

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1280

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150404). Claimant filed a timely request for hearing. On October 6, 2015, ALJ S. Lee conducted a hearing, and on October 9, 2015, issued Hearing Decision 15-UI-45714, concluding the employer discharged claimant, but not for misconduct. On October 29, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The deadline for parties to file written argument in this case was November 18, 2015. See OAR 471-041-0080 (October 29, 2006). The employer's written argument was received on November 23, 2015 and was late. It also was accompanied by new information consisting of documents and a witness statement that were not offered at hearing, and failed to include an explanation of the circumstance or reason beyond its control that prevented it from presenting the new information at hearing. See OAR 471-041-0090. Under OAR 471-041-0080 and OAR 471-041-0090, we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Reality Kitchen Non Profit, a non-profit wholesale bakery, employed claimant as a bakery worker from October 4, 2014 to July 8, 2015.

(2) Claimant suffered a work injury to her back at a prior employer and in March 2015, was released to full duty by her treating physician. Claimant sometimes wore a back brace for support to accommodate her back condition and guard against re-injury. On March 12, 2015, the employer had claimant sign a document that explained its requirement that claimant be consistent about taking required breaks and being safety-conscious on the job.

(3) On or about April 19, 2015, claimant re-injured her back lifting a large mixing bowl of dough and went to an urgent care facility for treatment. Claimant filed a worker's compensation claim with the employer. To prevent further re-injury caused by lifting, the employer arranged for claimant to have an assistant work with her during her late night shift "to make sure that she would not pick up any heavy

weights” in performing her job. Transcript at 9. The employer explained to claimant that it expected her to use the assistant for lifting support when necessary. Claimant was aware of the employer’s expectation.

(4) After the April 19 injury, claimant used the assistant to lift heavy items necessary to perform her job, such as large batches of ciabatta dough. However, when the assistant prepared to leave at the end of his shift before claimant’s shift was over, he helped claimant break down large batches of ciabatta dough into smaller batches loaded into “totes” that claimant believed she could lift on her own. Transcript at 24.

(5) On July 2, 2015, claimant re-injured her back after lifting several of the smaller “totes” and left work early after reporting her injury to the employer. The next day, the employer told claimant not to come in to work because it was evaluating her employment status. On or about July 8, 2015, the employer terminated claimant’s employment because it concluded she had disregarded its instructions to use the assistant to lift heavy items and to work safely, and would likely continue to disregard its instructions in the future.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would violate the employer’s expectation. Here, the employer failed to satisfy that evidentiary burden.

As a preliminary matter, the employer chose not to discharge claimant until after her injury on July 2, and to limit the inquiry to relevant matters, the discharge analysis initially is focused on the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. *See e.g. Cicely J. Crapsler* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that “triggered” the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the “final straw” that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the

incident without which a discharge would not have occurred when it did). Here, the initial analysis of whether claimant's discharge disqualifies her from unemployment benefits is, therefore, properly limited to claimant's behavior that resulted in the July 2 injury which proximately caused her discharge on or about July 8.

The employer discharged claimant because it believed that on July 2, claimant disregarded its standing instructions to utilize the assistant to lift heavy items, had sent the assistant home early, and would continue to disregard its instructions in the future. Transcript at 17-19. The employer had the right to expect claimant to follow its instruction to refrain from lifting heavy items at work. However, at hearing, claimant denied that on July 2 she lifted any item outside of her lifting limitations and asserted that she had the assistant help her break down a large tote of ciabatta dough into smaller manageable totes before he left that day. She further testified that she believed it was the excessive number of smaller totes she lifted that day rather than any one heavy item that aggravated her injury. Transcript at 25-26. On this record, claimant's testimony was plausible. The employer failed to offer firsthand testimony from the assistant contradicting claimant's assertions and provided only hearsay evidence in support of its position. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath more weight than the employer's hearsay evidence and found facts in accordance with her testimony. Accordingly, on this record, the employer failed to establish that claimant knowingly violated the employer's safety instructions to her on July 2, 2015, and without willful or wanton negligence, misconduct has not been shown.

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-45714 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 30, 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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