

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0274

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80301). Claimant filed a timely request for hearing. On March 9, 2016, ALJ Barber conducted a hearing and issued Hearing Decision 16-UI-54663, affirming the Department's decision. On March 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her 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 claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Seven Feathers Hotel & Casino Resort employed claimant from July 14, 2015 to January 4, 2016 as a café cashier.

(2) The employer expected claimant to refrain from engaging in insubordinate conduct at work. Claimant understood the employer's expectations.

(3) One of claimant's duties was to divide large amounts of cookie dough into smaller, premeasured portions. On December 19, 2015, claimant watched her coworkers dividing cookie dough to learn the process. Claimant saw her coworkers weighing each individual portion of cookie dough, and asked her lead if it was necessary to do so. Claimant's lead told claimant that she was supposed to measure each portion individually.

(4) On January 2, 2016, it was claimant's turn to divide the cookie dough. Claimant used a 2 ounce cup to make ten portions of cookie dough, and weighed them to see if she could divide the dough faster using the cup instead of weighing each individual portion. Each portion was "within one line on the scale," so claimant continued making the portions using the 2 ounce cup, instead of by weighing each individual portion. Audio Record at 23:41 to 42:17. Claimant's lead approached her and told her she had to weigh each portion individually. Claimant explained that she found a way to measure the dough

she thought “might work.” Audio Record at 24:00 to 24:02. Claimant’s lead weighed some of the portions and was dissatisfied with the weights. Claimant told her lead she thought using the cup might be more efficient. The lead told claimant to weigh each portion individually, and claimant complied.

(5) On January 4, 2016, the employer discharged claimant for allegedly behaving in an insubordinate manner regarding the cookie dough on January 2, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant 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.

The employer asserted at hearing that it discharged claimant due to multiple incidents of insubordination, but that the final incident that led to the discharge was claimant’s failure to follow her lead’s instructions regarding weighing the cookie dough on January 2, 2016. Audio Record at 9:27 to 10:21. We therefore focus our analysis on claimant’s conduct on January 2 as the reason for her discharge, and address prior incidents only if necessary to determine whether her conduct on January 2 was an isolated instance of poor judgment.

The employer had the right to expect claimant to refrain from being insubordinate at work. Claimant understood that expectation as a matter of common sense. In Hearing Decision 16-UI-54663, rather than focusing on the final incident, the ALJ found that claimant was insubordinate “at least four times” between November 26, 2015 and January 2, 2016, and that the employer “reasonably interpreted [claimant’s] actions as insubordinate” on those four occasions.¹ The ALJ concluded that claimant showed a willful disregard for the employer’s standards because she was unwilling to follow her lead’s orders. Thus, the ALJ concluded, claimant’s insubordination was misconduct.² We disagree.

At hearing, claimant testified that although she did initially follow her lead’s instructions for how to measure the cookie dough, she measured the dough differently on January 2 in an attempt to find a more efficient way to measure it, and complied with the lead’s orders to weigh each portion individually after claimant explained her method, and the lead rejected it. Audio Record at 23:25 to 24:48. To the extent the employer discharged claimant because she tried using a new method to measure the cookie dough, the employer failed to show that claimant knew or should have known her doing so probably violated the employer’s expectations against insubordination. The employer’s evidence about prior incidents of

¹ Hearing Decision 16-UI-54663 at 2.

² *Id.*

alleged insubordination is not sufficient to show claimant was insubordinate during the final incident, and the record fails to show that merely trying a new measuring method was insubordinate. However, the employer's manager also asserted at hearing that claimant argued with her lead about how to measure the dough, called it "a stupid waste of time," and ultimately refused to measure the dough as instructed. Audio Record at 10:31 to 11:16. Those additional allegations were hearsay, and were contradicted by claimant's firsthand testimony of what occurred during the final incident. Absent a basis for concluding that claimant was not a credible witness, her firsthand testimony outweighs the employer's hearsay evidence to the contrary. Thus, the evidence as to whether claimant told the lead her orders were a "stupid waste of time" and refused to follow the lead's instructions after being told to do so on January 2 is, at best, equally balanced.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to show by a preponderance of the evidence that claimant engaged in behavior that was insubordinate or that otherwise was a willful or wantonly negligent violation of the standards of behavior which the employer had the right to expect of claimant. Thus, the record fails to show the employer discharged claimant for misconduct.

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

DECISION: Hearing Decision 16-UI-54663 is set aside, as outlined above.³

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

DATE of Service: April 15, 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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³ 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.