

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1023

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 160554). The employer filed a timely request for hearing. On October 4 and 11, 2018, ALJ S. Lee conducted a hearing, and on October 19, 2018 issued Order No. 18-UI-118462, affirming the Department's decision. On October 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments from the employer and claimant when reaching this decision.

FINDINGS OF FACT: (1) Sharis Management Inc. employed claimant, Haley Hale¹, from January 14, 2018 until July 18, 2018 as a restaurant server.

(2) The employer's cash handling procedure required servers to put cash into the cash register immediately after receiving cash from a patron. Claimant was given a written copy of the policy at hire. The employer also expected employees to refrain from engaging in theft at work. Claimant understood as a matter of common sense that the employer prohibited theft.

(3) On multiple occasions, patrons had left the restaurant without paying during claimant's shift. Claimant worked the graveyard shift and the restaurant was "not in the best area." Transcript (October 4, 2018) at 16.

¹ Claimant's correct name differs from Department records and is Haley Hale.

(4) On July 9, 2018, the shift supervisor from the swing shift worked with claimant during the beginning of claimant's shift. The shift supervisor worked as a trainer for the employer, but had not trained claimant. At one point, the supervisor saw cash next to the register and asked claimant about the cash. Claimant responded that she had forgotten to put it into the register. Claimant told the supervisor that she had a habit of putting cash there. The supervisor told claimant that putting cash next to the register was "highly abnormal" and to put the money in the register. Transcript (October 11, 2018) at 13.

(5) Claimant worked a shift from 10:00 p.m. on July 10, 2018 until 6:00 a.m. on July 11, 2018. The same shift supervisor from July 9 worked with claimant until the supervisor's swing shift ended at 2:00 a.m. At 11:52 p.m. on July 10, claimant recorded a sale on the cash register for \$65.82 for a table she was serving, creating an open ticket in the register. After taking the \$65.82 order, claimant turned in the order and "tucked" tips and other money belonging to her from her pocket under the register before she left to take her meal break. Sometime later, the shift supervisor saw cash next to the register on her way to take a 30-minute break. When she returned from her break, she counted the cash, determined it was \$90, and put it into the register. Claimant asked the shift supervisor about the cash that had been by the register, and told her it was her money. The supervisor told claimant she had put the money into the register and permitted claimant to remove the money from the register. The shift supervisor left a note for the general manager about claimant having left money next to the register on July 9 and July 10.

(6) After a meal ticket is open for more than 30 minutes, it will appear as red on the register screen. Claimant did not notice if the \$65.82 ticket appeared red and was still open at the end of her shift.

(7) The general manager arrived at the store at 6:00 a.m. on July 11 and determined that the \$65.82 ticket was still open. Later on July 11, 2018, when the shift supervisor from the July 10 incident reported for her shift, the general manager and the shift supervisor reviewed still photographs, with no audio, from surveillance video of the prior night. The photographs showed the patrons with the \$65.82 ticket gave claimant cash at the cash register. The photographs showed that claimant pushed buttons on the cash register screen, and the cash register drawer opened. The surveillance photographs did not show what happened to the cash from the patrons.

(8) Claimant was scheduled to work a graveyard shift beginning on July 11, 2018. When claimant began her shift, the general manager asked claimant about an open ticket from claimant's shift the prior night, and claimant stated that she "believed it was a walkout." Transcript (October 11, 2018) at 25. The manager asked claimant to review the surveillance photographs from that night with her. Claimant acknowledged that the patrons in the photographs were the ones from the table with a \$65.82 ticket, that she could see that the patrons gave claimant cash at the register, and that she opened the register drawer.

(9) On July 11, 2018, the employer suspended claimant while it investigated the July 10-11, 2018 incident. On July 13, 2018, the employer ended its investigation and decided it would discharge claimant. The employer continued claimant's suspension until July 18, 2018 to allow time to prepare claimant's final paycheck and discharged claimant on July 18 for alleged theft and mishandling cash.

CONCLUSIONS AND REASONS: We agree 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. 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). In a discharge case, 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 discharged claimant because she allegedly stole cash given to her by patrons as payment on July 11, and mishandled cash by placing it next to the register rather than depositing it immediately into the register. To the extent the employer discharged claimant for theft, the employer failed to meet its burden to show that claimant stole money from the employer on July 11.

Claimant testified that the surveillance photographs from July 11 showed she received cash for the \$65.82 ticket, and that she assumed she placed it in the cash register. Transcript (October 11, 2018) at 26-27. Claimant also testified that the general manager told her when she questioned claimant about the July 11 incident that "she saw [claimant] didn't take the money or set it down anywhere," and that "there was no footage of [claimant] putting money down anywhere or closing the register." Transcript (October 11, 2018) at 26, 27. Moreover, although the shift supervisor found cash next to the register on July 11, claimant told her it was her own money, and the shift supervisor did not testify that the video surveillance showed claimant placing cash for the \$65.82 ticket next to the register. See Transcript (October 11, 2018) at 10-13. Although the general manager testified that the surveillance photographs showed claimant put the money to the side of the register and that claimant stated on July 11 that she had put it on the side of the register (Transcript (October 4, 2018) at 7, 10, 20), claimant testified that she told the general manager that she did not know what happened to the money after she received it. Transcript (October 11, 2018) at 27.

Based only on the employer's limited evidence showing that claimant put the \$65.82 ticket payment next to the cash register, and claimant's testimony that the money next to the register on July 11 was her own money, the weight of the evidence fails to show that claimant put the \$65.82 she received anywhere but in the register, let alone that she stole the cash. As for the employer's argument that claimant committed theft because she had more "walkouts" than other servers, the record does not show that claimant's higher number of unpaid tickets was attributable to claimant's conduct rather than working a graveyard shift in "not the best" neighborhood. The employer argued that claimant was untruthful because she told the general manager that the unpaid ticket was a "walkout." However, claimant's testimony was plausible at hearing that she was "confused" and did not know which table the general manager referred to when claimant told the manager that the patrons left without paying. Transcript (October 11, 2018) at 25-26.

We next address whether claimant engaged in misconduct by putting cash next to the cash register. As explained above, the record does not show by a preponderance of the evidence that any portion of the \$90 found next to the cash register on July 11 came from the \$65.82 ticket. Claimant "tucked" her own cash under the register during her break on July 11 and the record does not show that claimant's act of hiding her own money near the register while she took a lunch break was a violation of a known employer policy.

To the extent the employer discharged claimant because she put money next to the register on July 9, or even assuming, *arguendo*, that a portion of the \$90 was from the \$65.82 ticket, the record does not show that claimant knew that she was required to put all cash into the register *immediately*. Although claimant probably knew, as a matter of common sense, that the employer expected patrons' payments to go into the cash register, claimant apparently had a habit of setting money next to the register before putting it into the register, and had not been warned that the employer expected her to always deposit the money into the register immediately upon receiving it. Although the employer alleged at hearing and in its written argument that claimant's cash handling practices were an "ongoing issue," the general manager testified that she had never warned claimant about her cash handling procedures. Transcript (October 4, 2018) at 8, 16.

Similarly, the shift supervisor did not warn claimant to immediately put cash into the register when she asked claimant about the cash next to the register on July 9. Rather, when claimant told the supervisor that she had a "habit" of putting cash there, the supervisor told claimant that practice was "highly abnormal," but did not inform claimant that it was against the employer's policy or direct her to refrain from putting cash next to the register in the future. The record therefore does not show that claimant knew from prior training, experience or warnings that she was violating the employer's policy by "tucking" money under the cash register while she took a meal break. As a result, the employer did not demonstrate that the cash handling incidents constituted misconduct on the part of claimant.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-118462 is affirmed.

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

DATE of Service: November 30, 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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