EO: 300
BYE: 201519

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1207

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 162523). The employer filed a timely request for hearing. On June 27, 2014, ALJ Shoemake conducted a hearing, and on July 3, 2014 issued Hearing Decision 14-UI-20859, affirming the Department's decision. On July 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to 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). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) World Wide Granite – Marble LLC employed claimant from July 1, 2012 to May 17, 2014 as a lead installer of tile and stone products.

(2) The employer expected claimant to contact the employer's sales staff if he went to a jobsite to make a template for a countertop, and the template measurements were different than the measurements specified in the paperwork for the countertop, or if he had questions or concerns about the template. The employer also expected claimant to include the customers, if they were present at the jobsite, in preparing the template.

(3) On May 13, 2014, claimant met with customers at a jobsite to make a full-scale template for a countertop. The paperwork for the countertop showed the overall length of the countertop was supposed to be 70 inches long. Claimant discussed the measurements with the customers, and completed the template. Based on the information he collected from the customers, and the standard measurement normally used for countertop overhangs, the template was 65 inches long, with standard overhangs on the sides of the countertop. The paperwork did not say the overhang for the sides of the countertop was to be a nonstandard length. The customers, husband and wife, both saw the template in place before

claimant returned it to the employer to cut the countertop. The customers did not express concerns about the template size. Claimant noticed the paperwork measurement was different than the template. He did not contact the employer's sales staff about the difference between the template and paperwork measurements.

(4) The employer cut and began to install the countertop for the customers. The customers rejected the countertop because the countertop was not sufficiently long to create the side overhangs the customer wanted. The employer's loss for the rejected countertop was $1,889.

(5) On May 17, 2014, the employer's owner called claimant and told him that the employer was "going to let him go unless he would be willing to help work [$1,600 to replace the countertop] off." Transcript at 18, 29. Claimant responded that he could not afford to pay the employer $1,600, and the owner discharged him.

CONCLUSIONS AND REASONS: We agree with the Department and 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) 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct.

The employer discharged claimant because he refused to pay for the damages claimant allegedly caused the employer by failing to confirm the countertop measurement with sales staff. Deducting any portion of claimant's wages for the employer's losses would have been a violation of Oregon law. ORS 652.610(3) prohibits an employer from deducting any portion from an employee's wages unless certain conditions, that do not apply here, are met, such as being required to make the deduction by law, or that the deduction be for the employee's sole benefit.[1] The employer had no right to expect claimant to agree

[1] ORS 652.610(3) provides in relevant part:

652.610 Itemized statement of amounts and purposes of deductions; timely payment to recipient of amounts deducted. ***

(3) An employer may not withhold, deduct or divert any portion of an employee's wages unless:
(a) The employer is required to do so by law;
(b) The deductions are authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books;
(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books;
(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party;

to repay the employer's loss for the rejected countertop. Because the employer discharged claimant for violating an unreasonable expectation, the employer discharged claimant not for misconduct.

One of the employer's owners asserted at hearing that the employer did not discharge claimant because he refused to pay for the countertop, but, rather, because of claimant's "negligence" in making a countertop template. Transcript at 5, 29. The employer had a right to expect claimant to check with sales staff if there was a discrepancy between the paperwork and the template measurements for their products. However, claimant testified that he did not understand the employer expected him to contact sales staff if the paperwork and template were different where, as here, claimant discussed the measurements with the customers, they expressed no concerns about the template, and the paperwork did not say the countertop overhangs were to be a nonstandard size. Transcript at 20. On May 13, claimant had no questions or concerns about the countertop template because the template he made appeared accurate based on the information he collected from the paperwork and the customers at the job site. Transcript at 22, 25, 27 to 28. One of the employer's owners also testified that claimant was expected to check the paperwork, and to "always include the clients," because it was "imperative" to review the details with the homeowners. Transcript at 15. The preponderance of evidence does not show claimant knew or should have known that the employer expected him to contact the sales staff when the template appeared accurate and the customers saw and appeared to approve of the template. The employer therefore failed to establish that claimant violated those expectations willfully or with wanton negligence.

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

DECISION: Hearing Decision 14-UI-20859 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: <u>August 14, 2014</u>

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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On

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(e) The deduction is authorized under ORS 18.736; or
(f) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:
(A) The employee has voluntarily signed the agreement;
(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;
(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;
(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 18.385; and
(E) The deduction is recorded in the employer's books.

the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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