

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0375

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153953). Claimant filed a timely request for hearing. On April 10, 2018, ALJ Hoppe conducted a hearing, and on April 11, 2018 issued Order No. 18-UI-107082, concluding the employer discharged claimant, but not for misconduct. On April 16, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

Order No. 18-UI-107082 states that the employer did not participate in the hearing, which is incorrect. The employer participated in the April 11, 2018 hearing. The ALJ did not mark or admit the employer's documents at hearing, but the claimant testified that he received the documents, the employer discussed the documents during the hearing, and the ALJ considered them in making his decision. Audio Record at 23:57. Because the documents are readily identifiable from the discussion at hearing and, having been discussed at hearing, are necessary to complete the record under OAR 471-041-0090(1) (October 29, 2006), EAB has marked the documents as "Exhibit 1" and admits them into the record. A copy of Exhibit 1 is served to each party along with this decision. Any party who objects to our admitting Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection within ten days of our mailing this decision. Unless such objection is received and sustained, Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Mini Pet Mart, Inc. employed claimant from July 24, 2017 until February 26, 2018 as a manager.

(2) The employer required claimant, as manager, to make a daily bank deposit on the days he was working of funds collected in the store on those days. The employer expected claimant to perform his duties in a detailed, organized manner to avoid losses to the employer. Claimant understood the employer's expectations.

(3) On November 17, 2017, the employer gave claimant a verbal warning for mishandling funds when claimant allegedly lost \$58 worth of coupons presented to the employer that claimant was expected to

send to the employer's district office for reimbursement. The district manager spoke with claimant and warned him that he must be organized and detail-oriented in performing his duties and not mishandle funds or coupons in the future. Exhibit 1 at 8.

(4) On February 14, 2018, the employer's bank called claimant and told him it had not received a daily bank deposit on February 7, 2018. Claimant recalled having put the deposit in the bank's lock box on February 7. Claimant contacted a district manager and told her that the bank had informed him that it had no record of receiving the employer's bank deposit on February 7.

(5) The local police investigated the missing deposit and concluded that there was no conclusive evidence that claimant took or did not take the deposit money.

(6) On February 26, 2018, the employer discharged claimant because he failed to execute his duties in an organized, detail-oriented manner, including allegedly failing to complete the daily deposit on February 7, 2018.

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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The employer has 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).

As a preliminary matter, the employer asserted at hearing that its decision to discharge claimant was based on multiple incidents, including the final incident, that related to lack of organization and attention to detail, and as a result, "an overall lack of ability to do the job [of manager]." Audio Record at 18:48 to 20:02; 32:54 to 33:01. However, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. The employer's district manager also testified that the last missing deposit led to the discharge. Audio Record at 20:03 to 20:12. Therefore, it is that conduct that was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer expected claimant to perform his work in an organized, detail-oriented, and reasonably mistake-free manner. Claimant violated that expectation by allegedly failing to complete a daily deposit on February 7, 2018. However, claimant recalled making the deposit and the police investigation was

inclusive. The record simply does not show by a preponderance of the evidence that claimant was responsible for the lost deposit. Thus, the employer failed to show that claimant acted with willful or wanton negligence that resulted in a violation of the employer's expectations. Thus, the employer failed to show misconduct. Even assuming, *arguendo*, that claimant lost the deposit as a result of his lack of organization or attention to detail, the record does not show that claimant's actions were other than the result of unintentional errors or a lack of skills. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The preponderance of the evidence therefore fails to show that claimant engaged in misconduct.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-107082 is affirmed.

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

DATE of Service: May 15, 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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