

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0180**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74009). Claimant filed a timely request for hearing. On January 25, 2016, ALJ S. Lee conducted a hearing, and on February 2, 2016 issued Hearing Decision 16-UI-52136, reversing the Department's decision. On February 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Arrowhead Ranch Equestrian Center, LLC employed claimant as a ranch hand and general helper from August 20, 2015 until October 18, 2015.

(2) The employer expected claimant to refrain from transporting non-employees in the employer's equipment and vehicles, including in its Kubota rugged terrain vehicle (RTV). The employer's expectation was never communicated to claimant and she was unaware of it.

(3) Sometime before approximately September 20, 2015, claimant told the employer's ranch manager that she was behind in her work and wanted to ask a non-employee friend for help. The manager told claimant that non-employees were not allowed to help with ranch work for insurance and liability reasons.

(4) During claimant's employment, her elderly grandmother and son usually visited her at the ranch during work hours on Wednesdays. Claimant often transported them to ranch locations using the Kubota RTV. The ranch manager was aware that claimant allowed her grandmother to ride in the Kubota RTV. On occasion, claimant also allowed her friends who visited the ranch to ride in the Kubota RTV. In addition, claimant transported people who were boarding horses at the ranch in the Kubota RTV. The ranch manager never advised claimant that she was prohibited from allowing non-employees to ride in the Kubota RTV.

(5) On October 17, 2015, claimant's boyfriend and her boyfriend's son visited claimant at the ranch during work hours. Claimant allowed them to ride in the Kubota RTV while she drove it from the lower barn to the upper barn. The ranch manager observed claimant doing so.

(6) On October 18, 2015, the employer discharged claimant for allowing non-employees to ride as passengers in the Kubota RTV on October 17, 2015.

**CONCLUSIONS AND REASONS:** 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. The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's ranch manager testified that the final incident leading to claimant's discharge was that she allowed her boyfriend and his son to ride in the employer's Kubota RTV on October 17, 2015. Audio at ~10:20, ~10:37, ~15:05. Because this was the event that precipitated the discharge, it is the proper focus of the misconduct analysis. *See Appeals Board Decision*, 13-AB-0341, March 28, 2013 (misconduct analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Appeals Board Decision*, 13-AB-0029, February 14, 2013 (misconduct analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Appeals Board Decision*, 12-AB-0434, March 16, 2012 (misconduct analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Appeals Board Decision*, 09-AB-1767, June 29, 2009 (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

The employer's ranch manager testified that she told claimant on at least one occasion that the employer prohibited her from driving non-employees in the Kubota RTV. Audio at ~14:26. In contrast, claimant testified the ranch manager had never orally or in writing forbidden her from transporting non-employees in the Kubota RTV, and that she often drove people who boarded horses at the ranch, her grandmother, her son and friends who visited the ranch in the Kubota, without any comments being made about this practice by the ranch manager or other representatives of the employer. Audio at ~21:32, ~29:46, ~30:12. The testimony of both witnesses appeared sincere and there is no reason in the record to doubt the credibility of either witness or to prefer to testimony of one over the other. Where, as here, the evidence on a disputed issue is evenly balanced, any uncertainty in that evidence must be resolved against the employer since it is the party that has the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). While the employer might have prohibited non-employees from riding in the Kubota RTV, the employer did not show by a preponderance of the evidence that its expectation was ever communicated to claimant. Nor is a prohibition like that of the employer so widely understood and commonly accepted that a reasonable awareness of it may be imputed to claimant as a matter of common sense.

To establish the behavior of claimant at issue was a willful or wantonly negligent violation of the employer's standards, the employer must show that it had a "right to expect" claimant to comply with its standards. *See* OAR 471-030-0038(3)(a). An employer is entitled to expect compliance only with standards of which claimant was or should have been reasonably aware. Here, the employer's prohibition against non-employees riding in the Kubota was not sufficiently obvious that claimant should have been aware of it, and it was never communicated to claimant. On this record, the employer did not meet its burden to show that, as of October 17, 2015, it had a right to expect claimant to refrain from allowing her boyfriend or her boyfriend's son to ride in the Kubota. The employer thus failed to demonstrate that it discharged claimant for behavior that constituted misconduct.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-52136 is affirmed.

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

**DATE of Service:** March 10, 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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