

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0545**

*Reversed*  
*No Disqualification*  
*(No Descalificación)*

**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 # 155528). Claimant filed a timely request for hearing. On April 27, 2016, ALJ Seideman conducted an interpreted hearing, and on May 2, 2016, issued Hearing Decision 16-UI-58635, affirming the administrative decision. On May 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

**EVIDENTIARY MATTER:** At the hearing, the ALJ admitted Exhibit 1, a document in Spanish submitted by claimant. No English translation of this document was provided, or elicited from the interpreter at the hearing. Although the ALJ asked claimant if he wanted to testify about any matters addressed in Exhibit 1, the claimant appeared confused by the ALJ's questions.<sup>1</sup> We have therefore prepared an English translation of Exhibit 1 and included it as part of the exhibit. (A copy of Exhibit 1 and the English translation is attached to this decision). Any party that objects to the addition of an English translation to Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, the English translation will remain part of Exhibit 1.

**FINDINGS OF FACT:** (1) Timber Products employed claimant as a spreader from December 11, 2012 until February 8, 2016.

(2) In March 2013, the employer gave claimant an oral warning for breaking into another employee's locker without permission.

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<sup>1</sup> When the ALJ asked claimant if he had anything from Exhibit 1 "that you wanted to testify to," claimant responded as follows: "What do you mean by testified? I don't understand that." The ALJ subsequently asked if Exhibit 1 was "kind of a summary of what you have already testified?" Claimant answered: "I don't understand." Transcript at 18.

(2) On February 4, 2016, at 5 a.m., claimant was taking a rest break and seated at a table in an area designated for employee rest breaks. Claimant moved another employee's lunch bag, and began to eat an apple. Claimant's break ended before he could finish eating the apple, however, so he threw the half-eaten apple into the garbage and went back to work.

(3) Another employee witnesses claimant's actions during his February 4 rest break and concluded that claimant had taken a granola bar from another employee's lunch bag and discarded the wrapper. He reported claimant's conduct to the employer's managers, who conducted an investigation into the matter.

(4) On February 8, 2016, the employer discharged claimant for stealing an item from another employer's lunch bag on February 4.

**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.

The employer expected that claimant would refrain from taking other employees' property. Claimant knew about and understood this expectation, both as a matter of common sense and because in March 2013, the employer reprimanded him for breaking into another employee's locker without permission. In Hearing Decision 16-UI-56835, the ALJ concluded that claimant acted in willful violation of these employer expectations on February 4, 2016 because "the evidence is compelling that he did get into a co-worker's lunch bag and take a food energy bar." Hearing Decision 16-UI-56835 at 3. We disagree.

The employer presented hearsay evidence regarding claimant's alleged theft. Claimant denied that he took anything from another employee's lunch bag on February 4. Absent a reasonable basis to conclude that claimant was not a credible witness (and we find none in this record), we conclude that claimant's firsthand denials are at least equal to the employer's hearsay evidence. 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 alleged theft was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant stole anything from another employee on February 4, 2016.

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

**DECISION:** Hearing Decision 16-UI-58635 is set aside, as outlined above. *Decisión de la Audiencia 16-UI-58635 se deja a un lado, de acuerdo a lo indicado arriba.*

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

**DATE of Service:** June 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](http://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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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