

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0399**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83219). The employer filed a timely request for hearing. On March 21, 2016, ALJ Wipperman conducted a hearing, and on March 25, 2016 issued Hearing Decision 16-UI-55866, affirming the Department's decision. On April 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Winco Foods, Inc. employed claimant as a deli worker from June 22, 2011 to October 7, 2015.

(2) The employer expected claimant to be honest. Claimant understood the expectation. On several occasions prior to October 2015, the employer notified claimant of its expectations and issued several warnings to him for violating other policies related to behavior and sanitation issues. Claimant understood the employer's expectations and did his best to meet them.

(3) On October 6, 2015, a coworker asked claimant when some food would be ready for a customer. The coworker and other employees heard claimant respond, "Shut up," and claimant believed he responded that, because of a problem with the oven, it "keeps shutting [] off." Exhibit 1. Claimant and his coworker had previously had communication problems.

(4) The employer subsequently interviewed claimant's coworkers and concluded that claimant told his coworker to "shut up." The employer interviewed claimant, who stated that he had not said that. The employer concluded claimant was being dishonest, and, on October 7, 2015, discharged claimant for dishonesty. Had claimant admitted that he told his coworker to "shut up," the employer would likely have imposed discipline but would not have discharged him.

**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 prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means that the employer must not only prove that claimant did the act the employer alleged, but also that he did so with a willful or wantonly negligent mental state. In this case, it is more likely than not that claimant told his coworker to "shut up." Although claimant denied having done so, three coworkers provided consistent statements to the employer in which they agreed that they all heard claimant use the words "shut up." However, the employer testified that claimant would not have been discharged if he had not been dishonest about the incident. Therefore, it was not claimant's use of those words that prompted his discharge, but rather the employer's belief that he was dishonest about it.

Dishonesty occurs when an individual make an untrue statement with an intent to deceive the listener. Therefore, for claimant's denial that he said "shut up" to his coworker to be considered misconduct, he must have intentionally or consciously denied saying "shut up" in an attempt to deceive the employer into believing he did not say those words. Claimant credibly offered a plausible explanation about what it was he intended, thought and remembered he said to his coworker on October 6, 2015. It is more likely than not that claimant's explanation was mistaken, but that only means that the denial was false or inaccurate. The preponderance of the evidence in this record does not show that claimant was intentionally or consciously dishonest when he denied having told a coworker to "shut up."

Therefore, claimant's denial did not amount to misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 16-UI-55866 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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