

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0218

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 172641). Claimant filed a timely request for hearing. On February 10, 2015, ALJ Vincent conducted a hearing, and on February 11, 2015, issued Hearing Decision 15-UI-3375, affirming the administrative decision. On February 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Walmart Associates, Inc. employed claimant from August 9, 2007 through December 3, 2014, last as an associate in the deli department of one of its stores.

(2) The employer expected that employees would not take and eat food from the deli unless they paid for it. Claimant knew and understood this expectation as a matter of common sense. Claimant believed that it was permissible to give employees small quantities of food to sample and often saw her co-workers offer samples to employees. Claimant regularly gave employees food to sample and on occasion, sampled small quantities of food from the deli.

(2) On November 27, 2014, the employer provided a Thanksgiving meal to employees. A number of baked potatoes were left over from that meal, and employees brought them to the break room behind the deli for consumption by employees.

(3) On November 28, 2014, claimant reported for work at 11 a.m. She ate some of the left over baked potatoes in the break room behind the deli. Other employees observed claimant's actions, and reported to store management that claimant had eaten food for which she had not paid.

(4) On December 3, 2014, the employer's market investigator and asset protection manager interviewed claimant about the November 28 incident. During the course of this interview, claimant admitted that over the past three to four months, she had occasionally eaten food samples from the deli that she had not paid for, including items such as potato wedges or small pieces of chicken. When pressed by investigator and manager, claimant agreed to pay \$40 as restitution for the food samples she had eaten. Also on December 3, 2014, the employer discharged claimant for consuming food for which she had not paid.

CONCLUSION AND REASONS: We disagree 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. 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. OAR 471-030-0038(3)(b).

As a preliminary matter, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred in a discharge case. The proximate cause of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, the evidence shows the employer discharged claimant for eating food for which she had not paid. The employer alleged that claimant's unauthorized consumption occurred when claimant sampled small amounts of deli food over a three to four month period, and also when she ate potatoes on November 28, 2014. Because the last incident of claimant's alleged misconduct before her discharge occurred on November 28, that incident was the proximate cause of claimant's discharge and is the proper focus of our misconduct analysis.

Claimant knew and understood that the employer expected her to pay for any food from the deli food that she consumed. In regard to the potatoes she consumed on November 28, however, claimant understood that these were leftovers from a meal the employer had provided for its employees. Because her coworkers made these potatoes available to other employees by putting them in the break room, claimant reasonably believed it was permissible to eat them. Claimant's conduct was therefore the result of a good faith error and did not therefore constitute misconduct.

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

DECISION: Hearing Decision 15-UI-33375 is set aside, as outlined above.

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

DATE of Service: April 8, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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