

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0525

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 90806). Claimant filed a timely request for hearing. On April 4 and 19, 2016, ALJ Murdock conducted a hearing, and on April 22, 2016, issued Hearing Decision 16-UI-57965, affirming the administrative decision. On May 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Plaid Pantry employed claimant as a store manager from March 24, 2011 until January 20, 2016.

(2) Behaviors prohibited by the employer's code of conduct included falsifying timesheets, employer records and reports. Claimant knew about and understood this prohibition, both as a matter of common sense and because he received and read a copy of the employer's code of conduct when he was hired.

(3) Under the employer's store manager bonus plan, managers were eligible to earn bonuses for controlling shrinkage or loss in their store inventories; shrinkage is typically caused by shoplifting, employee theft or damaged items. Eligibility for this bonus was calculated by reviewing monthly inventory records to determine the difference between the amount of merchandise that should have been in the store and the amount of merchandise that actually was in the store. The difference between these two amounts constituted shrinkage; the employer applied a formula to pay bonuses to managers who were successful in limiting the amount of shrinkage in their stores. Transcript at 30; Exhibit 1, "Store Manager Bonus Program."

(4) On December 30, 2015, claimant received a large shipment of merchandise for his store. The employee who normally unpacked merchandise and placed it on store shelves was absent on December 30, and claimant had to perform this task. Claimant noticed that he had not received some items from the supplier that had been ordered and were listed on the invoice as having been delivered to claimant's store. Among the items claimant had not received was a box of Snickers candy bars; although two boxes of these candy bars had been ordered, claimant received only one box, which contained 48 candy

bars. In addition, claimant did not receive one box of Slim Jim meat snacks that had been ordered; the box would have contained 18 Slim Jim snacks. On a form used to list shortages in items delivered, claimant mistakenly noted that he had not received 96 Snickers candy bars, the amount of candy bars that would have been contained in two boxes. Also on this form, claimant noted that he had not received 18 Slim Jim meat snacks. Exhibit 1, “CoreMark Return, or Delivery Shortage, or Delivery Mispick Control Form”; Transcript at 13-14.

(5) Sometime in early January 2016, the employer’s managers became concerned about shortages, *i.e.*, the amount of merchandise store managers reported as having been ordered but not delivered. The managers reviewed records and determined that claimant’s store had a significant amount of shortage. The employer’s district manager reviewed video surveillance tapes from claimant’s store for the month of December 2015 and invoices for merchandise delivered during that month. Based on her review of the videotapes and invoices, the district manager concluded that on December 30, 2015, claimant received two boxes of Snickers candy bars and one box of Slim Jim meat snacks, and falsely reported he had not received these items.

(6) On January 20, 2016, the employer discharged claimant for falsifying documents to show that had not received merchandise that he had actually received.

CONCLUSION AND REASONS: We disagree 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The incident that resulted in claimant’s discharge occurred on December 30, 2015. On that date, claimant received delivery of merchandise for the store he managed. On the form on which he was required to report any shortages in delivered items, claimant noted that he had not received 96 Snickers candy bars and 18 Slim Jim meat snacks. According to the employer, the district manager’s review of video surveillance tapes from claimant’s store showed claimant putting a box of Snickers candy bars and a box of Slim Jim meat snacks on the shelves of his store. Based on this evidence, the employer concluded that claimant falsified records to show that he not received merchandise that he actually had received, and discharged him for dishonesty. The employer failed to meet its burden to demonstrate that claimant engaged in misconduct, however.

In regard to the Snickers candy bars, claimant testified that although two boxes of Snickers candy bars had been ordered, only one box (which contained 48 candy bars) was included in the delivery he received. Claimant placed this one box of candy bars on the shelf of his store, as the video surveillance footage showed, but mistakenly noted that he had not received 96 candy bars, the number of candy bars contained in two boxes, on the form used to report delivery shortages. The notation claimant made on the delivery shortage form resulted from a calculation error, and not from any conscious or knowing disregard of the employer's prohibition against falsifying records.

In regard to the Slim Jim meat snacks, claimant emphatically denied that he ever received a box of this product on December 30, insisting that what the employer saw him placing on the store shelves was a meat product other than the Slim Jim snacks that he did not receive. The employer's district manager testified, however, that the video surveillance footage she reviewed clearly showed the Slim Jim logo on the box claimant was placing on the store shelves; unfortunately, the image in evidence does not corroborate her testimony. Absent any reason to find that claimant was not a credible witness (and we find none), claimant's firsthand denial is at least equal to the evidence presented by the district manager. 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). Because the evidence regarding claimant's actions in regard to the Slim Jims was, at best, equally balanced, the employer failed to show by a preponderance of evidence that claimant received an item which he falsely reported that he had not.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 16-UI-57965 is set aside, as outlined above.

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

DATE of Service: June 7, 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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