

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0334

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85940). Claimant filed a timely request for hearing. On March 16, 2015, ALJ R. Davis conducted a hearing, and on March 19, 2015 issued Hearing Decision 15-UI-35448, affirming the Department's decision. On March 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bi-Mart Corporation employed claimant from July 15, 2009 to January 20, 2015.

(2) During the last six months of her employment, claimant worked for the employer as a pharmacy clerk. The employer expected its pharmacy clerks to sell the "correct prescription [medication] to the correct customer." Exhibit 1 at 2. The employer therefore required its pharmacy clerks to ask each customer the first and last name of the individual for whom the medication was intended, and the individual's birth date, street address or phone number. Claimant understood the employer's expectations and prescription medication sales procedures.

(3) On January 16, 2015, claimant assisted a customer purchasing a prescription medication. On one side of claimant, a pharmacist was counseling another customer. On the other side, another pharmacy clerk was assisting a third customer. Claimant therefore moved closer to her customer to ensure she heard the customer's answers to her questions. Claimant asked the customer the first and last name of the individual for whom the medication was intended, and the individual's birth date. The individual's last name was the same as another individual whose prescription medication was ready to be purchased. Claimant misheard the customer's answers to her questions, and therefore sold the wrong prescription medication to the customer.

(4) The employer discharged claimant for selling the customer the wrong prescription medication.

CONCLUSIONS AND REASONS: We disagree 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).

In Hearing Decision 15-UI-35448, the ALJ concluded that claimant's conduct on January 16, 2015 was a wantonly negligent violation of the employer's expectation that she sell the correct prescription medication to the correct customer.¹ In support of that conclusion, that ALJ asserted that although neither party could "definitively state" that claimant failed to follow the employer's prescription medication sales procedures, it did not appear "plausible" that claimant could have sold prescription medication to the wrong customer if she had followed those procedures.² The ALJ further asserted that claimant testified that she did not remember listening to the customer's responses to her questions, which showed she was indifferent to the consequences of her actions.³

At hearing, however, claimant testified that she followed the employers' prescription medication sales procedures by asking the customer the first and last name of the individual whose medication was being purchased, and the individual's birth date. Audio Record at 30:00, 32:00. Contrary to the ALJ's assertion, claimant testified that she misheard the customer's answers; she did not testify that she did not remember listening to them. Audio Record at 32:30. We do not find claimant's testimony implausible given that the individual's last name was the same as another individual whose prescription medication was ready to be purchased. The record therefore shows that claimant followed the employer's prescription medication sales procedures, and not that she consciously engaged in conduct she knew or should have known would probably result in her selling the customer the wrong medication, or that she was indifferent to the consequences of her actions. Claimant may have been careless, arguably negligent, but the employer failed to establish that her conduct rose to the level of wanton negligence, as defined under OAR 471-030-0038(1)(c).

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-35448 is set aside, as outlined above.

¹ Hearing Decision 15-UI-35448 at 3.

² *Id.*

³ *Id.*

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

DATE of Service: May 12, 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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