

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1859

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 31, 2014, the Employment Department (Department) issued an administrative decision concluding that the employer discharged claimant for misconduct (decision # 120123). Claimant filed a timely request for hearing. On December 2, 2014, ALJ Clink conducted a hearing, and issued Hearing Decision 14-UI-29698, concluding that the employer discharged claimant, not for misconduct. On December 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) C & K Marketing employed claimant from April 15, 2013 through October 7, 2014 as a produce clerk.

(2) The employer expected that claimant would inspect produce offered for sale in the market and removing any spoiled items from the shelves. Spoiled produce that claimant removed was placed in boxes in a cooler and donated to a community kitchen. Claimant knew and understood these expectations.

(3) On May 5, 2014, claimant's supervisor counseled him about his attendance.

(4) On August 9, 2014, claimant's supervisor gave him a written warning about claimant's failure to work scheduled hours.

(5) On October 3, 2014, claimant left work at 3:30 p.m. Before he left, he checked the produce shelves and determining that there were no spoiled or moldy items on the shelves.

(6) On October 6, 2014, claimant's supervisor suspended claimant for three days because he believed that claimant had left produce that was moldy or of poor quality on the shelves on October 3.

(7) After consulting with the employer's district manager, the store manager discharged claimant on October 7, 2014.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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).

The employer discharged claimant because the store manager concluded that claimant left produce on the shelves that was moldy or of poor quality on October 3, 2014. Claimant, however, testified that he checked the produce shelves before he left work on October 3, and found no moldy or poor quality items on them. Audio Recording at 27:50 and 28:32. The evidence regarding the quality of the produce on October 3 is thus equally balanced, and the employer has failed to meet its burden to establish misconduct.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-29698 is affirmed.

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

DATE of Service: January 16, 2015

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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