

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1934

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130452). Claimant filed a timely request for hearing. On December 17, 2014, ALJ Lohr conducted a hearing, and on December 18, 2014 issued Hearing Decision 14-UI-30629, concluding the employer discharged claimant, but not for misconduct. On December 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) C & K Market Inc. employed claimant as a closing manager from February 28 to August 4, 2014.

(2) The employer expected employees to pay for any of the employer's food or beverages they took for consumption during their breaks. Claimant understood that expectation.

(3) On August 1, 2014, claimant took one of the employer's beverages for consumption during his break. The employer discharged claimant for allegedly failing to pay for the beverage.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer failed to establish that claimant's discharge was 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 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 had a right to expect employees to pay for any of the employer's food or beverages they took for consumption during their breaks. Claimant understood that expectation. At hearing, the employer's store manager testified that on August 1, 2014, claimant failed to pay for a beverage he took for consumption during his break. Transcript at 4. Claimant denied the allegation. Transcript at 14. We agree with the ALJ that the evidence on that issue is equally balanced.<sup>1</sup> The employer therefore failed to show by a preponderance of evidence that claimant violated the expectation that he pay for any of the employer's food or beverages he consumed during his breaks. Absent such a showing, the employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-30629 is affirmed.

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

**DATE of Service:** February 3, 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](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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<sup>1</sup> *See* Hearing Decision 14-UI-30629 at 3.