

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1020**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150851). Claimant filed a timely request for hearing. On August 21, 2017, ALJ Murdock conducted a hearing, and on August 23, 2017 issued Hearing Decision 17-UI-91010, concluding the employer discharged claimant, but not for misconduct. On August 28, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Roth IGA Foodliner employed claimant in one of its grocery stores as a deli services clerk from sometime in May 2014 until April 2, 2017.

(2) The employer expected claimant to wear clean gloves and engage in hygienic practices when handling food in the delicatessen and to immediately change gloves when they became contaminated. Claimant understood the employer's expectations.

(3) On March 30, 2017, claimant waited on a deli customer who had asked for chicken. While claimant was gathering the chicken, claimant turned her head, looked back and coughed over her shoulder. Claimant did not change her gloves after coughing and continued to gather chicken for the customer. Immediately after, the customer complained to the market director that, while gathering her chicken, claimant had coughed into her gloved hand and continued handling chicken, without changing her gloves.

(4) On April 2, 2017, the employer discharged claimant for coughing into her gloved hand while handling chicken and continuing to handle food afterward, without changing the gloves.

**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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer contended based on a customer's complaint that claimant had, when handling food, failed to change her gloves after coughing into her gloved hand, claimant vigorously denied that she had done so. Audio at ~7:33, ~21:41. Claimant contended that while she had coughed, it had not been in her hand, but that she had turned her head and coughed over her shoulder, which would not have contaminated the gloves that she was wearing. Audio at ~16:34, ~16:59. The conflicting testimony of the market director and claimant was the only direct evidence presented as to what actually transpired on March 30, 2017, and no independent evidence corroborating or tending to corroborate the accuracy of either party's account was presented. Based on well-established evidentiary principles, claimant's first-hand account of what occurred on March 30, 2017 is entitled to greater weight than the employer's hearsay account, which was based solely on the alleged observations of the customer. On this ground, the employer did not show more likely than not that claimant actually coughed into her gloved hand on March 30, 2017. In addition, giving equal weight to the testimony presented by both parties, since there was no reason in the record to doubt the accuracy of the account of either party, burden of proof principles establish that the disputed issue is to be revolved against the party who carries the burden of persuasion, which is the employer in this discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this alternative ground as well, the employer failed to show more likely than not that claimant actually coughed into her gloved hand on March 30, 2017. The employer did not meet its burden to show that claimant engaged in misconduct on March 30, 2017.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 17-UI-91010 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** September 25, 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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