

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1458

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125215). Claimant filed a timely request for hearing. On November 12, 2015, ALJ Shoemake conducted a hearing, and on November 17, 2015 issued Hearing Decision 15-UI-47801, concluding claimant's discharge was not for misconduct. On December 7, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision, to the extent the argument was based on the record.

FINDINGS OF FACT: (1) Rack Room Shoes, Inc. employed claimant as an assistant manager from August 20, 2014 to September 18, 2015.

(2) The employer prohibited employees from removing merchandise from the store without first paying for it. Claimant understood the employer's prohibition.

(3) Prior to September 12, 2015, claimant purchased a pair of shoes from the employer's business. A manager subsequently gave claimant permission to exchange the shoes. Claimant exchanged the shoes for two pairs of shoes, and held all three pairs of shoes at the manager's desk until she could process the exchange.

(4) On September 12, 2015, claimant's feet hurt while she was at work. She asked for and obtained permission to wear one of the pairs of shoes being held for her at the manager's desk. Claimant subsequently left the store wearing those shoes without completing the exchange/purchase of them, wore the shoes home, and left them there. At the time claimant left the store, she had forgotten she was wearing shoes she had not yet purchased.

(5) The district sales manager subsequently found an empty shoe box behind the manager's desk. On September 16, 2015, a loss prevention representative and district sales manager investigated the empty shoe box. Claimant admitted she had the shoes at her home. The loss prevention representative told claimant to pay for the shoes by the end of the work day. Claimant agreed to do so, but left work at the end of the day having forgotten to complete the exchange/purchase of the shoes she had worn home.

(6) On September 18, 2015, the employer discharged claimant for failing to pay for a pair of shoes before taking them from the employer's store.

CONCLUSIONS AND REASONS: We agree with the ALJ 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. 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.

The employer had the right to expect claimant to refrain from removing merchandise from the store without first having paid for the merchandise. Claimant understood the expectation, and, on September 12, 2015, violated it. She further violated the employer's reasonable expectations when she left work on September 16 without paying for the shoes after having promised that she would do so. There is no dispute that claimant twice violated the employer's expectations. For claimant's violations to be considered misconduct, however, the violations must have been the result of willful or wantonly negligent behavior on claimant's part. The record fails to show that claimant intentionally removed the shoes or failed to pay for them, so her conduct was not willful. Rather, at the time claimant left the store wearing shoes she had not yet purchased on September 12, she had forgotten that she was wearing them. At the time claimant left work without paying for the shoes on September 16, she had forgotten that she was expected to pay for them. Because claimant's violations of the employer's expectations occurred as a result of forgetfulness, she was not conscious of her conduct at the time of each event, so her conduct was not wantonly negligent. Because the record fails to show that claimant's violations were the result of willful or wantonly negligent behavior, misconduct has not been established.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-47801 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 6, 2016

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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