

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0546

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 28, 2018, 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 the date of discharged were not canceled (decision # 94938). Claimant filed a timely request for hearing. On May 8, 2018, ALJ Amesbury conducted a hearing, and on May 10, 2018 issued Order No. 18-UI-109088, reversing the Department's decision. On May 30, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oil Can Henry's, Brookings, Oregon employed claimant as a lube technician from December 12, 2006 until February 23, 2018.

(2) Through one of the employer's co-owners, the employer sometimes loaned modest amounts of money to employees. The co-owners expected that employees obtain permission from one of them borrowing money. Notwithstanding this expectation, claimant thought he was allowed to borrow small amounts of money from the employer's cash register when no owners were at the workplace if he notified the assistant manager on duty before doing so, the assistant manager did not object and claimant returned the same amount of money that he had borrowed to the employer's cash register the next day.

(3) On several occasions during his employment, claimant asked one of the co-owners if he could borrow a small sum of money, usually \$5, to purchase gasoline for his vehicle. Sometimes the co-owner handed the requested money to claimant and sometimes the co-owner told claimant to take the requested money from the employer's cash register.

(4) Also on occasion when neither co-owner was present in the workplace, claimant would tell the assistant manager or other staff that he was going to take \$5 from the cash register for gas money and would return \$5 to the cash register the next day. Claimant told the assistant manager because the assistant manager balanced the daily tills and he would know if the till was short on a particular day. Claimant also informed the assistant manager and other staff because he knew the employer had surveillance cameras monitoring the cash register and he did not want to be accused of theft.

(5) Sometime around February 22, 2018, it came to the attention of one of the co-owners that surveillance videos showed claimant removing currency from the cash register at the end of his work day on approximately four recent occasions when neither co-owner was present in the workplace. The co-owner reviewed the videos for two of those occasions, on approximately February 21 and February 14, 2018, and observed claimant had placed his hand in the cash register and taken currency from it.

(6) On February 23, 2018, both co-owners met with claimant to discuss what was shown on the employer's surveillance videos. Claimant admitted that on occasion he removed \$5 from the cash register to purchase gasoline, but told the assistant manager before doing so, and always returned \$5 to the cash register the next day.

(7) On February 23, 2018, the employer discharged claimant for taking money from the employer's cash register without having permission from a co-owner.

CONCLUSIONS AND REASONS: 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) (January 11, 2018) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness contended that, when claimant met with both co-owners on February 23, 2018, he admitted to "doing it," which, in context, meant that claimant admitted to stealing money from the employer's cash register on approximately February 21, 2018. Audio at ~15:25. However, claimant denied making this admission, and contended that he told the co-owners that he had "borrowed" \$5 from the cash register for gas money, that he had told the assistant manager that he was going to take this \$5 before doing so and he had intended to return \$5 to the cash register the next day, as he had done on several other occasions. Audio at ~21:10, ~28:20. Notably, the employer's witness at hearing did not contend that claimant failed to replace the \$5 he had taken from the cash register on February 21, 2018. There is no reason in the record to doubt either party's credibility or to prefer the testimony of one over the other. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it was the party who carried the burden to prove. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The testimony of the employer's witness was vague on how the employer might have explicitly communicated to claimant and other employees that if they wanted to borrow small sums of money from the employer they were required to obtain permission from the one of the co-owners and, if a co-owner was not on duty, telling the assistant manager was not sufficient to satisfy the employer's standards. Audio at ~13:15, ~37:36. Notably, the co-owner did not testify that claimant was ever told in so many words that the assistant manager could not give the employer's permission for him to borrow a small sum of money overnight from the employer's cash register. Also notably, the co-owner did not dispute

that on a number of occasions claimant notified the assistant manager that he intended to borrow \$5 from the cash register, he removed that \$5 after the assistant manager did not object and he returned \$5 to the cash register the next day. Even if the employer actually had the expectation that only a co-owner could permit an employee to take a modest overnight loan from the employer's cash register, the preponderance of the evidence in this record shows that, given the assistant manager's apparent authority in the workplace absence of either co-owner, claimant's belief that the employer would allow him to do so upon notification to the assistant manager and the assistant manager's failure to object was plausible and likely held in good faith. Good faith errors are not misconduct.

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

DECISION: Order No. 18-UI-109088 is affirmed.

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

DATE of Service: July 2, 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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