

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1194

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 120602). The employer filed a timely request for hearing. On October 5, 2016, ALJ Wyatt conducted a hearing, and issued Hearing Decision 16-UI-68626, affirming the Department's decision. On October 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a lead clerk from December 28, 1995 until July 9, 2016.

(2) In approximately 2014, claimant established a food truck business, which she operated while remaining employed by the employer. In the food truck, claimant prepared and sold fast food, including hamburgers, french fries, hot dogs, chicken strips and chili.

(3) The employer expected when claimant purchased food from the employer using her ten percent employee discount, that food would be for personal consumption only and not used to supply her food truck business. Claimant was not aware of the employer's expectation.

(4) Sometime around July 7, 2016, the store director noticed claimant purchasing several cartons of eggs. The store director became concerned that the eggs had been purchased using claimant's employee discount and were going to be used in menu items on the food truck. The store director reviewed journal detail reports showing recent purchases claimant had made from the employer's store. He discovered that on June 3, 2016, claimant or someone using her discount had purchased three packages of cream cheese at the discounted rate for employees. Exhibit 1 at 17. He determined that on June 7, 2016, claimant or someone using her discount had purchased twelve cartons of eggs at the employee discounted rate. Exhibit 1 at 16. He determined that on June 13, 15, 19 and 20, 2016, claimant or

someone using her discount had purchased at the employee discounted rate miscellaneous items, including four cans of coffee, one loaf of bread, three loaves of bread, two packages of sausages, two packages of shredded cheese, four packages of chicken breasts, a carton of sour cream and three cartons of milk. Exhibit 1 at 8, 9, 11, 12.

(5) Sometime around July 7, 2016, the store director spoke with claimant about her food truck business. Claimant informed the director of the types of food that were sold at the food truck. In response to his questions, claimant stated to the director that she purchased food supplies for the food truck from a number of sources, including sometimes from the employer if she needed the items on an emergency basis. The store director did not ask claimant whether she used her employee discount when she purchased food for the food cart from the employer. The store director did not ask claimant whether she had purchased any of the items shown the journal detail reports for use on the food truck or whether they were for her and her family's personal consumption. Based on the purchased items shown using claimant's discount on the journal detail reports, the employer concluded that claimant had used them for the food truck.

(6) On July 9, 2016, the employer discharged claimant for using her employee discount to obtain food supplies for her food truck.

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 connected with work. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the employer did not establish that if claimant purchased some food items from the employer using her employee discount, she was aware or reasonably should have been aware that the employer did not allow her to sell through her food truck any item that contained such food as an ingredient. Claimant testified she was not aware of that prohibition. Transcript at 30. The employer's witness contended that parts of the employer's policy referred to the discount as intended only to benefit the employee and dependent family members and indicated that an employee was prohibited from using the discount to "purchase items and then sell those items for personal gain (i.e. place them for sale on eBay)" was sufficient to have placed claimant on notice that she was not allowed use the employee discount to purchase any food items for the food truck. Transcript at 12-13; Exhibit 1 at 19, 20. However, if claimant purchased food for the food truck using her employee discount, and those foods became all or part of the ingredients were used to prepare a food truck menu item (as opposed to reselling an already prepared and packaged item obtained from the employer on the food truck), all reasonable employees would not necessarily have understood the employer's prohibition of resales on eBay to extend by analogy to prohibit the sale of any food truck items containing ingredients obtained from the employer using the discount. Since the employer's prohibition on "reselling" items was not sufficient to reasonably notify claimant of this prohibition, the employer did not establish that, if claimant used any food items obtained from the employer on the food truck, she was violating the

employer's expectations willfully or with wanton negligence. Accordingly, the employer did not establish that claimant engaged in misconduct.

As well, the employer also did not establish that claimant actually used any of the food items shown on the journal detail reports as supplies for the food truck. While claimant purchased several cartons of eggs using the employee discount, there is no clear link between eggs and any of the foods sold on the food truck. The employer also did not rebut claimant's explanation that the eggs were used to make a potato salad for a social function she was hosting and that her daughter had purchased some eggs to make a wedding cake in June 2016, and did not suggest that, if accurate, claimant was not permitted to purchase eggs for these purposes using the employee discount. Transcript at 27. The other food items shown on the journal detail reports that were purchased using the employee discount were not of a type or purchased in such a quantity that any use of them other than in the food truck was reasonably ruled out, or that for some other reasons it was implausible that they were purchased for the personal consumption of claimant and her dependents. Notably, the employer never asked claimant the purpose(s) for which she purchased any of those food items. Transcript at 9, 10, 28. Absent at least some evidence ruling out that claimant made the food purchases for the benefit of herself or her dependents, the employer did not demonstrate, and could not demonstrate, that claimant violated the employer's standards when she made those purchases. For these reasons as well, the employer did not demonstrate that claimant engaged in misconduct.

Although the employer discharged claimant, it did not show that it discharged her for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-68626 is affirmed.

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

DATE of Service: November 16, 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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