

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1475

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85341). Claimant filed a timely request for hearing. On November 30, 2015, ALJ Vincent conducted a hearing, and on December 4, 2015 issued Hearing Decision 15-UI-48847, concluding the employer discharged claimant, but not for misconduct. On December 8, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Rosen Sunvisor Systems LLC employed claimant as a milling machine operator from July 28, 2014 to October 8, 2015.

(2) The employer expected employees to perform their assigned duties. Claimant understood that expectation.

(3) Claimant typically operated a computer numerical control (CNC) milling machine. On October 5, 2015, claimant's supervisor assigned him to operate a manual milling machine. Claimant had no experience or training with the manual machine. He operated the machine on October 5 and 6, 2015, but had difficulty doing so due to his lack of training and experience.

(4) On October 7, 2015, another employee told claimant he would have to partially dismantle the manual milling machine and reassemble it differently in order to finish the parts he was milling. Claimant determined that he lacked the skills necessary to safely dismantle, reassemble and operate the machine

as modified. Claimant told his supervisor he was uncomfortable operating the machine. Claimant's supervisor asked him if it was beyond claimant's pay grade. Claimant replied that it was beyond his abilities. Claimant's supervisor demanded to know whether he was refusing to operate the machine. Claimant replied that he was. The supervisor ordered claimant to leave work without allowing him an opportunity to explain that he lacked the skills necessary to safely dismantle, reassemble and operate the machine as modified.

(5) On October 8, 2015, the employer's human resources director discharged claimant for refusing to continue operating the manual milling machine.

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. 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 the right to expect claimant to perform his assigned duties to the extent they were reasonable. However, it was unreasonable for the employer to expect claimant to continue operating the manual milling machine after claimant determined that he lacked the skills necessary to safely dismantle, reassemble and operate the machine as modified. Claimant therefore did not violate the standards of behavior which an employer has the right to expect of an employee. Claimant's discharge therefore was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-48847 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 7, 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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