

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0426

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75803). Claimant filed a timely request for hearing. On April 5, 2018, ALJ L. Lee conducted a hearing, and on April 18, 2018 issued Order No. 18-UI-107672, affirming the Department's decision. On April 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Elwood Corporation employed claimant from February 18, 2016 until March 6, 2018 as a bartender in a tavern.

(2) The employer expected claimant to charge customers for the alcohol she served them and refrain from giving away free drinks.

(3) On February 24 and 25, 2018, claimant was the only bartender and server on duty during the day shift. She worked from 7:57 a.m. until 5:02 p.m. on February 24, and had total sales of \$274.25. Exhibit 1, 2. On February 25, claimant worked from 7:56 a.m. until 3:38 p.m. and had total sales of \$119.63. Exhibit 2.

(4) The owner believed the amounts in the cash register at the end of claimant's shifts on February 24 and 25 were unusually low. The owner reviewed the security video from the tavern from February 24 and 25, and attempted to count the drinks claimant poured. The owner was unable to determine what type of drinks claimant was serving, but estimated how much money he believed claimant should have collected on February 24 and 25. Based on what he saw in the video tapes and the amounts in the cash register at the end of claimant's shifts, the owner concluded that claimant had given free drinks to customers, including family and friends, or had kept cash payments instead of putting them in the cash register.

(5) Claimant did not admit that she gave away free drinks or stole money from the employer. The employer did not file a police report regarding its suspicions.

(6) On March 6, 2018, the owner discharged claimant because he believed claimant gave away free drinks without the employer's permission or stole money from the employer on February 24 and 25, 2018.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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.

The employer discharged claimant because of her alleged conduct on February 24 and 25, 2018. According to the owner of the tavern, his review of the video surveillance tapes from those days showed claimant serving more than 30 drinks, which should have totaled sales in "the hundreds," but totaled to the abnormally low sales amounts of \$34 on February 24 and \$36 on February 25. Transcript at 13. Based on what he viewed in the video and the total sales for the two days, the employer concluded that claimant gave away free drinks or kept money from alcohol sales on those days.

In Order No. 18-UI-107672, the ALJ concluded that claimant's testimony was less reliable than that of the employer's witness and having thereby discounted claimant's testimony, concluded that the evidence showed claimant willfully disregarded the employer's expectations by giving away free drinks and that the employer therefore discharged claimant for misconduct.¹ We disagree with the ALJ's credibility determination and conclusion that the weight of the evidence shows claimant engaged in misconduct.

The ALJ found the employer's witness to be credible because his "perceptions appeared accurate and his memory reliable."² However, we did not find the employer's testimony reliable because it was inconsistent during the hearing and with the sales records provided in Exhibit 2. The owner's testimony was inconsistent about when he reviewed the security tapes he used as the basis for his decision to discharge claimant. The owner testified first that he "was in the process of" reviewing the tapes when he discharged claimant. Transcript at 5. The owner later contradicted himself by also testifying that he had already reviewed the tapes before he discharged claimant (Transcript at 7), only to testify again that he was still reviewing the tapes when he discharged claimant (Transcript at 8). Moreover, the owner's testimony that claimant's sales were \$34 and \$36 conflicted with the shift reports showing claimant's sales were \$274.25 on February 24 and \$119.63 on February 25. Exhibit 1, 2. Finally, given that the security videos did not show sufficient detail to determine what drinks claimant served and their corresponding prices, the owner's testimony about what he viewed in the security video was too

¹ Order No. 18-UI-107672 at 3-4.

² *Id.* at 3.

approximate to persuasively show, more likely than not, that claimant gave away drinks or stole money from the employer.

Regarding claimant's testimony, the ALJ also discounted it, further reasoning that it was "inherently self-serving" and failed to show why the employer would fabricate claimant's sales amounts.³ Claimant denied that she stole money from the employer, gave away free drinks, and that her sales were as low as alleged by the employer. Transcript at 23, 25, 26-27. While all such denials are inherently self-serving, we disagree the record shows claimant was not credible. Her testimony was detailed and consistent throughout the hearing, and consistent with the shift reports showing her sales were not abnormally low. Exhibit 1, 2. The employer failed to meet its burden to show that it had low sales on February 24 and February 25, much less that its low sales were due to theft or other misconduct on claimant's part.

For the foregoing reasons we conclude that the discharge was not attributable to claimant as misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation from the employer.

DECISION: Order No. 18-UI-107672 is set aside, as outlined above.

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

DATE of Service: May 30, 2018

NOTE: This decision reverses an order 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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³ Order No. 18-UI-107672 at 3-4.