

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1332

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104439). Claimant filed a timely request for hearing. On October 8, 2015, ALJ Vincent conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46044, concluding the employer discharged claimant, but not for misconduct. On November 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record, including Exhibit 1, which the ALJ received into evidence at the hearing, although Hearing Decision 15-UI-46044 mistakenly states that no exhibits were offered or admitted into evidence. Audio Record at 3:20-5:30; Hearing Decision 15-UI-46044 at 1. EAB also considered the parties' written arguments to the extent they were based on information received into evidence at the hearing. See ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Recreational Equipment Inc. employed claimant as a sales specialist from August 26, 2012 to August 11, 2015.

(2) The employer expected employees to behave in a professional manner and treat each other with dignity, fairness and respect. Claimant understood that expectation.

(3) On July 10, 2015, claimant sold a car top box to a customer. Claimant located the car top box in the employer's warehouse, removed it from its cardboard box, and took it out to the customer's vehicle. She did not have time to break down the cardboard box, and therefore left it in the warehouse. When claimant returned to the warehouse, she noticed that an employee had written her name on the cardboard box, followed by "for you to break down later."

(4) An employee reported to the employer's store manager that when claimant entered the warehouse to retrieve the car top box, she "in a snippy tone demanded that stuff get out of her way, that she needed to get to the car top boxes, that she removed it from the warehouse but did not return to break down the

box, stating that it was beneath her to do so.” Transcript at 8. A second employee reported that claimant refused to break down the box, and “said that she had been here long enough that she didn’t need to break down a car top box.” Transcript at 8. A third employee reported that claimant “had come back to the warehouse, pulled the car top box, left the car top box in the warehouse and did not break it down.” Transcript at 8.

(5) On August 7, 2015 the store manager met with claimant, who denied making the statements alleged by the employees. However, the employer discharged claimant for allegedly making those statements.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant’s discharge was 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 discharged claimant for allegedly making rude statements to other employees on July 10, 2015. However, the employer presented only hearsay statements from unidentified employees to support that allegation. *See* Transcript at 6-8. Claimant testified that she did not make the statements alleged by the employees,¹ and absent a basis for determining that claimant was not a credible witness, we find the evidence on that issue equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant engaged in the conduct for which she was discharged. Absent such a showing, we cannot find that claimant was discharged for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-46044 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 11, 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

¹ Transcript at 16-17.

‘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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.