

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0799**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90141). Claimant filed a timely request for hearing. On June 15, 2016, ALJ Vincent conducted a hearing, and on June 23, 2016 issued Hearing Decision 16-UI-62441, concluding claimant's discharge was not for misconduct. On July 5, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

On its application for review the employer wrote, "I can provide statement from customer stating she was not impaired and DID NOT write \$30 tip." Emphasis in original. The employer's statement is considered an offer of additional information to EAB. OAR 471-041-0090(2) (October 29, 2006) provides that EAB may consider new information from a party if the party offering it establishes that the new information is relevant and material to EAB's determination and that "[f]actors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing." Although there is no question that the information the employer is offering to provide EAB would be relevant and material to the determination, the employer did not submit any information tending to show that it was beyond its reasonable control to offer the new information during the June 15th hearing. EAB will not, therefore, allow the employer's offer of new information, and reached this decision based solely on review of the hearing record under ORS 657.275(2).

**FINDINGS OF FACT:** (1) Jericho Enterprises, Inc. employed claimant as a Figaro's delivery driver from April 2, 2016 to April 17, 2016.

(2) The employer expected claimant not to falsify customers' credit card receipts. Claimant understood the expectation.

(3) On April 15, 2016, claimant delivered pizza to a customer. Claimant presented the customer with her pizza and a credit card slip, which the customer signed and returned to claimant. Claimant then left the customer and returned to his car.

(4) Upon reviewing the credit card slip in the car, claimant observed that the customer had written in a \$30.00 tip for her \$17.99 order. Claimant was uncertain how to handle the situation. He called his supervisor and explained what happened. Claimant's supervisor attempted to call the customer to ask if she had intended to leave such a large tip but did not reach her. The supervisor told claimant to go ahead and receive the \$30.00 tip, and refund the customer later if she disputed the charges.

(5) The supervisor later spoke with the customer. The customer reported to the supervisor that she had left only a \$3.00 tip. The supervisor concluded that claimant had falsified the customer's credit card slip by adding a zero to the tip amount in order to receive a larger tip than the customer had intended.

(6) On April 17, 2016, the employer discharged claimant for the alleged falsification.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was 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.

The employer alleged that claimant falsified a customer's credit card slip to receive a \$30.00 tip when she had only given him a \$3.00 tip. Claimant denied having done so, and explained that because the customer appeared to him to be intoxicated at the time of the transaction, he had reported the excessive tip to his supervisor, and acted on his supervisor's advice when processing the \$30.00 tip. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Absent a reason to disbelieve either witness about the events at issue, the evidence of whether claimant acted as the employer alleged in falsifying the tip amount is, at best equally balanced. Where, as here, the evidence is equally balanced, the party with the burden of persuasion, the employer, has failed to show misconduct. Because the evidence of claimant's misconduct is equally balanced, we conclude that claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-62441 is affirmed.

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

**DATE of Service:** August 2, 2016

**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](http://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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