

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0562

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94644). Claimant filed a timely request for hearing. On May 8, 2018, ALJ Scott conducted a hearing, and on May 14, 2018 issued Order No. 18-UI-109285, affirming the Department's decision. On June 4, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant filed a written argument in which she requested a new hearing to present new evidence about her work separation. Given EAB's disposition of this matter in claimant's favor, claimant's request is not addressed.

FINDINGS OF FACT: (1) Vitamin World employed claimant from February 6, 2013 until March 29, 2018, last as a manager of one of its stores.

(2) The employer expected that, as store manager, claimant would ensure that all areas on the premises in the store she managed were kept neat, tidy and clean. Claimant understood the employer's expectation.

(3) On Monday, March 12, 2018, the employer issued corrective action form to claimant because she did not review and approve payroll for the store she managed by noon on Sunday, March 11, 2018.

(4) On Wednesday, March 14, 2018, the district manager made a site visit to the store that claimant managed and, among other things, found that the employee restroom was untidy and unclean and that the backroom, where inventory was stored, was disorganized. At that time, one of claimant's subordinates at the store was assigned to clean the employee restroom approximately once per week. That day, the district manager discussed her observations with claimant. On March 19, 2018, the employer issued a corrective action form to claimant based on the March 14, 2018 site visit.

(5) After March 22, 2018, claimant was on vacation until she was scheduled to return to work on March 29, 2018.

(6) On March 27, 2018, the district manager made another site visit to claimant's store while claimant was not working and was on vacation. Although the condition of some areas of claimant's store had improved since March 14, 2018, the district manager thought the employee restroom was so dirty it was not in a "usable condition" and the backroom was messy. Transcript at 6. On March 28, 2018, the district manager returned to claimant's store, instructed the first assistant manager buy some cleaning supplies at a nearby store and cleaned the bathroom herself. The district manager also re-organized the backroom that day.

(7) On March 29, 2018, which would have been claimant's first day back at work after her vacation, the district manager called claimant at her home and told her she was discharged. The employer discharged claimant for "continual failure to meet expectations." Transcript at 19.

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) (January 11, 2018) 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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-109285, the ALJ concluded that the employer established that it discharged claimant for misconduct. The ALJ reasoned that the employer discharged claimant for "repeated failure to comply with instructions and failure to perform reasonable duties," and the employer presented "substantial evidence" that claimant had not remedied those deficiencies either on March 14 or on March 27-28, 2018 despite having been warned several times about the unsatisfactory condition of the store. Order No. 18-UI-10925 at 4. We disagree with the ALJ's conclusions.

At the outset, EAB customarily limits its analysis to determine whether claimant is disqualified from benefits to the final incident of a claimant's alleged misconduct. EAB takes this approach because, as here, when the employer was aware of claimant's violations of its standards prior to the final incident and did not discharge claimant at the time of those prior violations, it presumably did not consider those violations sufficient serious to merit discharge. For this reason, the ALJ erred in considering claimant's alleged violations of the employer's standards prior to March 27-18, 2018 as evidence of claimant's disqualifying misconduct. EAB will limit the misconduct analysis to claimant's alleged violations of the employer's standards arising from the site visits on March 27-18, 2018.

At hearing, the employer appeared to contend that, given the condition of the store on March 27-28, 2018, claimant necessarily engaged in misconduct because, as store manager, she was ultimately responsible for the condition of the store. Transcript at 23, 111. However, to disqualify claimant from benefits, the employer must show that some willful or wantonly negligent aspect of claimant's behavior led to the store's lack of cleanliness and tidiness on March 27-28, 2018. As of March 27, 2018, claimant

had been away from the store on vacation for five days. It does not appear that the employer required claimant personally to clean and tidy up the store at all, or during a period when she was away on vacation. The employer did not present any evidence at hearing as to what steps it specifically expected claimant to take after March 14, 2018 to ensure that the store was kept clean and tidy and that she failed to take them. The employer also failed to rule out that unforeseeable willful or wantonly negligent behavior by claimant's subordinates, or a willful or wantonly negligent failure to act by the assistant manager while claimant was away on vacation led to the uncleanliness in the employee restroom and the disorganization in the backroom that the district manager observed on March 27, 2018 and cleaned up on March 28, 2018. On this record, the employer failed to meet its burden to show that the condition of the store premises on March 27-28, 2018 was, more likely than not, attributable to willful or wantonly negligent behavior on claimant's part.

The employer did not establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION:

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

DATE of Service: July 6, 2018

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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