

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1383

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70823). Claimant filed a timely request for hearing. On September 19, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for October 4, 2017. On October 4, 2017, ALJ Scott conducted a hearing at which the employer failed to appear, and on October 10, 2017, issued Hearing Decision 17-UI-94107, concluding the employer discharged claimant, but not for misconduct. On October 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

On October 26, 2017, EAB issued Employment Appeals Board Decision 2017-EAB-1230, reversing Hearing Decision 17-UI-94107, and remanding the case to the Office of Administrative Hearings for additional proceedings after concluding that the employer's failure to appear at the October 4, 2017 hearing was due to circumstances beyond the employer's reasonable control, and, for that reason, additional proceedings were necessary. On November 14, 2017, ALJ Scott conducted a second hearing at which the employer appeared, and on November 17, 2017, issued Hearing Decision 17-UI-97211, again concluding that the employer discharged claimant, but not for misconduct. On November 30, 2017, the employer filed an application for review of Hearing Decision 17-UI-97211 with EAB.

The employer's application for review included a written argument. However, the employer's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and the employer's argument, to the extent it was based on the hearing record, when reaching this decision.

Claimant also submitted written arguments to EAB. However, the deadline for the parties to file written argument concerning this appeal was December 20, 2017, and claimant did not file a request for an extension of time to file written argument. See OAR 471-041-0080 (October 29, 2006). Claimant's written arguments were received on January 3 and 4, 2018, and therefore were not considered.

FINDINGS OF FACT: (1) The Hydrant, a bar and grill, employed claimant as a bookkeeper and bartender from approximately 2004 to June 18, 2017.

(2) In late May 2017, the employer's president (CH) determined that between February and May 2017, it appeared that the employer had experienced significant financial losses in liquor sales and food inventory. At that time, he promoted another employee (JL) to manager and asked her to investigate the employer's operations to determine the cause.

(3) Prior to late May 2017, claimant typically took the cash register tapes home with her to do the bookkeeping work. Shortly after JL was promoted, JL requested that claimant return all of the employer's register tapes to the employer's premises, which claimant did. After reviewing the tapes, JL concluded that during the times that claimant, another bartender (D) and the former manager (N), who had quit, tended bar, the employer had charged less for drinks than the approved, pre-programmed amounts, which was possible by manually entering drink prices. JL instructed claimant and the other bartender to discontinue the practice, which claimant eventually, though not immediately, did.

(4) After considering the information gathered by JL, CH concluded that claimant and the other bartender D had charged customers the programmed price for drinks, manually entered the purchases at a lower price and kept the difference for themselves. CH also concluded that claimant and possibly D had taken food home without authorization or payment, which explained the loss of food inventory.

(5) On June 18, 2017, the employer discharged both claimant and the other bartender D for theft of money and food. The employer did not meet with claimant prior to making its discharge decision and did not report the suspected theft to law enforcement authorities for investigation.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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 standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably violate a standard of behavior the employer had the right to expect of her. The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

We agree with the ALJ that the record contains insufficient evidence to establish that the employer's losses were attributable to acts of theft by claimant or even attributable to claimant at all. Hearing Decision 17-UI-97211 at 4. Claimant denied taking money or food at any time and explained that the former manager had instructed and authorized her to discount drinks by 50 cents for specials and happy hours, which she did. The employer admitted that claimant and D always worked together, and did not present documentary evidence or testimony showing that it was more probable than not that claimant

was responsible for the losses in liquor sales and food or disputing that the prior manager had authorized the discounts claimant employed. Transcript at 39-40 and 44, 47-52, 59-60. Moreover, the employer's witnesses admitted that it was not possible to determine which bartender had keyed in the transactions in question and that there was not a single instance where it could prove that only claimant tended bar during a time that a questionable transaction was keyed in. Transcript at 57.

In the absence of evidence demonstrating that claimant was not a credible witness, and we find none, her first hand denials and explanations were at least as persuasive as the employer's circumstantial evidence. Although the employer established that its losses subsided after the claimant and the other bartender left its employ, the evidence was no more than equally balanced that claimant was responsible for any of those losses. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy its evidentiary burden. Accordingly, on this record, although the outcome of the employer's investigation may have been sufficient for it to make its discharge decision regarding two individuals, without more, it was insufficient for the employer to meet its burden to establish misconduct on the part of claimant, as defined under ORS 657.176(2)(a).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-97211 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: January 5, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.