

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0521**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85246). Claimant filed a timely request for hearing. On April 13, 2017, ALJ S. Lee conducted a hearing, and on April 21, 2017 issued Hearing Decision 17-UI-81587, affirming the Department's decision. On May 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Blue Moon Lounge, Inc. employed claimant from April 14, 2011 until January 3, 2017, last as a night bartender.

(2) The employer expected that claimant would not remove cash from the cash drawer to make it appear that her cash drawer balanced and to not appropriate that cash for her personal use. The employer also expected that claimant would ring up all sales and deposit all funds collected from sales during her shift in the cash drawer. Claimant understood the employer's expectations.

(3) The employer maintained two separate cash drawers, one for food, drink and keno sales and one for other lottery sales. As night bartender, claimant shared the same lottery cash drawer with the daytime bartender. The same cash fund was maintained for three consecutive days in the cash drawer. At the conclusion of each shift, at either 12:00 midnight or 2:30 a.m., claimant was required to complete certain paperwork in which she counted and recorded the cash on hand in her cash drawer at the shift's end, recorded the sales made during her shift, recorded and subtracted the cash that was paid out during her shift (generally receipts from state-sponsored lottery or keno games) and determined what the cash balance should be in the cash drawer. If the amount that claimant recorded as being in the cash drawer was more than five dollars less than what it should have been according to her paperwork,

claimant was required to reimburse the employer for the total amount by which her cash drawer was recorded as being short.

(4) Since at least September 2016, the employer's owner had reviewed the cash reconciliations that claimant performed at the end of her shifts and observed that on several occasions claimant had made arithmetical errors greater than five dollars in her paperwork but, despite the errors, the amount of cash she recorded as being in her cash drawer was regularly less than five dollars different from what it should have been. In particular, on September 5, 2017, claimant recorded in her closing paperwork that she had paid out \$41.00 in cash in keno, the owner determined claimant should have paid out \$59.00, but claimant's count of her cash drawer was not \$18.00 greater than what it should have been. Exhibit 1 at 5. In claimant's paperwork for September 20, 2016, she recorded that she paid out \$428 in cash, but she subtracted \$478 from the amount of cash she recorded as having been in her cash drawer to determine what the balance in her cash drawer should have been. Exhibit 1 at 6. The owner determined that the count of her cash drawer that claimant recorded should have yielded an overage of \$50 for this day, but her recorded count of the cash drawer did not reflect this overage. The owner suspected claimant was taking cash from her cash drawer for her personal use and adjusting the figures in her closing paperwork so that the cash in her cash drawer would appear to reconcile with sales. Despite her suspicions, the owner never counted the cash in claimant's cash drawer to determine if it was actually over or short from what it should have been. On September 25 and 27, 2016, claimant did not record counts of her cash drawer on her closing paperwork and the owner thought claimant was trying to hide something by not doing so.

(5) Sometime after approximately September 2016, the owner began to suspect that claimant was not writing up order tickets for meals served to her husband and not collecting payment for those meals. The owner confronted claimant about her concerns and claimant denied that she had ever failed to write a meal ticket or to collect payment for a meal that her husband ordered.

(6) On December 4, 2016, the closing paperwork that claimant prepared showed that claimant had deposited \$395 in cash to the state lottery when the owner determined that claimant should have deposited \$495. Exhibit 1 at 3. In the closing paperwork, the cash drawer balanced within five dollars of what its balance should have been, although the owner determined that the error in the lottery deposit resulted in a \$100 shortage. On December 5, 2016, claimant found in the cash drawer a \$100 bill inadvertently placed with the \$20 bills, stuck to those bills and not counted the previous night. Claimant tried to give the \$100 to the owner to deposit with the money collected from the previous evening, but the owner refused to take it, telling claimant that she was going to deduct the amount of the shortage from claimant's paycheck. As a consequence, claimant kept that \$100 she had found to avoid paying for the shortage since she was already going to be required to reimburse the employer for it. The owner never counted the cash in claimant's drawer to determine whether it was actually short the \$100.

(7) On January 3, 2017, the owner came to the workplace at the end of claimant's shift and reviewed her closing paperwork. The owner determined that claimant had collected \$36 more in cash than the sales that were recorded. The owner also was not able to locate an order ticket for a meal that claimant's husband had eaten that evening. The owner believed that claimant had intended to take the \$36 cash overage from the drawer for her personal use and had intended that her husband have a free meal.

(8) On January 3, 2017, the employer discharged claimant because the owner believed that claimant was taking money from the cash drawer for her own use and giving her husband free meals at the employer's expense.

**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 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the owner contended that claimant was manipulating the figures in her closing paperwork to disguise that she was taking cash from the employer, claimant vigorously denied that she was stealing anything. Transcript at 6, 14, 15. Claimant did concede that she could have made some arithmetical errors in the calculations in her closing paperwork. Transcript at 15, 21. Reviewing the closing paperwork that claimant completed for September 5 and 20, 2016 and December 4, 2016, it is impossible to determine how the owner concluded from that paperwork that some of claimant's recorded figures were incorrect, what the actual count of claimant's cash drawer was for those days, how the employer determined that the cash counts that claimant recorded were over or short from what they should have been and by how much they differed from what they should have been. Exhibit 1 at 3-8. Because the basis for the owner's contentions is not evident from the closing paperwork that the employer submitted, we are left with the conflicting contentions of the parties about whether claimant was intentionally taking money from the employer. In this regard, there is no basis in the record to prefer the testimony of one party over the other or to doubt the credibility of either party or the accuracy of either's testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it carries the burden to persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the employer did not meet its burden to show that claimant was intentionally adjusting the closing paperwork to hide thefts of cash from the employer, or that she took any of the employer's money for personal use.

With respect to claimant and her husband not paying for meals that the husband ordered and consumed, the parties also disputed each other's testimony. Claimant contended that after the owner raised a concern about claimant supposed failure to create order tickets for the husband, claimant always made a point of doing so, wrote the husband's name on his tickets so the owner could see that one had been created and stated that she or her husband always paid for the meals that he ordered. Transcript at 18. While claimant testified that a meal ticket for the husband might have been occasionally lost, she reiterated that his meals were always paid for and that the loss of the occasional ticket was likely due to her or the daytime bartender's accidentally misplacing it. Transcript at 17-18. At hearing, the owner

testified that she did not witness claimant or her husband ever failing to pay for one of the husband's meals, and admitted that the surveillance cameras that were in the workplace did not have the capability to detect whether or not claimant failed ring up a meal for the husband on the cash register or to receive payment for that meals. Transcript at 30-40. As before, we are left with the parties' conflicting testimony and, as before, the conflict in that testimony must be resolved in claimant's favor. On this record, the employer did not meet its burden to show that claimant supplied meals to her husband that were not paid for.

The employer did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-81587 is affirmed.

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

**DATE of Service:** May 31, 2017

**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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