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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
2018-EAB-0788

Modified
No Disqualification
Benefits Rights Based on Wages Earned Are Not Canceled

PROCEDURAL HISTORY: On June 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct and claimant's benefit rights based on wages earned prior to the date of discharge were not canceled (decision # 71426). The employer filed a timely request for hearing. On July 26, 2018, ALJ Seideman conducted a hearing, and on July 30, 2018 issued Order No. 18-UI-114036, concluding that the employer discharged claimant for misconduct but that benefits rights based on wages earned prior to the date of discharge were not canceled. On August 14, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument containing information that was not part of the hearing record. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

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 in Order No. 18-UI-114036 are **adopted** with respect to the conclusion that claimant's benefits rights based on wages earned prior to discharge are not canceled.

FINDINGS OF FACT: (1) A-B Enterprises Inc. employed claimant as a pumper at a fuel station from July 2017 until April 25, 2018.

(2) The employer expected that claimant would not steal any money customers gave him to pay for their fuel purchases. Claimant understood the employer's expectation as a matter of common sense.

(3) Sometime before or around April 23, 2018, the general manager learned that some days earlier a customer had driven into the station, prepaid $20 for fuel and then had driven away before any fuel was

pumped into his vehicle. One of claimant's coworkers told the general manager that claimant had taken that $20 for his personal use.

(4) On April 23, 2018, claimant sent a text message to the general manager asking whether he needed to work that afternoon. The general manager told claimant that someone else was working and then stated, "Also, the customer who pre-paid this weekend for $20 but never fueled[,] we need that money, he [the customer] came in today." Exhibit 3. When claimant received the text message, he was busy dealing with a family emergency, and responded, "Ok no problem . . . . so don't come in today[.]," to which the general manager replied, "Correct, but we need the $20 back[.]" *Id.* Claimant responded, "Yes I get that . . . ok thank you Liz[.]" *Id.* Although claimant did not know about the $20 the general manager was inquiring into, claimant did not seek more information because he was distracted by the family emergency and knew he had not taken the money.

(5) On April 25, 2018, claimant was working a shift when the general manager called him to the office. The general manager told claimant she was discharging him for theft of the $20 he was alleged to have taken.

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. 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).

In Order No. 18-UI-114036, the ALJ concluded that the employer met its burden to show that it discharged claimant for misconduct. The ALJ found as fact that claimant placed $20 he received from the customer whose car was not fueled in his pocket and, in response to the text message later received from the general manager, admitted that he had taken the $20 and then returned it to the general manager on April 25, 2018. Order No. 18-UI-114036 at 3. Based on these facts, the ALJ further found that claimant had willfully disregarded the employer's expectations by taking the $20 and had engaged in misconduct. *Id.*

The evidence on which the findings in Order No. 18-UI-114036 were based was in sharp conflict. The employer's general manager contended that claimant's coworker had told her that claimant had taken the $20 that the customer had tendered for fuel never received, had joked that the $20 was a "freebie" to him and that claimant had returned the $20 to her on April 25, 2018, shortly before he was discharged. Audio at ~19:40, ~23:08, ~37:31. In contrast, claimant contended that he was not involved in any $20 transaction in late April 2018 where the customer did not receive fuel, did not receive, let alone take, any such $20, and did not return $20 to the general manager on April 25, 2018. Audio at ~27:50, ~29:54, ~31:37, ~34:03. Claimant further plausibly explained that his failure to explicitly deny that he had taken the $20 in response to the general manager's text messages on April 23, 2018 was a result of being distracted by a family emergency when he was composing his responses. Audio at ~38:40.

In Order No. 18-UI-114036 the ALJ did not indicate any ground for discounting or ignoring claimant's testimony, and we can find none in the record. Where, as here, there is no reason in the record to prefer the testimony of one party over the other and the evidence on disputed issues is evenly balanced, the uncertainty in the evidence must be resolved against the employer because it is the party who carries the burden of persuasion in discharge cases. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on evidentiary principles, the employer did not meet its burden to demonstrate that claimant took the $20 that the customer tendered for fuel that the customer did not receive. Accordingly the ALJ erred in concluding that the employer met is burden to prove that claimant engaged in misconduct.

The employer did not demonstrate that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-114036 is modified, as outlined above.

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

DATE of Service: <u>September 11, 2018</u>

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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