

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0323**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 92040). Claimant filed a timely request for hearing. On February 24, 2016, ALJ S. Lee conducted a hearing, and on March 24, 2016, issued Hearing Decision 16-UI-54126, concluding that the employer discharged claimant, but not for misconduct. On March 21, 2016 the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer asserted that the ALJ erred when it denied the employer's request for a continuance so that the employer's asset protection manager, who was unavailable for the hearing, could testify about a November 10, 2015 meeting with claimant. The employer asks that EAB order a new hearing to allow for the testimony of the asset protection manager. The ALJ did not err in denying the employer's request for a continuance, however. At the hearing, the employer's general manager, who supervised claimant, testified that he was present at the November 10 meeting. As a result, he was able to provide an eyewitness account of what occurred and what was discussed at that meeting. We also note that the employer provided no explanation as to what the asset protection manager would testify about, so we are unaware of what, if anything, this employee could add to the general manager's testimony about the November 10 meeting. Because it appears that the testimony of the asset protection manager would be duplicative of evidence already presented, the employer's request for a new hearing is denied.

**FINDINGS OF FACT:** (1) Best Buy employed claimant from July 15, 2011 until December 3, 2015, last as a Geek Squad in-home agent.

(2) The employer's policies required that employees refrain from misuse and theft of the employer's property. Claimant knew about and understood these policies, partly as a matter of common sense and also because he had received and read a copy of these policies when he first began work for the employer.

(3) Customers who returned products purchased from the employer were usually given credit on a credit card or cash equal to the purchase price of the item returned. Under certain circumstances however, *e.g.*, if the customer had no receipt for the item, the customer would be given a gift card in an amount equal to the purchase price of the returned item. Employees were expected to give the customer these gift cards, and not use them for personal purchases. Claimant understood this employer expectation.

(4) Claimant's job required that he visit customer's homes to install items purchased from the employer. On three occasions prior to November 10, 2015, claimant arrived at a customer's home and discovered the item the customer had purchased was defective or otherwise not suitable for the use for which it was intended. Claimant processed this item as a "no receipt return," which meant that he placed the purchase price of the returned product on a gift card issued in the customer's name. Claimant then used this gift card to purchase a non-defective or suitable item for the customer, and installed it. Had claimant not processed the transaction in this manner, the customer would have been required to bring the gift card to the employer's store to purchase the non-defective or appropriate item. Claimant therefore believed that his use of the gift card to purchase items for the customer was a convenience for the customer.

(5) On one occasion prior to November 10, 2015, claimant purchased a cable from the employer for his personal use. When claimant discovered the cable was defective, he exchanged the cable for a non-defective one and processed the transaction himself. Claimant was unaware that the employer prohibited him from processing his own exchange transactions under the circumstances.

(6) In August 2015, a personal friend of claimant's purchased a receiver from the employer, which the customer returned as defective. Claimant discovered that the receiver should have been covered by a warranty that the customer had purchased, but found no proof of purchase for the warranty. Claimant exchanged the defective receiver for a new one, and personally paid for the purchase of a warranty for the new receiver. Transcript at 31.

(7) Some time prior to November 10, 2015, a customer allegedly complained to the employer that the customer had not received a gift card. The employer began an investigation into transactions claimant had processed, and on November 10, 2015, the employer's asset protection manager met with claimant to ask him about allegedly improper transactions. Claimant's supervisor, the general manager of the store to which claimant was assigned, was present during this meeting as a witness. During this meeting, claimant provided a written statement in which he explained the three "no receipt returns" he had processed for customers, his exchange of the defective cable he purchased from the employer, and his personal purchase of a warranty for his friend's receiver. Claimant also agreed to pay the employer \$500 for losses to the employer he was accused of creating; he agreed to make this payment because he believed he could avoid discharge if he did so.

(8) On December 3, 2015, the employer discharged claimant for alleged theft or misuse of the employer's property.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that 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. 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. In a discharge case, the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for alleged misuse or theft of the employer's property. Claimant knew and understood the employer's expectations and policies, primarily as a matter of common sense and also because he had received and read a copy of the employer's policies, which prohibited theft and misuse, when he was hired. The allegations made against claimant resulted from a statement that claimant gave to the employer as a result of an investigation made into transactions claimant had processed. The allegedly improper transactions consisted of three "no receipt returns" claimant had processed for customers, a defective cable which claimant had purchased from the employer and exchanged for a non-defective one, and a receiver which claimant exchanged for a customer who was a personal friend. The employer failed to meet its burden to demonstrate that claimant's conduct in processing any of these transactions violated its policies or expectations.

In regard to the three "no receipt return" transactions that claimant processed for customers, claimant provided un rebutted testimony that the gift cards he issued to himself as part of these transactions were not used for his personal benefit. Instead, he used these gift cards to purchase items for customers and did so as a convenience to the customers. Transcript at 26. Concerning the exchange of the defective cable that claimant made, claimant credibly testified that he was unaware the employer prohibited him from processing his own exchange under the circumstances. *Id.* The employer failed to demonstrate any clearly articulated policy prohibiting such transactions that was made known to employees. Finally, in regard to the receiver which claimant exchanged for a friend, the employer did not show what, if any, employer policy or expectation this transaction violated. For these reasons, we conclude that the employer did not demonstrate that claimant engaged in any behavior that violated the standards of behavior it reasonably expected of its employees. The employer did not therefore establish that it discharged claimant for misconduct, and claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 16-UI-54126 is affirmed.

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

**DATE of Service:** April 19, 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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