

State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0818**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140750). Claimant filed a timely request for hearing. On June 12, 2017, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for June 21, 2017 at 1:30 p.m. to the parties at their address of record on file with the Department. On June 21, 2017, ALJ Triana conducted a hearing, at which the employer failed to appear, and on June 28, 2017, issued Hearing Decision 17-UI-86756, concluding the employer discharged claimant, but not for misconduct. On July 7, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer asserted that the notice of hearing was not received by the employer “until after [the hearing] had already taken place” and requested “timely notice of the appeal hearing.” The employer’s request is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstance beyond its reasonable control from presenting the information at the hearing. The record shows that OAH mailed notice of the June 21<sup>st</sup> hearing to the employer at its address of record nine days prior to the scheduled hearing, which exceeds the five days advance notice required under OAR 471-040-0015(1) (August 1, 2004). The employer did not offer any explanation concerning why it did not receive, or might not have received, the hearing notice until after the hearing, such as information about how often the employer received and checked the mail, or whether the employer was experiencing any problems receiving mail. Without any such explanation, the employer has not shown information sufficient to overcome the presumptions of delivery and the receipt of mail within one to three days of the mailing date<sup>1</sup> or that it was prevented by

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<sup>1</sup> Under OAR 137-003-0520 (January 31, 2012), documents sent through the US Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. We also take notice of the generally cognizable fact that first class mail shipped through the United States Postal Service generally takes 1-3 days to deliver to the designated recipient, making it more likely than not that the employer received the notice of hearing, mailed on June 12, 2017, between June 13 and June 16, 2017. See <https://www.usps.com/ship/first-classmail.htm>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this

any other circumstance beyond its reasonable control from presenting the new information at the hearing. Accordingly, the employer's request for EAB to consider new information under OAR 471-041-0090 is denied.

**FINDINGS OF FACT:** (1) Jimmy John's Gourmet Sandwiches employed claimant as an assistant manager from September 2014 to January 10, 2017.

(2) On or about January 4, 2017, the employer's area manager notified claimant that a female employee had filed a complaint with the corporate office that claimant made a comment that had offended her. When claimant asked for detail concerning the employee and the comment allegedly made, the area manager refused to provide any details over concerns of possible retaliation. Thereafter, the area manager reportedly conducted an investigation.

(3) On January 10, 2017, the employer discharged claimant based on the reported complaint. Even at discharge, the employer refused to divulge information regarding the nature of the complaint.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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. 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).

The employer discharged claimant based on a complaint it received from an employee who reported that claimant had made an offensive comment to her. However, the employer did not provide claimant with any details about the nature of the comment or to whom he allegedly made it to and there is no evidence in the record suggesting what claimant said or why he said it. Accordingly, the employer failed to meet its burden to establish that claimant's discharge was due to a willful or wantonly negligent violation of a reasonable employer expectation. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving benefits based on his work separation.

**DECISION:** Hearing Decision 17-UI-86756 is affirmed.

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decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

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

**DATE of Service: August 1, 2017**

**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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