

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0618

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162348). Claimant filed a timely request for hearing. On April 7, 2014, ALJ Seideman conducted a hearing, and on April 8, 2014 issued Hearing Decision 14-UI-14547, concluding claimant's discharge was not for misconduct. On April 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Rogue Valley Manor employed claimant as a cook from November 20, 2006 through January 30, 2014.

(2) The employer expected employees to pay by the pound for any food they took from the employee buffet, and to pay a fixed price for to-go containers. In approximately 2013, the employer learned of a couple of instances in which employees had failed to pay for their food. On October 25, 2013, the employer issued a warning to all employees that failing to pay for their food was considered theft and would result in their immediate discharge without further warning.

(3) Claimant received and signed the warning, and understood the employer's expectation with respect to paying for food and food containers. Claimant always paid for her food. However, claimant understood that employees were permitted to take certain bread without paying for it. Claimant also observed that employees frequently were not required to pay for their food containers.

(4) On January 22, 2014, claimant put aside one hamburger patty and a bun with the intent of purchasing the items from the employer for her own use. She handled a second hamburger patty as well, but determined it was inedible and discarded it. Claimant then got busy with her cleaning duties, and ultimately forgot to pay for the food she had taken before leaving. Claimant did not intend to take the food without paying, but did so by mistake.

(5) On January 23, 2014, claimant placed some bread into a to-go container and took both without paying. Claimant believed she was permitted to take that bread without paying for it. Claimant knew the employer customarily would charge fifty cents for the to-go container, but she had seen other employees take to-go containers without paying for the container, especially if their orders were processed by their friends, and decided not to pay for it.

(6) On January 30, 2014, the employer discharged claimant for taking food and a to-go container from the employer without paying for them.

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. 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to pay for food and food containers. Claimant generally understood that she was expected to pay for food, but not for certain bread items. She did not understand that she was expected to pay for to-go containers, as she had observed other employees take to-go containers for their food without payment or consequences for failing to pay.

On January 22, 2014, claimant violated the employer's expectations by taking a hamburger patty and bun without paying for either item. For the violation to be considered misconduct, however, claimant must have acted willfully, or with indifference to the consequences of her conscious conduct. Here, claimant forgot to pay for the items, not because she intended to take food without paying, or because she was indifferent, but instead because she got busy with her duties and forgot to pay. Because claimant was not conscious of her conduct, her failure to pay for the hamburger and bun on January 22, 2014 was not misconduct.

On January 23, 2014, claimant again violated the employer's expectations by taking bread and a to-go container without paying for either. Claimant sincerely believed she was permitted to take the bread. With respect to the to-go container, claimant had previously witnessed coworkers take those containers without paying for them, without consequence, and, as such, believed she did not have to pay for the to-go container, either. Because claimant acted on the basis of her good faith belief, based on her understanding of the employer's expectations and her observation of others, that the employer would condone or excuse her conduct with respect to the bread and to-go container, and regardless of the fact that the employer did not, in fact, condone or excuse the conduct at issue, claimant's good faith errors on January 23rd are not considered misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 14-UI-14547 is affirmed.

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

DATE of Service: May 16, 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.