

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0546

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 75644). The employer filed a timely request for hearing. On March 21, 2014, ALJ Seideman conducted a hearing and issued Hearing Decision 14-UI-13171, affirming the Department's decision. On April 1, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Munder Trucking employed claimant as a delivery driver helper from April 8, 2013 to August 16, 2013.

(2) From April 8 to June 5, 2013, claimant voluntarily performed duties in addition to his required duties as a delivery driver helper.

(3) On or about June 5, 2013, claimant failed to report for work as scheduled or notify the employer that he would be absent. The employer's owner warned claimant that his conduct was unacceptable.

(4) After June 5, 2013, stopped performing duties in addition to his required duties. The driver claimant helped reported to the owner that claimant was refusing to perform his required duties.

(5) On August 2, 2013, the owner gave claimant a warning for allegedly failing to follow the owner's order to help the driver with a delivery. The owner warned claimant that if his behavior did not improve over the next two weeks, he would be discharged.

(6) After August 2, 2013 claimant continued not performing duties in addition to his required duties. The driver reported to the owner that claimant continued refusing to perform his required duties.

(7) On August 16, 2013, the employer discharged claimant because he allegedly continued refusing to perform his required duties after August 2, 2013.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's owner testified that claimant was discharged because he continued refusing to perform his required duties after August 2, 2013. Audio Record at 10:00. However, claimant testified that he never stopped performing his required duties. Audio Record at 19:00. Absent a basis for concluding that claimant was not a credible witness, we find the evidence on that issue equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant engaged in the behavior for which he was discharged. Absent such a showing, the employer failed to establish that it discharged claimant for misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-13171 is affirmed.

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

**DATE of Service:** April 22, 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.