

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0671

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 132045). The employer filed a timely request for hearing. On April 17, 2014, ALJ Seideman conducted a hearing, and on April 18, 2014 issued Hearing Decision 14-UI-15542, affirming the Department's decision. On April 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Wildhorse Resort and Casino employed claimant as a bell staff from March 30, 2013 to January 18, 2014.

(2) The employer expected employees not to steal from guests. Claimant understood the expectation.

(3) On January 15, 2014, a guest went into a restroom then left it. Claimant then went into the restroom, exited appearing to hold an unidentified object, returned to the restroom, and left it empty-handed. Claimant did not see or handle a lost wallet during his restroom visits. The guest then returned to the restroom and left it holding a wallet and appearing upset. The guest subsequently reported to the employer that he had inadvertently left his wallet in the restroom, and, when he retrieved it, someone had taken \$150 from the wallet.

(4) The employer reviewed surveillance footage and determined that claimant was the only individual who had been inside the restroom during the period the guest reported that his wallet had been out of his custody. The employer concluded that claimant must have taken the wallet, and, on January 18, 2014, discharged him for theft.

(5) Prior to discharging claimant, the employer was unable to obtain any confirmation of the guest's report that his wallet had been missing or that \$150 was missing from the wallet. The employer also did not obtain confirmation that claimant had taken the \$150 or had the missing denominations in his possession.

**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. 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 bears the burden to prove misconduct occurred by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer alleged that claimant stole \$150 from a wallet a guest inadvertently left in the restroom. In support, the employer provided witness statements from individuals who observed video surveillance footage showing that claimant was the only person other than the guest who visited that restroom during the period of time the wallet was allegedly missing, and who averred that it appeared claimant had the wallet in his hands at some point during that period and was doing something that might have been counting money later the same day. *See e.g.* Exhibit 4, 5.

However, the employer's witness at the hearing, who viewed the same video surveillance footage as the witnesses who did not testify, stated at the hearing, "it appeared that he had something in his hand, though the surveillance footage wasn't in my – my estimation clear enough to tell what it was." Transcript at 10. Given that the footage was not clear enough to tell what claimant was holding at any point, the evidence fails to show that, more likely than not, claimant ever held the wallet or the allegedly missing money. Moreover, although the surveillance footage conclusively established that claimant was the only person other than the guest to use the restroom during the relevant time frame, the guest was not observed with the wallet while entering the restroom the first time, the employer did not have any evidence that the guest's wallet was left in the restroom, and there was no evidence that the guest's wallet contained \$150 before claimant entered the restroom and nothing thereafter. Nor was claimant discovered with cash in the denominations the guest reported stolen.

In short, while circumstantial evidence would tend to show that, if a theft had occurred, claimant was probably the only individual with the opportunity to have committed it, the preponderance of the evidence fails to show that a theft occurred. Without sufficient evidence of theft, claimant's discharge was for suspicion of theft, and the employer's unconfirmed suspicions about claimant's culpability for a theft cannot be considered misconduct attributable to claimant. Therefore, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 14-UI-15542 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;  
Susan Rossiter and D.E. Larson, not participating.

**DATE of Service:** May 22, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.