

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0387**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80121). Claimant filed a timely request for hearing. On March 25, 2015, ALJ Triana conducted a hearing, and on March 27, 2015 issued Hearing Decision 15-UI-35902, concluding the employer discharged claimant, not for misconduct. On April 3, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of the argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Powells Diner LLC employed claimant from May 17, 2014 to January 3, 2015 as a kitchen worker.

(2) The employer expected claimant to complete tasks given to him by managers and to refrain from engaging in insubordination. Claimant understood the employer's expectations.

(3) On January 1, 2015, the owner was not at the employer's diner, and told the assistant manager by telephone to assign claimant the tasks of moving the garbage dumpster, and removing plastic and garbage from the cardboard recycling bin. The manager told the owner she assigned claimant those tasks.

(4) On January 2, 2015, the owner and claimant were not at work.

(5) On January 3, 2015, the owner saw the garbage dumpster had not been moved, and a cook showed her plastic items he said he found in the cardboard bin on January 2, 2015.

(6) On January 3, 2015, the employer discharged claimant for allegedly engaging in insubordination by failing to follow the assistant manager's instructions to move the dumpster and remove plastic from the cardboard recycling bin on January 1, 2015.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, 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's owner testified that he began having problems with claimant's performance in August 2014, but would not have discharged claimant on January 3, 2015 had he not allegedly engaged in insubordination by failing to follow the assistant manager's instructions on January 1. Audio Record at 20:12-21:07. Consequently, because claimant's alleged conduct on January 1, 2015 triggered the employer's decision to discharge claimant, it was the proximate cause of the discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to complete tasks given to him by his managers. Claimant understood that expectation. However, the allegation that the assistant manager told claimant on January 1, 2015 to move the garbage dumpster and remove plastic from the cardboard recycling bin, consisted entirely of hearsay from the employer's owner, who was not at the diner on January 1 or 2, 2015. Claimant denied that the assistant manager told him to move the garbage dumpster or remove plastic from the cardboard recycling bin, and the record fails to show that he knew or should have known to do so on January 1 without having been told by a manager. Audio Record at 35:25-35:59. The evidence as to whether claimant failed to follow instructions from the assistant manager to move the dumpster and remove plastic from the cardboard recycling bin is, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant engaged in the conduct for which he was discharged.

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-35902 is affirmed.

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

**DATE of Service: May 21, 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](http://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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