

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0653

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 135152). The employer filed a timely request for hearing. On May 18, 2015, ALJ Clink conducted a hearing at which claimant did not appear, and on May 21, 2015 issued Hearing Decision 15-UI-38899, affirming the Department's decision. On June 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Finnegan's Toys & Gifts Inc. employed claimant from October 24, 2013 to March 18, 2015 as a stocker.

(2) The employer expected claimant to demonstrate a positive attitude in her work with other staff members, and accept tasks and assignments with enthusiasm. The employer explained its expectations to claimant on January 21, 2015 when it gave her a warning about having a poor attitude at work, and gave her the expectations in writing on January 27, 2015.

(3) On March 6, 2015, the employer's receiving clerk was not on duty when boxes arrived for inventory. The manager on duty asked an employee to check the shipment, and he completed the task although it was not normally his job duty. The manager on duty told claimant the other employee had checked the shipment even though it was not his duty. The manager on duty told claimant, "I would do it if I knew how." Claimant replied, "I would do it if I was being paid to do it." Exhibit 1 at 12. Later that day, the manager on duty sent the store manager an email about the incident. The store manager recommended to the owner that she discharge claimant because of her comment that day. The owner told the store manager she would address the matter when the store manager returned from her vacation on March 18, 2015.

(4) On March 18, 2015, the manager returned from her vacation, and the employer discharged claimant for allegedly exhibiting a poor attitude at work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. 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 had a right to expect claimant to have a positive attitude at work, and to accept assignments in a positive manner. Claimant understood the employer's expectations both as a matter of common sense and as a result of the January 21, 2015 warning she received from the employer. The record shows the employer discharged claimant because she allegedly showed a poor attitude at work by commenting, "I would do it if I was being paid to do it," to a manager on duty after the manager noted that another employee had completed another employee's job duty in her absence. The preponderance of the evidence fails to show, however, that claimant acted intentionally or with indifference to the employer's expectations when she made the comment. The scant hearsay evidence about the incident fails to show claimant's tone or demeanor when she made the statement, or other evidence that her comment was negative. Given that claimant knew another employee had already completed the task, the record does not show claimant knew or should have known the employer would perceive her statement as insubordinate or showing a poor attitude.

On this record, the employer failed to meet its burden to establish that claimant consciously violated the employer's policy against exhibiting a poor attitude at work. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-38899 is affirmed.

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

DATE of Service: July 22, 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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