EO: 200
BYE: 201819

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
2017-EAB-1476

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but claimant's benefit rights based on wages earned prior to discharge were not canceled (decision # 151509). Claimant filed a timely request for hearing. On December 6, 2017, ALJ Seideman conducted a hearing, and on December 11, 2017 issued Hearing Decision 17-UI-98768, affirming the Department's decision. On December 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. However, claimant did not explain why he did not offer this information during the hearing and failed to otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present by way of his written argument and considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a barista in an in-store Starbuck's kiosk from November 10, 2016 until September 5, 2017.

(2) The employer expected that claimant would not consume food or drink items that the employer offered for sale unless he had previously purchased them. However, the employer required baristas to periodically drink espresso shots during shifts to test the strength and quality of the espresso drinks prepared and did not require the baristas to pay for those espresso drinks. Claimant understood the employer's expectation that he test the espresso.

(3) Claimant did not like the taste of espresso and considered it too strong. When claimant was trained, his supervisor told him that he was permitted to prepare any sort of espresso-based coffee drink in order to perform the required espresso quality tests. Thereafter, claimant typically prepared a "grande"-sized espresso-based mocha for testing purposes. Claimant did not attempt to conceal that he was preparing

and not paying for the mochas he was consuming for testing purposes. Subsequent supervisors and other employer representatives did not correct claimant's understanding that he was allowed to prepare any sort of espresso-based coffee drink to test the espresso, or inform him that he was limited to testing only espresso shots. Claimant's coworkers in the Starbuck's kiosk also prepared espresso-based drinks of their choice to test the quality of the espresso.

(4) Beginning around July 30, 2017, loss prevention personnel observed claimant on surveillance video consuming a mocha without paying for it. Between July 30 and August 23, 2017, loss prevention personnel observed claimant while on shift preparing and consuming mochas which he did not pay for seventeen times. Exhibit 3; Exhibit 4; Exhibit 5.

(5) On August 29, 2017, the employer's loss prevention personnel interviewed claimant about observations that he had been observed on surveillance cameras drinking mochas without paying.

(6) On September 5, 2027, the employer discharged claimant for drinking and not paying for mochas he prepared and consumed between July 30 and August 23, 2016, which allegedly violated its policy against consuming merchandise that had not been purchased.

CONCLUSIONS AND REASONS: Claimant's benefit rights based on wages earned prior to the date of discharge are not canceled. The employer discharged claimant, but not for misconduct.

Benefit Rights. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis that claimant's benefit rights based on wages earned prior to discharge are not canceled are **adopted.**

Discharge. 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. The employer carries the burden to prove by a preponderance of the evidence that claimant engaged in misconduct for which he was discharged. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-98768, the ALJ concluded that claimant was discharged for misconduct because he prepared and consumed mochas without paying for them. Although claimant contended that he was consuming the mochas, an espresso-based drink, as part of the employer's required sampling of the espresso, the ALJ rejected claimant's justification based principally on claimant's alleged statement to a loss prevention employee that he knew what he had done was "wrong." Hearing Decision 17-UI-98768 at 4. We disagree.

The employer contended that claimant knew he was prohibited from preparing any type of drink to test the quality and strength of the prepared espresso other than an "undertow," which was a straight espresso shot diluted with a small amount of milk. Audio at ~ 19:24. The employer also argued that claimant admitted to a loss prevention officer in an interview that he had known what he was doing was wrong. Audio at ~20:28. Claimant vigorously disputed that he ever admitted wrongdoing to the loss prevention officer or any other employer representative. Audio at ~28:07. Claimant also vigorously

disputed the employer's other contentions and testified that his supervisors had all uniformly told him he could prepare any espresso-based drinks for testing purposes, his coworkers prepared all types of espresso-based drinks for testing and not just "undertows," and that he openly prepared and did not pay for the mochas he was drinking for testing purposes and he had never been corrected. Audio at ~24:28, ~25:16, ~26:10. The testimony of the employer's witness, the human resources manager, that claimant had admitted wrongdoing to the loss prevention employee was based exclusively on hearsay. The further testimony of the human resources manager that claimant and all other baristas had been told "they didn't get to make their own drinks, whatever they wanted" for testing purposes but were limited to espresso shots, appeared to be based on hearsay from an unknown source and did not directly rebut that claimant was told by his supervisor that he was allowed to prepare any type of espresso based drink. Audio at ~19:24. As well, the written policy the employer entered into evidence did not specifically address the types of drinks that employees were allowed to prepare for purposes of testing the espresso, nor did it address the issue of employees who were required to consume merchandise in the course of their job duties. Exhibit 1. Moreover, while the employer's witness testified that claimant's supervisor knew it was wrong to prepare drinks other than undertows to test the espresso, had been discharged for doing so, and had told claimant and other baristas to avoid being caught if they followed her practice, not only was this hearsay that claimant disputed, but there was no evidence suggesting that the supervisor ever directly told claimant that, or anything else that would have indicated to him that he could not prepare any type of espresso-based drink to test the espresso. Audio at ~34:57. Under the circumstances, claimant's rebuttal testimony, which was based on first-hand evidence, is entitled to greater evidentiary weight than that the human resources officer, which was based on hearsay evidence.

The employer's witness also attempted to impute knowledge of wrongdoing to claimant and other baristas who prepared drinks other than undertows for testing purposes based on her allegations that the baristas only prepared undertows for testing purposes when regional managers and supervisors were present and observing them. However, it is not clear how many times she observed baristas engaging in that conduct nor did the witness specifically describe any situation in which claimant was observed preparing and/or consuming an undertow instead of a mocha while being observed. Finally, the longevity of claimant's practice of preparing mochas to test the espresso, the consistency with which he appeared to have done so, and the openness with which claimant prepared the mochas without attempting to conceal it despite his awareness that his actions were being recorded by surveillance cameras all strongly suggest that not only did claimant not think what he was doing was prohibited, but also that he had been told and believed that it was allowed. On this record, the employer did not establish that claimant knew or should reasonably have been aware that he was not permitted to prepare and consume mochas as part of the espresso testing he was required to perform. The employer therefore did not meet is burden to establish that claimant's consumption of mochas without paying for them was a willful or wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-98768 is set aside, as outlined above.

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

DATE of Service: January 30, 2018

NOTE: 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.

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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