

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1626

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for misconduct (decision # 81621). The employer filed a timely request for hearing. On September 30, 2014, ALJ Clink conducted a hearing, and on October 3, 2014, issued Hearing Decision 14-UI-26379, affirming the Department's decision. On October 10, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Saks Fifth Avenue Inc. employed claimant as a sales associate from November 19, 2012 to July 24, 2014.

(2) On December 17, 2013, claimant processed a cash transaction by accepting \$800 in bills that were cut and taped together from a family suspected by a local police agency of laundering money and attempting to pass counterfeit bills. Claimant was warned that, in the future, when a member of that family wanted to pay with cash, she was expected to notify a manager so the manager could supervise the transaction. In April 2014, claimant acknowledged training regarding the employer's "Fitting Room Best Practices" policy for servicing customers in a fitting room to prevent theft. The policy required associates to maintain awareness of the number of clothing items their customer took into the fitting room and to monitor the customer while in the fitting room. Claimant was aware of the employer's expectations regarding the suspected money laundering family and fitting room best practices.

(3) On July 16, 2014, claimant was helping three customers and also assisting a new associate who also was receiving instructions from the store director regarding when to leave the associate's customer, who had taken numerous items into a fitting room, and take a break. Claimant cautioned the new associate to pull some items from the fitting room and monitor the customer, and if she had any difficulties, to ask the store director who had been supervising her. Although claimant suggested that the customer use a rolling rack when taking clothing items into the fitting room, she did not monitor the number of items taken in or the customer while she was in the fitting room because it was not her customer. The customer later left the store without paying for some clothing items resulting in a theft of \$461.

(4) On July 20, 2014, claimant processed two cash transactions totaling \$315 with a member of the suspected money laundering family while in the presence of a manager who supervised the transactions. She later assisted a new associate in processing other cash transactions with a member of the money laundering family also while in the presence of a manager who supervised the transactions. None of the cash transactions resulted in a loss to the company.

(5) On July 24, 2014, the employer discharged claimant for failing to monitor the new associate's customer and clothing items taken into the fitting room by that customer on July 16 and for both processing the two cash transactions totaling \$315 with a member of the money laundering family and assisting another associate with cash transactions with that family on July 20 both "without notifying management." Exhibit 1; Transcript at 20, 40.

CONCLUSIONS AND REASONS: We agree with the Department and 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 wantonly negligent disregard of an employer's interest. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer asserted that claimant violated the employer's fitting room best practices on July 16 by providing the new associate's customer with a rolling rack, allowing "70+ items" in the fitting room, not monitoring the number of items taken by the customer into the fitting room and not monitoring the customer while in the fitting room. Exhibit 1. However, the employer's witness, the store director, did not dispute claimant's assertion that under the policy she was not responsible for that customer because the customer was not hers or that the store director herself had provided direction to the new associate that day regarding the customer while she was in the fitting room. The employer's witness also asserted that claimant processed the \$315 in cash transactions and assisted another associate with processing cash transactions with the money laundering family on July 20 without notifying a manager. However, that testimony was based on hearsay reports from another employee that claimant disputed under oath, asserting the store director's assistant, a manager, supervised both sets of transactions. Weighing the evidence as a whole, there seems to be no reason to accept the employer's hearsay and other evidence over claimant's first hand testimony under oath, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of production, here the employer, has failed to meet its burden of proof that claimant willfully or with wanton negligence violated a known, reasonable employer expectation.

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

DECISION: Hearing Decision 14-UI-26379 is affirmed.

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

DATE of Service: December 1, 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. 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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