

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0550

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132959). Claimant filed a timely request for hearing. On April 19, 2016, ALJ Holmes-Swanson conducted a hearing, and on April 26, 2016 issued Hearing Decision 16-UI-58183, reversing the Department's decision. On May 12, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant both submitted written arguments in which each offered information not offered during the hearing. Neither party showed as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond the party's reasonable control prevented it from offering that new information at hearing. For this reason, EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Nature Bake employed claimant as a divider in its bread making operation from November 23, 2014 until February 8, 2016.

(2) The employer expected claimant to refrain from unsafe horseplay or other unsafe behaviors in the workplace. Claimant understood this expectation as a matter of common sense and as he reasonably interpreted it.

(3) During claimant's employment, he and other employees sometimes tossed loaves of raw bread dough that did not meet the employer's baking specifications from the stations at which they were working to the hopper for reprocessing or to a table for weighing. They did this to avoid interrupting their work to walk from their stations to these other locations.

(4) On December 16, 2015, claimant's supervisor warned him for taking raw dough, rolling it into balls and shooting it from an air gun in the workplace. On January 22, 2016, claimant's supervisor issued a

final written warning to claimant for his behavior on January 4, 2016 when he picked pieces of dough from a raw loaf and threw those pieces at some coworkers.

(5) On February 3, 2016, claimant's work task was to take loaves of raw dough from the production line and roll them in seeds in preparation for baking. Claimant removed a loaf from the production line because he thought it was underweight and did not meet the employer's specifications. Rather than placing the loaf on a nearby table, claimant "tossed" the loaf "underhanded" toward a scale on a table approximately ten to twelve feet away, intending for the loaf to land on the scale for weighing. Transcript at 27, 37. Claimant's toss missed the scale and the loaf landed on the floor. Claimant did not aim the loaf at any of his coworkers and it did not strike any of them.

(6) On February 8, 2016, the employer discharged claimant for violating its safety standards by throwing a raw loaf of dough at a coworker on February 3, 2016.

CONCLUSIONS AND REASONS: 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer contended claimant should have known tossing dough in the workplace, even if he was not throwing the dough at a coworker, was prohibited under its safety policy. However, the prior warnings issued to claimant about mishandling dough, which were the only communications the employer cited as alerting claimant to a specific prohibition against throwing bread dough, all involved the allegations that the dough had been aimed at coworkers. Exhibit 1 at 5; Transcript at 8. It was not at all apparent from the testimony of the employer's witnesses or the language of the warnings that claimant should reasonably have been aware that all tossing or lobbing of dough for any purpose was absolutely banned in the workplace. With respect to his intention in tossing the bread dough on February 3, 2016, claimant testified he intended only for it to land on the scale where it would be weighed and not for it to hit another person. Transcript at 19. Claimant and the employer's witness who observed the incident on February 3, 2016 described claimant as having "tossed" the dough "underhanded," "like an egg toss pitch" toward the scale. Transcript at 27, 40. Given that their descriptions of the manner in which claimant launched the dough were not consistent with the dough having been thrown as a missile at another person, and claimant's denial, the testimony of the employer's witness that she thought claimant threw the dough at her is not accepted. Transcript at 16, 40, 42. At best, her testimony was based on an impression about which she was unable to articulate a basis. Transcript at 41, 42. On these facts, the employer did not demonstrate that claimant threw the dough at a coworker on February 3, 2016, but only that he tossed or lobbed the dough a short distance to hasten the work-related activity of reweighing it. As such, the employer failed to demonstrate claimant's actions were undertaken for the purpose of "horseplay," or that those actions violated the employer's safety policy as claimant reasonably understood them.

Although the employer discharged claimant, it did not meet its burden to show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-58183 is affirmed.

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

DATE of Service: June 24, 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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