

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0039

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 29, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant but not for misconduct (decision # 140229). The employer filed a timely request for hearing. On December 17, 2015, ALJ Wyatt conducted a hearing, and on December 21, 2015 issued Hearing Decision 15-UI-49739, affirming the Department's decision. On January 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented information that it did not offer at the hearing. The employer did not explain why it was not able to present this information during the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable prevented it from doing so. For this reason, EAB not consider the employer's new information. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) United States Postal Service (USPS) hired claimant on November 1, 2000 and suspended her on October 1, 2015. Claimant last worked for USPS as a rural mail carrier for the North Plains, Oregon Post Office.

(2) The employer expected claimant to deliver all mail she was given that was good and deliverable as addressed to addressees on her route, and to refrain from discarding such mail. Claimant understood the employer's expectations.

(3) On September 29, 2015, a carrier in the North Plains Post Office observed in the waste recycling hamper a number of neatly stacked "Red Plum" newspaper circulars in good and deliverable condition for which delivery appeared not to have been attempted. That carrier spoke to another mail carrier about the circulars she had found in the recycling hamper and the other carrier told her that he had observed claimant placing Red Plum circulars in that hamper sometime before she had discovered the circulars.

On September 29, 2015, the first carrier sent a text message to the postmaster of the North Plains Post Office informing the postmaster of what she had observed and stating that she “believed” claimant was improperly discarding mail intended for addressees on her route rather than delivering that mail to the intended recipients. Audio at ~15:49.

(4) On September 30, 2015, the postmaster at the North Plains Post Office contacted the postmaster of a nearby Post Office to verify the presence of the circulars in the North Plains recycling hamper, whether the circulars were in good and deliverable condition and to determine the route on which the addressees resided. The other postmaster confirmed that approximately 78 to 80 Red Plum circulars were present in the recycling hamper and were in good and deliverable condition. That postmaster observed that the circulars were marked by the sender for delivery in that week and that the circulars were all addressed to residences on claimant’s route. Sometime on or before October 1, 2015, the carrier who had first observed the Red Plum circulars in the recycling hamper called the postmaster and told her that a second carrier had seen claimant placing the circulars in that hamper around the time of the first carrier’s observation of them.

(5) On October 1, 2015, the employer placed claimant on off-duty status without pay while it investigated her possible involvement in discarding good and deliverable mail. The postmaster who spoke with claimant told claimant that the employer was “investigating the mail in the hamper.” Audio at ~25:15.

CONCLUSIONS AND REASONS: The employer suspended claimant but not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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 has the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

When the employer suspended claimant on October 1, 2015, it did so to allow it time to investigate whether claimant had knowingly or intentionally discarded the Red Plum circulars in the waste recycling hamper rather than delivering them to the designated addressees. Audio at ~11:40. ~11:55, ~25:15. Notably, the employer did not contend that it suspended claimant on October 1, 2015 as a disciplinary sanction for behavior it had already determined she had engaged in. Given the purpose for which the employer suspended claimant, and the fact that it had not yet determined that claimant had violated its standards when it suspended her, the employer could not have suspended claimant for misconduct. While later investigation occurring after October 1, 2015 may have shown to the employer’s satisfaction that claimant discarded mailed in the waste recycling hamper as accused, the issue is not whether the employer ultimately concluded that claimant had engaged in misconduct, but whether it had made that determination by the time it suspended her. It had not and conclusions it drew after further investigation do not affect the reasons for which it suspended claimant on October 1, 2015.

Although the employer suspended claimant, it did not do so for misconduct. Claimant is not disqualified from unemployment benefits arising from her October 1, 2015 suspension from work.

DECISION: Hearing Decision 15-UI-49739 is affirmed.
Susan Rossiter and J. S. Cromwell

DATE of Service: February 2, 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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