

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0598**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision #73516). The employer filed a timely request for hearing. On May 8, 2015, ALJ S. Lee conducted a hearing, and on May 13, 2015, issued Hearing Decision 15-UI-38439, affirming the administrative decision. On May 22, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Carmike Cinemas employed claimant as a floor staff person from May 5, 2014 to January 18, 2015. Exhibit 1.

(2) The employer's policy prohibits employees from harassing other employees; prohibited behaviors included verbal, physical and visual harassment, and coercion and reprisals. Exhibit 1.

(3) On November 26, 2014, the employer placed claimant on a 90 day probationary period because of excessive tardiness. During this probationary period, the employer had the right to immediately discharge claimant for poor performance or any violation of its policies.

(4) On February 17, 2015, claimant and other employees were talking with a new co-worker as they performed the tasks necessary to close the theatre's concession stand. Claimant told the new co-worker that she should be careful of a supervisor, who often tried to make advances toward new, female employees. Claimant described the supervisor's behavior as "rapey." Transcript at 15.

(5) On February 18, 2015, the supervisor about whom claimant had warned the new employee called claimant into his office and told him that he heard that claimant had described the supervisor's behavior as "rapey." Claimant responded that he thought the supervisor's actions with previous female

employees had been less than ethical, but agreed to stop describing the supervisor's behavior as "rapey." Transcript at 16. After leaving the supervisor's office, claimant told other employees what he and the supervisor had discussed.

(6) The supervisor believed that claimant had continued to describe his behavior as "rapey," and told the manager about claimant's remarks. The manager called claimant into his office, and asked claimant if he knew why he was there. Claimant responded that the situation was "bullshit." Transcript at 18. The manager asked claimant if he had used the word "rapey"; claimant admitted that he had, but said it was a joke. The manager dismissed claimant from his office.

(7) After claimant left the manager's office, claimant went to an area outside the theatre designated for garbage and began to break up empty boxes for disposal or recycling. Claimant was angry after his discussion with the manager, and believed the manager was going to discharge him. Claimant vented his frustrations on the boxes and punched and stomped them vigorously. Two employees watched claimant break up the boxes; they attempted to reassure him by telling him that the manager would not discharge him.

(8) Claimant's actions with the boxes were recorded by video camera and viewed by the manager on a monitor in his office. The manager discharged claimant for his actions in breaking up the boxes which the manager believed were violent and aggressive.

**CONCLUSION AND REASONS:** We agree 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.

The employer discharged claimant for behavior on February 17, 2015 that the employer's manager concluded was violent and aggressive. Although the manager was dissatisfied with claimant's behavior at a meeting in which he reprimanded claimant for an inappropriate remark claimant supposedly made to a supervisor, the manager had not decided to discharge claimant when the meeting ended. The manager subsequently watched a video of claimant breaking down empty boxes and testified that "seeing him on camera act that way just made me decide to let him go." Transcript at 6. Because this incident 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.

We conclude that claimant's behavior in regard to the boxes violated no policy or expectation of the employer. The employer provided no evidence of any policy related to proper handling of garbage or materials to be recycled. Claimant's actions posed no threat to the safety of employees or customers. No customers saw what claimant was doing, and there was no evidence that the two employees who watched claimant were frightened or upset by claimant's behavior. To the contrary, one of the employees watching claimant felt comfortable enough to put a box on her head and jokingly tell claimant she was a robot. We agree with the ALJ that "it is not misconduct to express frustration,

particularly as it was done out of public view and was aimed at objects that were being taken to the trash.” Hearing Decision 15-UI-38439 at 6. The employer therefore failed to meet its burden to demonstrate that claimant’s behavior in breaking down the boxes constituted a willful or wantonly negligent violation of its policies or expectations.

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-38439 is affirmed.

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

**DATE of Service:** July 7, 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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