post until claimant returned. There were no customers present when claimant left her post.

(5) On July 31, 2013, the employer discharged claimant for talking with other sales associates while working on July 20, 2013.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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) (August 3, 2011) 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 has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness alleged claimant left a customer unattended at her post and was talking in a group with other sales associates about matters not related to work. Transcript at 7 to 8. In Hearing Decision 14-UI-07966, the ALJ found as fact that claimant had told a manager that she was just "wasting time" when the manager found claimant talking with the other associates during the final incident. Transcript at 8. Based in part on these facts, the ALJ concluded that claimant willfully disregarded the employer's expectation that claimant refrain from socializing with her coworkers. We disagree with the ALJ's conclusion for the following reasons.

The employer's evidence regarding the final incident consisted of one hearsay statement from a manager who did not testify at hearing. Claimant testified that a manager told her to complete and turn in the survey, and that she needed to ask her coworkers questions before she could do so. Transcript at 16. Although it was reasonable for the employer to expect claimant to give customers her primary attention, the record does not show that claimant failed to make customers her top priority. Claimant testified that she asked another associate in the cosmetics department to cover her post while she inquired about the survey, and that there were no customers present at the time. Transcript at 16. Thus, the record does not show that claimant left her post or any customers unattended when she went to ask her associates about the survey. Absent a basis for concluding claimant was not a credible witness, the employer's hearsay evidence is insufficient to meet its burden of proof to show claimant violated the employer's expectation that claimant refrain from socializing while working.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-07966 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: February 25, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.