EO: 200
BYE: 201722

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1038

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113256). Claimant filed a timely request for hearing. On August 17, 2016, ALJ Wyatt conducted a hearing, and on August 25, 2016 issued Hearing Decision 16-UI-66360, affirming the Department's decision. On September 6, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision. EAB did not consider claimant's argument because she failed to certify that she provided a copy of it to the employer as required by OAR 471-041-0080(2)(a) (October 29, 2006).

FINDINGS OF FACT: (1) C&K Market Inc. employed claimant as a deli clerk from June 23, 2013 to June 3, 2016.

(2) On May 29, 2016, claimant was working as a deli clerk but, because none of her managers were scheduled to work, she was also acting as *de facto* manager. Although the employer's store policy generally dictated that outdated food products be discarded, managers in claimant's department regularly allowed employees to take outdated food items for their own use without paying for them. Claimant decided to take a package of outdated salad and a package of outdated fruit home for her own consumption. Had claimant not taken the outdated items, the items would have to have been discarded.

(3) The same day, claimant observed some old donuts. Claimant understood that two day old donuts were subject to be discarded or given to employees by a manager. Claimant understood that one day old donuts would be discounted and placed for sale to customers or employees. Claimant did not know if the donuts were one day or two day old donuts. Claimant discounted the price of the donuts to $5.99 as though they were one day old, and purchased them along with a $1.49 soda.

(4) The store manager observed claimant leaving with two grocery bags, but noticed that she had not gone through the check stands. The store manager questioned claimant about the groceries. Claimant told the store manager that she had not paid for the outdated salad and fruit, but that she had paid $5.99 for the donuts. Claimant could not locate her receipt, but specified which employee had processed the sale.

(5) The store manager spoke with the employee claimant said had processed her donut purchase, and the employee denied having processed claimant's order. The store manager checked the register records for a $5.99 or $6.00 sale that corresponded to claimant's donut purchase and could not find one. The store manager concluded that claimant had stolen the donuts. The store manager also concluded that claimant had stolen the salad and fruit because they should have been discarded if they were too old to sell.

(6) On June 3, 2016, the employer discharged claimant for alleged theft of food.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 connected with work. 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. In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is no dispute that claimant took an outdated salad and outdated fruit without paying for either. The issue is whether claimant's act constituted willful or wantonly negligent misconduct. Although the employer's witness testified that the employer prohibited employees from taking outdated food home for their own consumption and without paying for it, he was unable to identify the policy prohibiting them from doing so, did not have specific recollection of having discussed the matter during store meetings claimant attended, and did not have knowledge of deli department practices. Claimant testified that it was common practice by deli management to allow employees to take outdated product, and, on May 29th, she was the equivalent of deli management and therefore had the ability to decide whether or not she, or other employees, could take outdated food home. The store manager did not dispute that claimant was the *de facto* manager, or that she had the authority to act as such. Absent a reason to conclude either witness was not credible, the evidence of whether or not claimant knew or should have known taking outdated food home probably violated the employer's expectations was, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden. Therefore, claimant's act of taking outdated food was not misconduct.

The ALJ concluded that claimant's discharge was for misconduct based solely upon his conclusion that claimant either took donuts she did not pay for or discounted the donuts she purchased without authority.[1] The ALJ reasoned that if claimant took the donuts without paying, she committed theft, and if she discounted the donuts she acted without authority "because the store has no policy at all allowing employees to make discounted purchases."[2] We disagree with the ALJ's conclusions.

There is no dispute that claimant took donuts from the employer's store. The employer first alleged that claimant did not pay for the donuts. Claimant, on the other hand, testified that she purchased the donuts for a discounted price of $5.99 or $6.00 and plausibly explained why she was unable to produce a receipt. Although the store manager attempted to establish that claimant had paid for the donuts by asking the clerk claimant alleged sold her the donuts and looking for a register transaction showing a $5.99 or $6.00 purchase of donuts and could not do so, the lack of a witness or register transaction is not dispositive of the issue. The employer's evidence regarding the clerk's denial that she processed claimant's donut purchase was based on hearsay, and, as a practical matter, it seems there might be many reasons the clerk might have denied processing claimant's purchase, including that claimant might not have made the purchase she claimed to have made, the clerk might have had a faulty memory of the purchase, or the clerk might have had a fear of repercussion if she thought she might have made a mistake in selling the discounted donuts to claimant. In any event, the employer's hearsay evidence is, at best, equally balanced against claimant's testimony that she did purchase the donuts. Likewise, the fact that the store manager could not find a transaction corresponding to claimant's donut purchase is not dispositive of the issue, because it appears he was looking for evidence of a $5.99 or $6.00 transaction, when claimant actually purchased the donuts along with a $1.49 soda, and the transaction therefore would have been for $7.48 or $7.49 rather than the lesser amount the store manager tried to find. For those reasons, claimant's testimony that she purchased the donuts either outweighs or is equally balanced against the employer's allegation that she did not.

In the alternative, the employer alleged that even if claimant had purchased the donuts, she first discounted them in violation of the employer's expectation that employees not discount food items for themselves. The record does not show that claimant unilaterally decided to discount donuts that should not have been discounted, however. Rather, the donuts were at least one day old at the time she discounted them, and due to be discounted in accordance with the deli department's common practice of discounting one day old donuts. In other words, she did not discount the donuts so she could purchase them for less money, she discounted them because they were due to be discounted.[3] As the *de facto* deli manager on May 29, 2016, claimant reasonably believed herself to be authorized to discount the donuts, and the employer did not identify any policy or practice barring claimant from purchasing day old

[1] Hearing Decision 16-UI-66360 at 3-4.

[2] *Id.* at 3.

[3] We also note that the record shows that claimant was uncertain whether the donuts were one or two days old at the time she discounted them. In deciding how to proceed, claimant might have concluded the donuts were two days old, in which case she might either have discarded them or made them available to herself or another employee to take without having to pay for them, but instead erred on the side of treating them as though they were just one day old in order to pay for the product even though she might not have been required to do so. Given that circumstance, claimant was not acting against the employer's interests, but was, rather, attempting, albeit in error, to act in the employer's interests with respect to purchasing the donuts.

donuts at their discounted price. Nor did the employer allege or establish that claimant applied a larger discount to the donuts than another deli manager or clerk would have in the ordinary course of business.

For the foregoing reasons, we conclude that the employer did not establish by a preponderance of the evidence that claimant's discharge was for misconduct. Therefore, claimant is not disqualified from receiving unemployment insurance benefits because of her discharge from work.

DECISION: Hearing Decision 16-UI-66360 is set aside, as outlined above.[4]

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

DATE of Service: October 4, 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. 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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[4] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.