

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1371

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 101202). The employer filed a timely request for hearing. On November 3, 2017, ALJ Griffin conducted a hearing and issued Hearing Decision 17-UI-96208, affirming the Department's decision. On November 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. EAB considered the entire record and the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) TVI Incorporated employed claimant as a sales clerk at a thrift retail store from December 2015 until it discharged him on June 27, 2017.

(2) The employer prohibited employees from concealing, hiding or stashing merchandise for later purchase. Exhibit 1. Claimant understood the employer's policy.

(3) During the evening of May 31, 2017, claimant and a coworker moved jewelry from inside a glass case to the top of the case to sell the next day at a clearance price. Claimant was holding jewelry items in his hands, including one necklace that he had admired, when his manager called him to close his register. Claimant set the jewelry down and went to his register. The other coworker finished setting out the jewelry for the clearance sale. Claimant closed his register, clocked out and left work.

(4) On June 1, 2017, before the store opened, the store manager saw the clearance jewelry set out on the glass case. She also noticed one necklace inside a shoe on the corner of the glass case. It was the same necklace claimant had admired the day before. The manager removed the necklace from the shoe and put it with the rest of the clearance jewelry.

(5) The store manager saw claimant waiting in line outside for the store to open. Once the store opened, claimant went directly to the corner of the glass case where there were shoes, including the shoe that had contained the necklace. While there, claimant selected some packs of trading cards, which were located near the shoes. He then selected the necklace he had admired the day before from the clearance jewelry on the top of the glass case, and purchased it along with the card packs.

(6) On June 27, 2017, the employer discharged claimant for allegedly violating its policy prohibiting employees from stashing items for later purchase.

CONCLUSIONS AND REASONS: We conclude 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 had the right to expect claimant not to conceal items in the store to purchase, and alleged that claimant violated that expectation by hiding a necklace in a shoe to purchase the next day. However, there is no direct evidence proving that claimant put the necklace in the shoe on May 31. On June 1, the store manager saw claimant go directly to the corner of the glass case where the shoes were and deduced that claimant "noticed that the necklace was not in the shoe," and then saw claimant find the necklace on top of the glass case. Audio Record at 8:49-9:11. However, absent direct evidence showing that claimant looked in the shoe when he went to the corner of the glass case, the manager's testimony as to why claimant went to that area is subjective, and speculative. We find it equally plausible that claimant went to the corner of the glass case to select trading cards rather than to look in the shoe. Claimant denied that he tried to "stash" the necklace in the shoe, but told the manager that the necklace may have landed in a shoe when he set the items down on the glass case, which is, on this record, plausible. Audio Record at 12:00-13:06.

In a discharge case, the employer has the burden of proving that it is more likely than not that claimant willfully or with wantonly negligence violated its expectations. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, that would mean that the employer had to show not only that claimant put the necklace in the shoe, but that he did so on purpose or with a conscious indifference to the employer's expectation that he not conceal items in the store for later purchase. Where, as here, the employer has only circumstantial evidence suggesting that claimant might have put the necklace in the shoe, but lacks sufficient evidence to show that he actually put the necklace in the shoe with the intent to preserve the item for purchase, the employer has not met its burden to establish misconduct by a preponderance of evidence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-96208 is affirmed.

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

DATE of Service: January 2, 2018

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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