

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0942**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94433). Claimant filed a timely request for hearing. On July 16, 2015, ALJ Seideman conducted a hearing, and on July 20, 2015 issued Hearing Decision 15-UI-41732, affirming the Department's decision. On August 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Point Blank employed claimant as a delivery driver from May 13, 2015 until May 18, 2015. Throughout his employment, claimant was in training and drove a truck on an assigned route with a trainer-driver.

(2) The employer expected claimant to refrain from objectionable behavior on the premises of the businesses to which he delivered the employer's products. As a matter of common sense, claimant understood the employer's expectation as he reasonably interpreted it.

(2) On Friday, May 15, 2015, claimant and the trainer made a delivery to a customer who operated a combination convenience store, take-out sandwich shop and restaurant. Fridays were to be the busiest days on claimant's route. After they unloaded the delivery, the trainer told claimant he could pick up his lunch if he wished at the sandwich shop. Claimant went into the shop and ordered and paid for a sandwich. The person who waited on claimant told him that there were a few orders in front of his and it would take a few minutes before his sandwich was prepared. The trainer then came into the shop and claimant told him that the order was going to take a little time. The trainer was displeased at the delay and told claimant that they had a busy day and needed to get on with the route. The trainer then left the shop.

(3) After the trainer left, claimant decided that he did not want to irritate the trainer by causing a delay. Claimant went up to the sandwich counter to ask about his order and to cancel the order if it was not yet

prepared. The person behind the counter told claimant that he needed to speak with the person who had taken his order if he wanted to cancel it. The person who had taken claimant's order was in the restaurant part of the convenience store taking another order. When that person had finished waiting on her customers, claimant asked her to cancel his sandwich order and refund the purchase price. She told claimant she was busy at that time and she would attend to his request shortly. Claimant went back to the sandwich counter to wait for her. When claimant was at the counter the second time, he noticed that a sandwich had been prepared that resembled the one that he had ordered. Claimant asked the person preparing the sandwiches if that order was his and she said that it was not, but she was going to prepare his order next. She prepared the order, asked claimant if he wanted French fries or tater tots, gave claimant his food and claimant left the store.

(4) After claimant had his order, he went to the truck where the trainer was waiting and they continued on the route. During the remainder of the working day, claimant became upset with trainer over an unrelated incident. After claimant and the trainer completed the route, they went to the employer's premises to complete the day's paperwork. Shortly after they arrived at the workplace, the fleet manager approached claimant and asked him to come to his office. The manager told claimant that he had received a call from the manager of convenience store at which he had earlier ordered the sandwich complaining that claimant made "a scene" while placing and attempting to cancel his order. Audio at ~7:04. The manager of the convenience store told the claimant's manager that claimant was not going to be allowed on the premises of the convenience store in the future. Claimant's manager played for claimant a voicemail message he had received from the employer's sales representative about the reaction of the convenience store manager to claimant's behavior and what the convenience store manager had told him about claimant's objectionable behavior. Claimant told his manager that the accounts of his behavior given by the convenience store manager and the sales representative were "all false." Audio at ~27:23. Claimant then left the workplace and went home for the weekend.

(5) On Monday, May 18, 2015, claimant went to the workplace for a sales meeting. Before the meeting started, the fleet manager and the employer's sales manager met with claimant. The fleet manager told claimant that he was discharged for his reported behavior in the convenience store on Friday, May 15, 2015. Claimant insisted that the reports of his behavior were not accurate. The employer discharged claimant because the convenience store was an "important customer" of the employer and claimant was going to be unable to drive the route for which he was hired if the convenience store would not allow him to enter its premises. Audio at ~11:30. Claimant reacted emotionally to learning of his discharge, and the employer's managers perceived that claimant was "emotionally aggressive" during the discharge meeting. Audio at ~20:11.

**CONCLUSIONS AND REASONS:** 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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The fleet manager testified at hearing that the convenience store manager told him on May 15, 2015 that claimant had created a “general ruckus” and “made quite a scene” at the sandwich shop by cutting into line in front of other customers to order his sandwich, demanding that his sandwich be prepared “right away” and arguing with the server about refunding the purchase price for the sandwich after he cancelled the order. Audio at ~6:57. Claimant denied that he had done so, and he described a polite transaction in which attempted to learn whether he needed to cancel his order due to time constraints and obtain a refund. Audio at ~ 22:16, ~26:13, ~34:14. In Hearing Decision 15-UI-41723, the ALJ found that the hearsay statements provided by the employer’s witnesses at hearing about claimant’s behavior during the transaction were more credible than claimant’s description of it and that their description of claimant’s alleged demeanor during the discharge meeting on May 18, 2015 tended to corroborate claimant’s unreasonable behavior in the convenience store. Hearing Decision 15-UI-41723 at 3. Based on these findings, the ALJ concluded that claimant willfully disregarded the employer’s standards by his behavior on May 15, 2015. *Id.* We disagree.

Claimant’s testimony at hearing about his behavior in the sandwich shop was measured and calm. There was no reason in the record to question his credibility or the accuracy of his testimony. There was also no reason to question the credibility of the testimony of the employer’s witness about what the convenience store manager told him about claimant’s behavior in the convenience store. The convenience store manager appeared to have recited to claimant’s manager a description of claimant’s behavior that was provided to him by the two sandwich shop employees with whom claimant dealt on May 15, 2015. Audio at ~8:00. Because the convenience store manager’s statement to the fleet manager was based on third-hand hearsay, the ALJ lacked the ability to test the accuracy of what the sandwich shop employees told their manager or whether that manager accurately summarized the substance of their descriptions when he relayed them to claimant’s manager, the fleet manager. Similarly, the sales representative’s description of claimant’s alleged behavior apparently also originated with the convenience store manager’s hearsay statement and, when recounted at hearing by the fleet manager, became fourth-hand hearsay. Audio at ~8:00, ~9:57. Because of its limitations and its problematic accuracy, first-hand testimony by a person who observed an incident is generally entitled to greater weight than any hearsay testimony, let alone third or fourth hearsay, about the same incident unless there is some reason to doubt the credibility of the first hand account. Because there is no reason to discount credibility of claimant’s first-hand description about his behavior on May 15, 2014 hearing, it outweighs the hearsay evidence provided by the employer’s witnesses. As well, the description of claimant’s post-discharge behavior does not tend to undercut the force of his description of the incident and does not serve to impeach his hearing testimony. While the employer’s witnesses described claimant’s post-discharge behavior as “extremely aggressive,” the witness who clarified his meaning stated that claimant appeared to him to be “emotionally aggressive,” and claimant himself testified that he was “emotionally distraught” about being fired. Audio at ~20:11, ~34:49. Nothing in claimant’s post-discharge behavior, as recounted by the employer’s witnesses, suggests anything more than that claimant was upset at being discharged and does not tend to make it more or less likely that claimant would engage in objectionable or aggressive behavior on May 15, 2015 at the sandwich shop. On this record, given the weight of the evidence, the ALJ erred in concluding the employer met its burden to demonstrate that claimant’s behavior in the convenience store on May 15, 2015 was 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-41723 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell, participating.

**DATE of Service: September 15, 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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