

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0143**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 31, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111704). Claimant filed a timely request for hearing. On February 2, 2016, ALJ Murdock conducted a hearing, and on February 5, 2016 issued Hearing Decision 16-UI-52453, affirming the Department's decision. On February 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Master Heat Corporation employed claimant as a technician from January 2, 2014 to November 23, 2015.

(2) In January 2015, the employer and claimant entered into an agreement under which claimant was prohibited from competing with the employer or soliciting its customers or prospective customers. Claimant understood the agreement. Claimant also understood, however, that the employer would permit him to do supplement his income with periodic side jobs.

(3) One of the employer's clients asked the employer to send someone to perform an estimate on a Saturday. The employer gave the client claimant's phone number. Around the same time, claimant's cousin told claimant that he had referred a friend to claimant for a side job and that claimant should expect his friend to call.

(4) Claimant subsequently received a call from an individual asking him to perform an estimate. The caller said he did not know how he got claimant's phone number and did not mention the employer's business. Claimant believed that the caller was his cousin's friend. He did not know or suspect that the caller was one of the employer's clients.

(5) Claimant performed the estimate on a Saturday, and did not use his uniform or the employer's van. He discovered he could not do the job as a side job because the client wanted a CCB-licensed company to do the work. Because claimant believed the client was his cousin's friend and wanted him to pay the lowest price, he referred the client to his friend's business instead of the employer's because his friend usually charged customers less than the employer.

(6) The client complained to the employer about claimant's estimate. The employer concluded that claimant had solicited its client for a competing business, and, on November 23, 2015, discharged claimant for violating their agreement. Claimant would not have done the estimate if he knew or suspected that it involved the employer's client, and did not speak with the client again after finding out that he was the employer's client.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Claimant understood that, notwithstanding his agreement with the employer, the employer allowed him to do side jobs. Audio recording at ~29:12. The employer's witness stated that he did not allow claimant to do side jobs. Audio recording at ~38:27. Absent a reason to disbelieve either witness, the evidence about whether claimant was permitted to do side jobs is equally balanced and must be resolved against the party with the burden of persuasion, here, the employer.

The ALJ concluded that claimant committed misconduct when he solicited the employer's client for his friend's competing business because he "knew or should have known that the employer would not condone his conduct" and "did not hold a good faith belief that the employer would allow him to solicit or compete with the employer for a customer's business." Hearing Decision 16-UI-52453 at 3. We disagree with the ALJ and conclude that claimant's conduct was excusable as a good faith error.

The question is not whether claimant sincerely believed the employer would allow him to solicit or compete with the employer for a customer's business, but rather, whether claimant sincerely believed that he was soliciting or competing with the employer when he gave the estimate to an individual he believed was his cousin's friend. At the time the employer's client called claimant about the estimate, claimant's cousin had recently referred a friend to claimant for an estimate and the client did not

mention that he was contacting claimant because of his connection to the employer's business. When claimant gave the estimate, he sincerely (though mistakenly) believed it was related to a side job for his cousin's friend. He also sincerely, if mistakenly, believed he was not soliciting one of the employer's clients or competing with the employer, and only inadvertently violated his agreement not to solicit the employer's clients. Claimant's solicitation of the employer's client was, therefore, the result of a good faith error on claimant's part. Good faith errors are not misconduct.

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

**DECISION:** Hearing Decision 16-UI-52453 is set aside, as outlined above.<sup>1</sup>

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** March 1, 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](http://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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<sup>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.