

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1425

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but her wage credits were not subject to cancellation (decision # 85625). Claimant filed a timely request for hearing. On August 7, 2014, ALJ Seideman conducted a hearing, and on August 11, 2014 issued Hearing Decision 14-UI-23178, affirming the Department's decision. On August 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that she provided a copy of her 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 claimant's reasonable control prevented claimant 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) Imagine That employed claimant from April 8, 2011 until May 30, 2014 as a clerk in its store.

(2) The employer expected claimant not to steal from the employer. Claimant understood the employer's expectation.

(3) On May 29, 2014, claimant had one sale. Claimant put the credit card receipt from the sale in the money envelope. Claimant had no cash sales that day.

(4) On May 30, 2014, the employer's owner reviewed video surveillance footage of claimant working on May 29, 2014 and concluded claimant received a cash payment for merchandise, and put it in the

employer's money envelope after the sale. There was no cash in the envelope at the end of claimant's shift.

(5) The employer concluded claimant had taken cash from the money envelope, and on May 30, 2014, discharged claimant for theft. Claimant told the employer she did not take money from the employer.

(6) On approximately June 6, 2014, the owner told claimant he would not give claimant her final paycheck until she paid the employer \$65 to reimburse the store for the amount he alleged she stole. Claimant paid the employer \$65 and the employer gave claimant her paycheck of \$298.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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).

In Hearing Decision 14-UI-23178, the ALJ found that the employer discharged claimant for misconduct because claimant willfully violated the employer's expectation that she not steal from the employer by taking cash from the employer on May 29, 2014.¹ We disagree that the preponderance of evidence shows claimant stole from the employer. To support its allegation, the employer's manager testified that the owner told him he had observed video surveillance footage showing claimant putting cash into the employer's money envelope during her shift, but there was no cash in the envelope at the end of claimant's shift. However, the owner was the only person who viewed the video surveillance footage, and he did not testify at hearing. Nor was the footage submitted as evidence. Claimant was the only witness with firsthand knowledge of what occurred on May 29 to testify at hearing, and she testified that she had no cash sales on May 29, and that she did not take money from the employer. Audio Record at 13:49 to 13:52, 14:48 to 15:17.

The ALJ was persuaded, however, by the manager's hearsay testimony alleging that the owner told claimant he would refer the video footage to the local district attorney if she did not pay the employer \$65. Audio Record at 10:31 to 11:17. The ALJ concluded that claimant's subsequent \$65 payment to the employer "adds credibility to employer's testimony" that claimant stole money from the employer.² We disagree that claimant's \$65 payment to the employer adds sufficient weight to the employer's testimony to outweigh claimant's firsthand testimony that she paid the owner \$65 because he refused to give claimant her final paycheck until she paid the money and her repeated denials that she took money from the employer. The ALJ implicitly found claimant's testimony unpersuasive because she did not state why the employer insisted she pay the money, and "it is difficult to see why she wouldn't challenge

¹ Hearing Decision 14-UI-23178 at 3.

² *Id.*

[the employer's demand]."³ We, however, find claimant's testimony persuasive that she was willing to pay \$65 to receive a check for \$298 where she was unemployed and understood paying \$65 to be the only way she would receive her check. Audio Record at 14:20 to 14:32, 15:19 to 15:58.

In sum, claimant's denial under oath that she stole the employer's money outweighs the employer's evidence to the contrary. Thus, the employer has failed to prove by a preponderance of the evidence that claimant stole the money on May 29, and that her discharge was for misconduct.

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-23178 is set aside, as outlined above.

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

DATE of Service: September 30, 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. 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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³ *Id.*