

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0330

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101302). Claimant filed a timely request for hearing. On March 14, 2016, ALJ S. Lee conducted a hearing, and on March 17, 2016 issued Hearing Decision 16-UI-55302, concluding the employer discharged claimant, but not for misconduct. On March 22, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Club Sky High employed claimant as a bud tender trainee from November 13, 2015 through December 11, 2015.

(2) The employer limited the sale of some marijuana products to patients with an Oregon Medical Marijuana Program card (“medical marijuana card”), as required by Oregon law. Claimant did not have a medical marijuana card, but was permitted to purchase some products, including marijuana flower, without a medical marijuana card. The employer permitted only employees with medical marijuana cards to purchase marijuana products during work. The employer provided claimant with its policy manual at hire, and posted the product restrictions in multiple places in its dispensary. Claimant understood which products she was prohibited from purchasing without a medical marijuana card.

(3) Before December 8, 2015, claimant had seen employees purchase marijuana products during their breaks at work. Claimant did not see the employer reprimand the employees for doing so.

(4) On December 8, 2015, claimant tried to purchase a legal quantity of marijuana flower from the employer during one of her breaks at work. Claimant’s manager became upset with her, and told her that only employees who had medical marijuana cards were permitted to purchase marijuana products during their shifts. The manager reported to the owner that claimant had attempted to purchase a product available only to customers with a medical marijuana card.

(5) On December 11, 2015, the employer discharged claimant for allegedly attempting to purchase a product she was not permitted to purchase during her break.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer prohibited employees who did not have medical marijuana cards from purchasing products that were available legally only to card holders. Claimant knew and understood this policy and the products she was prohibited from buying. The employer also prohibited non-card holders from purchasing marijuana while on shift. The employer discharged claimant because she allegedly tried to purchase a marijuana product she was not legally entitled to purchase during her shift.

The employer's owner alleged that claimant attempted to purchase a product that was not available to her without a medical marijuana card on December 8. Audio Record at 26:41 to 27:11. Claimant denied that she attempted to purchase, on December 8 or at any other time, products she was prohibited from buying without a medical marijuana card. Audio Record at 27:49 to 28:40, 29:01 to 29:42. Claimant testified that she attempted to purchase marijuana flower on December 8, which is legal for her purchase. Absent any reason to doubt claimant's credibility as to what product she attempted to purchase on December 8, we give greater weight to claimant's first hand testimony about the incident than to the hearsay testimony of the owner. We therefore conclude that the employer failed to meet its burden to show that claimant attempted to purchase a product illegally on December 8.

The remaining issue is whether claimant engaged in misconduct because she attempted to make the purchase during her shift. We conclude that it was a good faith error, and not misconduct. The record fails to show that claimant knew or should have known through prior training, experience or warnings that purchasing marijuana during her breaks probably violated the employer's expectations. Claimant was still in training, and had seen the employer permit other employees to purchase marijuana products during their breaks. Claimant testified that she mistakenly believed all employees, and not just those with medical marijuana cards, were permitted to make purchases during breaks, and that she did not understand the prohibition from the employer's policy book. Audio Record at 39:10 to 39:27, 47:39 to 48:06. Nor do we find the employer's expectation that claimant refrain from purchasing marijuana during her breaks so obvious that claimant knew or should have known the expectation as a matter of common sense. To the extent claimant erred in the belief that she was permitted to make purchases during her breaks, she erred in good faith. Good faith errors are not misconduct.

Therefore, we conclude that 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-55302 is affirmed.

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

DATE of Service: April 25, 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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