

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0299

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92506). Claimant filed a timely request for hearing. On March 12, 2015, ALJ Kirkwood conducted a hearing and issued Hearing Decision 15-UI-35027, concluding the employer discharged claimant, but not for misconduct. On March 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted argument to EAB, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Virgils at Cimmiyottis employed claimant from June 25, 2014 to January 13, 2015 as a line cook.

(2) The employer expected claimant to put away food deliveries in a timely manner at the beginning of his shift, and to clean the kitchen, including the shelves in his work area, at the end of his shift. Claimant understood the employer's expectations regarding putting away food deliveries.

(3) On January 13, 2015, claimant spent one hour at the beginning of his shift unpacking and putting away a freight delivery into the employer's cold storage. Claimant did not clean the shelves in his work area at the end of his shift. The employer's owner discharged claimant for allegedly failing to put away a freight delivery in a timely manner, and failing to clean the kitchen properly, including wiping the shelves in his work area.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that claimant's discharge was 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, in part, for allegedly failing to put away a freight delivery in a timely manner at the start of his shift on January 13, 2015. The employer provided hearsay testimony that claimant failed to put away the freight for the first two hours of his shift even though the owner repeatedly asked him claimant to do so. Audio Record at 26:10 to 30:18. However, claimant testified that he put the freight away when he first reported to work that day without being told to do so. Audio Record at 19:22 to 19:39. Absent a basis for concluding that claimant was not a credible witness, his firsthand testimony that he put away the freight in a timely manner at the start of his shift outweighs the employer's hearsay evidence to the contrary. The employer therefore failed to establish that claimant violated the employer's expectations, let alone that he did so willfully or with wanton negligence.

The employer also discharged claimant for failing to properly clean the kitchen properly at the end of his shift on January 13, 2015. The owner told claimant he was being discharged, in part, for failing to clean the kitchen properly, including the kitchen shelves. However, claimant testified that he was never trained regarding his responsibilities in cleaning the kitchen. Audio Record at 18:20 to 18:33. The employer failed to show claimant knew or should have known from prior experience, training, warnings or common sense that his cleaning of the kitchen on January 13 probably violated the employer's expectations. Absent such a showing, the employer failed to establish that claimant violated its kitchen cleaning expectations willfully or with wanton negligence.

The employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-35027 is affirmed.

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

DATE of Service: May 4, 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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