

**EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-1324**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110628). The employer filed a timely request for hearing. On June 25, 2014, ALJ S. Lee conducted a hearing, and on July 3, 2014, issued Hearing Decision 14-UI-20916, affirming the Department's decision. July 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer requested "re-opening" of the hearing to present additional testimony and documentary evidence. Written Argument at 1. We construe the employer's statement as a request to have EAB consider new evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows that it was material and the party was prevented by factors or circumstances beyond its reasonable control from presenting the information at the hearing. The employer did not describe the new evidence, explain why the additional evidence was material to the issues decided or explain how it was prevented by factors or circumstances beyond its reasonable control from presenting the information at the hearing. Because the employer did not make the required showing, its request is denied.

**FINDINGS OF FACT:** (1) Petco Animal Supplies Stores Inc. employed claimant, last as an aquatics specialist, from March 25, 2001 to May 2, 2014.

(2) The employer had a written policy that prohibited employees from feeding one live animal to another. The employer provided a copy of its policy to claimant and trained claimant regarding the policy. Claimant was aware of the employer's expectation.

(3) As an aquatics specialist, claimant was responsible for maintaining 30 aquatic tanks. His main duties included feeding fish and cleaning the tanks. He also had caretaking responsibilities in the small reptile and animal departments.

(4) On December 21, 2013, claimant received a verbal warning for failing to fulfill some of his store opening duties. On December 28, 2013, claimant received a written warning for failing to fulfill some of his feeding responsibilities. On March 10, 2014, claimant received a written warning for failing to fulfill some of his watering responsibilities. On March 23, 2014, the employer sent claimant home for part of the day for demonstrating a poor attitude before following a direct order given by a manager.

(5) On April 27, 2014, a department manager noticed that a small Gold Barb fish was in a tank with a predatory Oscar fish which was against employer rules. She asked claimant how the Gold Barb got in the tank and claimant explained that it probably got caught in a net and ended up in the Oscar tank when the net was used in that tank. Transcript at 16-17. Claimant removed the Gold Barb fish from the Oscar tank and returned it to its tank. However, two employees reported to the general manager that claimant stated that he put the fish in the Oscar tank as food because the fish was injured.

(6) On April 27, the employer suspended claimant for the “multiple policy violations” that occurred from December 21, 2013 to that day and on May 2 discharged claimant for the “final incident” that occurred on April 27. Transcript at 6.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer suspended claimant for the “multiple policy violations” that occurred on and after December 21, 2013 but did not discharge him until after the “final incident” on April 27, 2014. Consequently, that incident triggered the employer’s decision to discharge claimant, was its proximate cause and is the proper focus of the misconduct analysis.

The employer discharged claimant for reportedly placing the Gold Barb fish into the tank with the Oscar fish as food. However, at hearing claimant denied that he did so and claimant’s explanation that the fish probably ended up in the Oscar tank because it accidentally got caught in a net was plausible. Transcript at 16-17. Moreover, the two employees that told the general manager that claimant stated he put the fish in the Oscar tank intentionally did not testify although they remained employees as of the date of the hearing. Transcript at 31. In the absence of evidence demonstrating that claimant was not a credible

witness, his first hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. Consequently the employer failed to establish that claimant consciously violated the employer's policy prohibiting feeding one live animal to another.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 14-UI-20916 is affirmed.

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

**DATE of Service:** September 2, 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 [court.oregon.gov](http://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 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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