

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0344

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151933). Claimant filed a timely request for hearing. On March 11, 2016, ALJ S. Lee conducted a hearing, and on March 18, 2016 issued Hearing Decision 16-UI-55404, concluding claimant's discharge was not for misconduct. On March 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Massage Envy Southwest employed claimant as a business manager from March 17, 2014 to January 12, 2016.

(2) During a corporate audit on January 12, 2016, the employer discovered that claimant had not yet completed a training module. The employer gave claimant until the end of the day to complete the training module.

(3) Claimant immediately logged on to the employer's intranet to check whether she had done the training. Claimant found a generic completion certificate issued to "Manager 0904". Claimant was confused because she thought the completion certificate should include her name instead of the manager number, and because she did not know why she had a completion certificate since she had not completed the training. Within a few minutes of being told to complete the training, claimant printed the certificate, showed it to the auditor, and asked if the auditor knew what it was.

(4) The auditor knew that claimant could not have completed the course within the few minutes that had lapsed since she was instructed to do so, and knew that if claimant had completed the course the completion certificate would include her name instead the manager number. The auditor concluded that claimant had printed a generic completion certificate and tried to pass it off as her own. She subsequently told claimant's manager that claimant had presented her with a fraudulent completion certificate. The auditor and manager concluded that claimant had printed the completion certificate to

try to prove she had completed the training module when she had not actually done so. On January 12, 2016, the employer discharged claimant for dishonesty.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 alleged that claimant behaved dishonestly by trying to pass a generic training module completion certificate off as her own in order to prove she had completed training when, in fact, she had not. The only two people in the room when claimant showed the completion certificate to the auditor were claimant and the auditor. The auditor alleged claimant presented the generic certificate as her own, but claimant denied that she had done so and testified that she merely showed the auditor the certificate and asked the auditor what it was. Absent a basis for concluding either was not a credible witness, their testimony about claimant's intent when showing the completion certificate to the auditor was equally balanced. 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). Where the evidence is equally balanced, the employer has failed to satisfy its burden. Therefore, we conclude that the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-55404 is affirmed.

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

DATE of Service: April 21, 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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