

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0466

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged but not for misconduct (decision # 150007). The employer filed a timely request for hearing. On April 15, 2015, ALJ Murdock conducted a hearing, and on April 17, 2015 issued Hearing Decision 15-UI-37116, reversing the Department's decision. On April 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Petco Animal Supplies Stores, Inc. employed claimant from July 12, 2011 until February 7, 2015, last as a manager in its dog grooming salon.

(2) The employer expected claimant to refrain from treating customers rudely. Claimant understood the employer's expectations as a matter of common sense.

(3) On February 1, 2015, a new general manager began working at the employer's store. The new general manager oversaw claimant's management of the grooming salon. In her few interactions with the new general manager, claimant thought that the new manager was preoccupied with enforcing her own interpretations of the employer's policies and procedures.

(4) On February 3, 2015, a customer called the grooming salon and spoke with claimant about an appointment to have a de-shedding treatment done on her dog, a full-grown husky. The customer wanted to obtain the treatment for \$32.99, which the employer had advertised as a special price for de-shedding treatments. Based on the employer's statements, claimant told the customer that the \$32.99 special did not include large, thick coated breeds like the customer's husky, for which the usual de-shedding charge was between \$60 and \$80 because de-shedding such breeds required an unusual amount of time and grooming products. After some discussion, claimant agreed to perform the de-shedding treatment on the customer's dog for \$40 and set up an appointment for February 4, 2015. On February 4, 2015, the customer arrived with her dog, but the assigned groomer was unable to perform the de-

shedding because the customer did not bring in a document showing that the customer's dog had an in force vaccination against rabies. The customer's appointment was re-scheduled to the morning of February 5, 2015 and claimant was assigned to groom the customer's dog.

(5) On Thursday, February 5, 2015, at approximately 8:30 a.m., the customer arrived with her dog for the de-shedding treatment. When claimant confirmed that the customer wanted her to give the dog a de-shedding treatment, and stated that she was going to charge the customer \$40, as agreed, the customer told claimant that an assistant manager had quoted her a price of \$32.99. Claimant repeated what she had told the customer on February 3, 2015 about the cost to de-shed large breeds, told the customer the assistant manager had misquoted the price to her but agreed to perform the de-shedding treatment "this one time" for \$32.99. Audio at ~17:16. Claimant emphasized to the customer that future de-shedding treatments for her dog would not be done for a charge of \$32.99. The customer became very upset and left the salon abruptly, entered the employer's store located on the same premises and began to loudly complain to a store employee about claimant's behavior toward her. Claimant paged the general manager to inform her of the situation and the customer's response to it. When the general manager did not respond within a couple of minutes, claimant began to walk from the salon toward the general manager's office. The customer then re-entered the salon and began "screaming" at claimant as claimant was walking toward the back room. Audio at ~18:40. Claimant said to the customer, "You know what, I'm done" and continued on her way to the general manager's office. Audio at ~18:56. The general manager discontinued a telephone call she was on and went to the salon to speak with the customer. When the general manager finished, she returned to her office to speak with claimant. Claimant tried to explain to the general manager that she had been polite to the customer, but had needed to clearly inform the customer of the employer's pricing policies for de-shedding large, thick-coated dog breeds. Claimant was "visibly upset" and the general manager told her to go home for the rest of the day. Audio at ~19:48.

(6) On Friday, February 6, 2015, claimant worked the full day. On Saturday, February 7, 2015, when claimant reported for work at 7:30 a.m., the general manager asked claimant to come to her office to discuss the incident on February 5, 2015. The general manager told claimant that the customer had made a complaint to the employer's corporate office and alleged that claimant treated her rudely on February 5, 2015. The general manager asked claimant repeatedly how she intended to guarantee that she would not treat a customer rudely again. Both claimant and the general manager became upset during their conversation and it was "heated." Audio at ~26:14. During the conversation, claimant asked the general manager if she was going to "fire" her and the general manager said she that she had not taken the steps needed to discharge claimant and that claimant needed to make her own decision about continuing to work for the employer. Audio at ~25:53. Claimant told the general manager that she was not going to quit work. Audio at ~26:05. After claimant's statement, the disagreement between claimant and the general manager escalated. Finally, the general manager told claimant that "was it" and she "was fired." Audio at ~26:14. Claimant gathered her personal belongings, left the workplace and did not return.

(7) Sometime between approximately February 8 and February 10, 2015, claimant called the general manager to ask if she had been "terminated." Audio at ~11:52, ~26:56. The general manager told claimant that she was and that the necessary paperwork had been processed. Audio at ~11:52. On approximately February 10 or 11, 2015, claimant received her final paycheck from the employer. The paycheck had been issued within one day after claimant was told she was fired, or no later than February

8, 2015. After claimant's conversation with the general manager, claimant tried unsuccessfully to contact the employer's human resources department about what had happened on February 5, 2015, and her belief that she had been unfairly discharged. Claimant discontinued trying to speak with the human resources department when she obtained a new job as a groomer, sometime between approximately February 13 and 18, 2015.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

In Hearing Decision 15-UI-37116, the ALJ concluded that claimant's work separation was a voluntary leaving and she was disqualified from benefits because she left work without good cause. The ALJ based her findings about the nature of the work separation on the testimony of the employer's witness, which she considered the "credible evidence in the record." Hearing Decision 15-UI-37116 at 2-3. For the reasons that follow, we disagree with the ALJ's findings, and conclude that the employer discharged claimant. We also conclude that claimant is not disqualified from benefits because, although she was discharged, it was not for misconduct.

The employer's witness, the general manager, contended that claimant voluntarily left work when she told her on February 7, 2015, "Well then, I'll quit." Audio at ~11:00, ~11:12. In contrast, claimant denied stating that she had quit and contended that the general manager discharged her when she told claimant, during the conversation on February 7, 2015, "That was it [and] I was fired." Audio at ~26:14. The Department's regulations define a work separation as a voluntarily leaving when a claimant could have continued to work for the employer for an additional period of time, but chose not to do so. OAR 471-030-0038(2)(a) (August 3, 2011). The regulations define a separation as a discharge when a claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer. OAR 471-030-0038(2)(b).

The testimony of claimant and the employer's general manager cannot be reconciled, and there is no evidence in the record showing that the testimony of one was more credible than the other or should be considered dispositive of the likely nature of the work separation. However, the circumstances surrounding the work separation tend most strongly to show that it was a discharge. The general manager agreed that claimant called her shortly after their heated conversation on February 7, 2015 to inquire whether she had been "terminated" and the general manager stated to her that she had. Audio at ~11: 57, ~26:56. It is unlikely that claimant would have made such an inquiry if she had quit work or intended to quit work during the February 7, 2015 conversation, but it is quite plausible she would make the inquiry to determine if the general manager had reconsidered her decision to terminate claimant on-the-spot during a heated conversation. In addition, the general manager did not dispute claimant's testimony about when her final paycheck was issued, or that it was issued within the expedited time frame statutorily required for an employee who had been discharged as opposed to the longer time frame for an employee who had quit work. Audio at ~29:15; ORS 652.140(1) (when an employer discharges an employee, the final paycheck must be issued not later than the end of the first business day after the discharge); ORS 652.140(2)(b) (when an employee quits work without notice of at least 48 hours, the final paycheck must be issued within five weekdays after the employee gave notice). Further, the general manager did not dispute claimant's testimony that she tried to reach the employer's human resources department to complain about the circumstances that led to her discharge by the general manager. Audio at ~27:10. It is unlikely claimant would have undertaken this contact if she had quit as

opposed to having been discharged. Based the undisputed circumstantial evidence in the record, claimant's work separation was a discharge on February 7, 2015.

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) 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Since the general manager took the position that she did not discharge claimant, she provided no reasons for the discharge. However, from the circumstances surrounding the February 7, 2015 discussion between claimant and the general manager, it can be inferred that the employer discharged claimant either for the way in which she allegedly treated the customer on February 5, 2015 or the way in which she interacted with the general manager during the February 7, 2015 discussion. While the discussion might have become heated, nothing about the manner in which claimant spoke to the general manager or the words that she used shows or tends to show that claimant violated a reasonable and known employer standard. Audio at ~9:50, ~20:32. With respect to the manner in which claimant supposedly treated the customer on February 5, 2015, although the general manager stated that the customer thought claimant had treated her rudely and "very aggressively," claimant denied that she had done so and supplied a context for her statements that made them understandable as attempts to politely explain the employer's pricing policies to the customer or as attempts to deter the customer from further outbursts. Audio at ~7:31, ~5:50, ~17:13, ~18:56. Claimant's first-hand evidence about her behavior toward the customer and what she said to the customer is entitled to greater weight than the employer's hearsay evidence based on the customer's characterization of the interaction. On this record, the employer did not meet its burden to demonstrate claimant treated the customers with unreasonable rudeness, that she was conscious that her conduct would probably violate the employer's expectations, or that the employer discharged claimant for a willful or wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-37116 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: June 19, 2015

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete

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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