

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1094

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On May 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134601). Claimant filed a timely request for hearing. On June 3, 2014, ALJ Seideman conducted a hearing, and on June 6, 2014 issued Hearing Decision 14-UI-19104, concluding the employer discharged claimant, but not for misconduct. On June 25, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At the hearing, the ALJ marked as Exhibit 1 the “Employee Handbook” and “Employee Handbook Policy Overview”; Exhibit 1 was admitted into evidence without objection. Audio Record ~ 2:00 to 2:30. A marked copy of Exhibit 1 was not included in the record, however. To complete the record, the “Employee Handbook” and “Employee Handbook Policy Overview” have been marked as EAB Exhibit. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record 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, the exhibit will remain in the record. OAR 471-041-0090 (October 29, 2006).

The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer’s reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Dick’s Kitchen LLC employed claimant as a manager from December 1, 2013 to March 19, 2014. The employer served alcoholic beverages on its premises and was an Oregon Liquor Control Commission (OLCC) licensee.

(2) The employer's written policy and an OLCC rule prohibited employees from using alcohol while on the employer's premises or conducting work-related activities. EAB Exhibit 1. Claimant was aware of the employer's alcohol policy, the OLCC rule and the employer's expectations.

(3) Typically at closing, the employer's manager-on-duty went into the office, completed necessary paperwork, counted cash, divided the night's tips and placed them into envelopes for the staff who came to the office before leaving to receive and sign for them. It was not uncommon for staff members to have "to-go" coffee cups filled with nonalcoholic beverages with them when they came to the office. Audio Record ~ 16:55 to 18:05.

(4) On or about March 17, 2014, the employer's operation's manager discovered a "to-go" coffee cup with the lid on it filled with beer in the employer's office the morning after claimant closed. Audio Record ~ 4:40 to 5:05. Two days later, the office manager called claimant on the phone, told him what he had found the morning after claimant closed and that claimant was being discharged for that reason. Claimant was "caught off guard", knew that as manager the employer held him responsible for his crew's conduct apologized for an "error in judgment." Audio Record ~ at 18:00 to 20:00. The operations manager never asked claimant if the cup was his or if he was aware an employee had been drinking alcohol on duty.

**CONCLUSIONS AND REASONS:** The employer discharged claimant, 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.

In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show that, more likely than not, claimant willfully or with wanton negligence engaged in conduct that violated the employer's expectations. Here, the employer failed to satisfy that evidentiary burden.

The employer's evidence that claimant used alcohol while on duty on the employer's premises was circumstantial. Claimant denied under oath that the cup or alcohol was his and presented unrefuted evidence that at least four employees on duty on the night in question came into the office to pick up and sign for their tips and that it was not uncommon for employees to pour themselves nonalcoholic drinks such as coffee or soda into the employer's "to-go" coffee cups and place lids on them. Audio Record ~ 16:55 to 18:05. Claimant's explanation that he apologized for an "error in judgment" because he knew the employer held its managers responsible for their crew's behavior was not implausible. Audio Record ~ 18:00 to 21:00. Absent a reason for disbelieving claimant's sworn testimony, the evidence about whether or not claimant violated the employer's alcohol policy as alleged is no more than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The record therefore fails to show that claimant used alcohol while on duty or knowingly allowed a member of his staff to do so on the night in question.

In the absence of a preponderance of the evidence showing that claimant willfully or with wanton negligence engaged in conduct that violated the employer's alcohol policy, misconduct has not been shown. Accordingly, the employer discharged claimant, but not for misconduct under OAR 471-030-0038(3)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 14-UI-19104 is affirmed.

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service:** July 29, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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