

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0395

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 103316). The employer filed a timely request for hearing. On March 17, 2016, ALJ Menegat conducted a hearing, and on March 18, 2016 issued Hearing Decision 16-UI-55401, affirming the Department's decision. On April 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review 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). EAB therefore did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Starbucks Corporation employed claimant as a shift supervisor from September 23, 2015 to January 7, 2016.

(2) The employer expected claimant to follow its cash handling procedures. When closing, claimant was expected to leave \$200 in each of the six employee tills, "drop" any excess cash from each till into the employer's safe, and record doing so in a log book. Transcript at 7.

(3) Claimant understood she was expected to following the employer's cash handling procedures. However, the employers' store manager observed that claimant "consistently" made mistakes when handling cash despite repeated counseling. Transcript at 5, 12.

(4) When closing on December 8, 15, 18 and 22, 2015, claimant left what she believed to be \$200 in each employee till, dropped any excess cash from each till into the employer's safe, and recorded doing so in the log book. On each occasion, however, she mistakenly left more than \$200 in at least one of the tills. On December 31, 2015, the employer gave claimant a final written warning for "consistently not

properly counting down tills, leaving extra money in them that should be dropped in a deposit.” Exhibit 1.

(5) When closing on December 31, 2015, claimant believed she performed the closing procedure on all six employee tills. However, she performed the procedure on only four tills. The employer discharged claimant for failing to perform the closing procedure on the other two tills.

CONCLUSIONS AND REASONS: We agree with the Department and 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. 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). Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant, when closing, to leave \$200 in each of the six employee tills, “drop” any excess cash from each till into the employer’s safe, and record doing so in a log book. Claimant understood that expectation. The employer discharged claimant for failing to perform the closing procedure on two of the six employee tills on December 31, 2015. At hearing, however, claimant testified that she remembered performing the procedure on all six tills when closing that day. Transcript at 14. Although claimant likely is mistaken, her testimony shows she did not consciously fail to perform the closing procedure on two of the tills, and the record fails to show she consciously engaged in other conduct she knew or should have known would probably result in her failure to do so. Claimant may have been careless, arguably negligent, but the employer failed to establish that her conduct was willful, or that she acted with *wanton* negligence as defined under OAR 471-030-0038(1)(c).

The employer failed to establish claimant’s discharge was for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-55401 is affirmed.

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

DATE of Service: May 10, 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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