

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0478

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113708). Claimant filed a timely request for hearing. On April 18, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for May 1, 2018. On May 1, 2018, ALJ Seideman conducted a hearing at which the employer failed to appear, and on May 4, 2018 issued Order No. 18-UI-108678, concluding that claimant's discharge was not for misconduct. On May 9, 2018, the employer filed a timely application for review with the Employment Appeals Board (EAB).

With its application for review, the employer requested a new hearing, asserting that it failed to appear at the May 1st hearing because its representative mistakenly believed it was scheduled for May 2nd. The employer's request is construed as a request for consideration of new information regarding claimant's work separation. Under OAR 471-040-0090 (October 29, 2006), however, the employer's new information may only be considered if the employer establishes that factors or circumstances beyond its reasonable control prevented it from appearing at the May 1st hearing and offering its information into evidence at that time. The employer did not assert or show that it was beyond its representative's reasonable control to understand from the April 18th notice of hearing that the hearing was scheduled for May 1st, and ensure that he appeared on that date. The employer's request for consideration of new information regarding claimant's work separation therefore is denied.

FINDINGS OF FACT: (1) C & J Super Services Inc. employed claimant from November 2013 to November 13, 2017, last as a gas station attendant.

(2) The employer's owner allowed employees to take draws on their paychecks with his or the manager's permission. On November 8, 2017, claimant asked the manger if he could take a \$500 draw on his November 10, 2018 paycheck, which was going exceed \$500. The manager gave claimant permission to take the draw. At the end of his shift, claimant completed and signed paperwork documenting the draw, left it at work for the owner, and took the \$500.

(3) On November 9, 2017, the owner telephoned claimant and left a voice message asking claimant where the \$500 was. Claimant returned the owner's call and told him that, with the manager's permission, he had taken the \$500 as a draw on his next paycheck, and completed and signed paperwork documenting the draw, which he left it at work for the owner.

(4) The employer discharged claimant for allegedly taking the \$500 without permission.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In the present case, the employer discharged claimant for allegedly taking \$500 from work without permission. However, the record shows it is more likely than not that claimant took the \$500 as a draw on his next paycheck, had the manager's permission to do so, and documented the draw in paperwork he left at work for the employer's owner. The record fails to show that claimant's conduct violated the employer's standards of behavior or amounted to a disregard of its interest. We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Order No. 18-UI-108678 is affirmed.

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

DATE of Service: June 8, 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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