

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0078

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114725). Claimant filed a timely request for hearing. On January 2, 2018, ALJ Amesbury conducted a hearing, and on January 4, 2018, issued Hearing Decision 18-UI-100177, affirming the Department's decision. On January 22, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Zone Sports Grill employed claimant as a bartender from April 26, 2017 until October 26, 2017. However, claimant was out on medical leave from October 13, 2017 to the end of her employment.

(2) The employer expected its bartenders to refrain from committing theft of employer property. Claimant understood that expectation as a matter of common sense.

(3) Generally, the employer's bartenders had exclusive control over the cash register during their shifts and would issue sales receipts and receive payments from customers.

(4) As an advertising promotion, the employer entered into an agreement with a radio station under which the station would award \$15 gift certificates to winners that could be used to pay for food at the employer's restaurant. The employer required bartenders to staple redeemed certificates to receipts and place them in the registers to keep track of the success of the promotion.

(5) From August 18 to October 23, a bartender during claimant's shift allegedly accepted gift certificates as at least part of a customer's payment and input the use of the certificates into the employer's computerized cash register system without attaching the certificates to the receipts. Prompted by the discrepancies, the employer conducted an investigation.

(6) During the investigation, the manager observed a video of one of the gift certificate transactions that allegedly depicted claimant accepting \$350 in cash for payment of a customer's bill, but inputting into the system that the bill was paid with a gift certificate without attaching the certificate to the receipt.

(7) On October 26, 2017, without showing or discussing the video with claimant, the employer discharged her for the suspected theft. Claimant denied stealing from the employer and has not been charged with theft.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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.

In Hearing Decision 18-UI-100177, after finding that “employer’s evidence was insufficient to persuasively show that claimant engaged in theft” but that the evidence was sufficient to show “claimant’s wantonly negligent handling of the employer’s finances”, the ALJ concluded that, for that reason, the employer discharged claimant for misconduct. Hearing Decision 18-UI-100177 at 3. We disagree and conclude the employer failed to meet its burden of proof. In a discharge case, the employer has the burden to show that the claimant in question was discharged for misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That burden includes a showing that the expectation allegedly violated, *for which the claimant was discharged*, was reasonable, fairly communicated and consistently enforced. The ALJ’s analysis ignores the fact that the employer’s witness asserted more than once that claimant was discharged for “theft”, rather than a “wantonly negligent handling of the employer’s finances.” Transcript at 6, 7.

The employer reasonably expected claimant to refrain from taking its property. We presume claimant understood this expectation as a matter of common sense. The employer’s manager presented circumstantial evidence regarding alleged thefts by claimant, including testimony regarding a single video that allegedly showed her taking \$350 in cash and then inputting into the cash register’s computer that a gift certificate was used during the transaction. Transcript at 8. However, the video was not offered into evidence, the witness was not able to clarify the October date of the transaction the video depicted, and he did not describe whether the alleged video demonstrated where the cash in the transaction ended up, whether in whole or part in the register or in claimant’s pocket. The employer’s witness also testified about a night during which it only had approximately \$350 in sales and claimant had approximately \$300 in tips. Transcript at 10. At hearing, claimant testified that she had explained to the manager that on the heavy tip night, she had been tipped by a generous video poker player who had won heavily. Transcript at 25. Additionally, the employer’s witness testified that one of the gift certificate transactions occurred on October 14 and another on October 23, when claimant was out on medical leave. Transcript at 8, 24, 46. She also presented undisputed evidence that other bartenders often left open transactions that had partially occurred before claimant began her shift and which claimant later closed. Transcript at 24. Finally, claimant denied having stolen anything from the employer, and she never admitted to, or was charged with, theft.

We find no reasonable basis in the record to conclude that any witness, including claimant, was not credible. Thus, we conclude that claimant's denial of theft is at least equal to the employer's circumstantial evidence of theft. Because the evidence regarding claimant's alleged theft was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant stole anything from the employer on any date in question.

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 18-UI-100177 is set aside, as outlined above.¹

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

DATE of Service: February 16, 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.

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¹ 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.