

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0241

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 73306). The employer filed a timely request for hearing. On February 3, 2016, ALJ S. Lee conducted a hearing, and on February 11, 2016 issued Hearing Decision 16-UI-52824, affirming the Department's decision. On March 2, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, 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). Therefore, we considered the entire record, but did not consider the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Sleep Country USA employed claimant from January 10, 2012 until December 12, 2015 as a sales associate.

(2) The employer expected employees to behave with integrity in the workplace, including being honest. Claimant understood that he should be honest as a matter of common sense.

(3) Claimant's store manager had permitted claimant to report early for his shifts since September 2015 to increase his potential for sales.

(4) In November 2015, the district manager told claimant and its other employees that it would conduct a sales contest on "Black Friday," November 27, and give the first few salespeople who sold a specific kind of mattress a chance to win a mattress, and that it would provide the remaining contest details on a later date.

(5) On November 24, 2015, the brother of one of claimant's friends spoke with claimant at the store, and decided to purchase the type of mattress that claimant had to sell for the November 27 contest. Claimant told the customer to return the morning of November 27, because he could give the customer the best price for the mattress during the employer's "Black Friday" sale. The customer told claimant he would return at 8:00 a.m. on November 27 to purchase the mattress.

(6) On November 27, 2015, claimant was scheduled to begin work at 9:00 a.m. His manager knew claimant planned to arrive at work early that day. Claimant arrived at work at 7:40 a.m., spoke by telephone with the customer who was going to buy the contest mattress, and told him he had found one of the mattresses on clearance for a reduced price. The customer asked claimant to hold the mattress for him. Claimant told the customer he was unable to hold the mattress without a deposit. The customer was unable to provide a deposit by telephone at that time. To hold the mattress for the customer, claimant created an invoice for him and secured the sale with a \$25 deposit payment from his personal credit card. The employer had no policy regarding employees using personal credit cards to place deposits to secure customer purchases. Paying a deposit for the contest mattress counted as a sale for purposes of the contest. Claimant sent an email to his manager stating he had made a sale. The manager told claimant to email the district manager and the mattress brand representative stating he had sold one of the mattresses for the contest.

(7) Also on November 27, after claimant paid a deposit on the mattress, claimant's coworker told claimant he thought the employer would disapprove of claimant using his personal credit card to secure a customer's sale for the contest mattress. Claimant canceled his payment, called the customer to tell him he needed to provide the deposit himself, and told his manager what had occurred. His manager confirmed that he should not use his personal credit card for a customer deposit. The manager reported the incident to the district manager.

(8) At approximately 1 p.m. on November 27, 2015, the customer who was purchasing the mattress went to the employer's store and applied for store financing for the mattress to secure his purchase. The customer was approved for partial financing for the mattress, with the remaining cost to be paid at the time of delivery.

(9) On December 11, 2015, the customer returned to the store and used the financing he received on November 27 to pay the full purchase price for a less expensive mattress of a different brand that did not qualify for the contest.

(10) On December 17, 2015, the employer discharged claimant for allegedly "manipulating" a sale to win a contest at work. Transcript at 5.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

ORS 657.176(2) provides that an individual shall be disqualified from the receipt of benefits if the individual has been suspended or discharged 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 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 discharged claimant because it believed claimant violated its integrity policy. The employer's human resources representative asserted that coming in early to work and using his personal credit card to secure a customer sale that the customer would later cancel was a dishonest attempt on claimant's part to win the employer's mattress contest. Transcript at 17. The record fails to support the employer's assertion. Claimant's uncontested testimony was that his manager permitted him to report to work early, including on November 27, so he would have more time on the sales floor. Transcript at 22. The employer had no policy regarding employees using personal credit cards to secure customer purchases. Nor had the employer disclosed the details of the contest, which may have detailed such restrictions, before the day of the contest. Although claimant understood after his coworker's and manager's comments on November 27 that the employer would disapprove of him using his personal credit card to assist a customer with a sale related to the contest, the record fails to show that claimant knew or should have known the employer expected him to refrain from doing so before his early morning sale. Moreover, even though the customer changed his purchase to a less expensive mattress after failing to obtain financing for the full purchase price of the contest mattress, the preponderance of the evidence fails to show that claimant falsified a sale. Nor does the record show that the customer had anything other than a good faith intent to purchase the mattress related to the contest, then subsequently changed his mind and chose to purchase a cheaper mattress. For these reasons, we conclude that the record fails to show claimant willfully or with wanton negligence violated the employer's integrity policy on November 27. Absent such a showing, we cannot find misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-52824 is affirmed.

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

DATE of Service: April 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. 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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