

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0339

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 112501). The employer filed a timely request for hearing. On April 4, 2018, ALJ Amesbury conducted a hearing, and on April 5, 2018 issued Order No. 18-UI-106710, affirming the Department's decision. On April 9, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Roth IGA Foodliner employed claimant from July 21, 2017 until February 15, 2018, as a sales clerk in the employer's deli department.

(2) The employer expected claimant to leave the deli kitchen in a clean condition at the end of his shift so that it was prepared and clean for the next shift. The employer provided a checklist of duties for cleaning the deli kitchen, including cleaning and putting away all the food containers, and leaving the storage shelves and floors clean. Claimant was aware of the employer's expectations regarding cleanliness.

(3) The dishwasher in the deli kitchen did not always work properly and sometimes left the dishes unclean.

(4) On February 13, 2018, before he left work, claimant's coworkers told him they had washed the soup pots for the day, emptied the dishwasher, and sprayed the dishwasher clean. Claimant observed the dishwasher before he left work and it appeared to him as though it was turned off. Claimant did not leave partially eaten food on a storage shelf and believed he had left the deli in a clean condition.

(5) On February 13, 2018, the store director observed the deli kitchen after claimant's shift and saw partially consumed food product left on a storage shelf, food particles and unclean soup pots in the automatic dishwashing machine, and unclean floors.

(6) On February 15, 2018, the employer discharged claimant for failing to properly clean the deli kitchen.

CONCLUSIONS AND REASONS: We agree with the ALJ and 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. 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. Isolated instances of poor judgment, good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to leave the deli kitchen as clean as it expected at the end of his shift on February 13, 2018. The employer had the right to expect claimant to leave the deli kitchen clean and ready for the next shift. The store director found the deli kitchen in an unacceptable condition at the end of claimant's shift on February 13. However, the record fails to show the condition of the kitchen was due to claimant's willful or wantonly negligent disregard of the employer's expectations. Claimant testified that he, "always left the deli in better condition than he found it." Transcript at 22. Claimant also asserted that he did not leave partially eaten food out in the kitchen, and was unaware, after a coworker told him he had washed the soup pots, that the soup pots were still in the dishwasher at the end of their shift. Claimant's conduct was, at worst, inadvertent or mere negligence, and not a conscious disregard of the employer's expectations. Mere negligence, even repeated negligence, in the performance of work-related duties may be a valid basis for discharge, but it is not sufficient to establish misconduct. The record shows claimant tried to prepare the deli kitchen for the next shift to the best of his abilities. Although he was unable to perform his duties well enough to meet the employer's expectations, the employer failed to show that it was the result of a willful or wantonly negligent disregard of the employer's standards, and not mere negligence or a lack of job skills, neither of which are misconduct. OAR 471-030-0038(3)(b).

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

DECISION: Order No. 18-UI-106710 is affirmed.

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

DATE of Service: May 8, 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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