

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0397

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On December 31, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141340). Claimant filed a timely request for hearing. On March 3, 2014, ALJ Hatfield conducted a hearing, and on March 31, 2014 issued Hearing Decision 14-UI-12034, affirming the Department's decision. On March 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Three Rivers Casino employed claimant as a table games dealer from November 15, 2007 until December 12, 2013.

(2) The employer expected to remain alert and focused when working as a dealer at gaming tables and to refrain from falling asleep. Claimant was aware of the employer's expectation.

(3) On several occasions before December 5, 2013, the table games shift manager observed claimant asleep or falling asleep while working at gaming tables. On these occasions, the shift manager told claimant to stay awake but did not issue any formal disciplinary warnings to claimant because he did not want to jeopardize claimant's job.

(4) On December 5, 2013, claimant was the dealer at the Pai Gow table. During claimant's shift, surveillance personnel told the table games shift manager that they had observed claimant asleep at the Pai Gow table from 3:56 p.m. until 4:09 p.m. Exhibit 1 at 10. The shift manager immediately went to claimant's table, observed that claimant was asleep and woke him up. Later during that same shift, the shift manager observed claimant "nodding off again," noticing that his eyes were drooping closed and his head was starting to nod. Audio at ~15:18, ~19:23. The shift manager sent claimant home. On December 8, 2013, the employer issued a final written warning to claimant for falling asleep at the gaming table on December 5, 2013 and suspended him for two days. The warning noted that claimant's

sleeping during work shifts was an ongoing issue about which claimant had been previously warned and that claimant was expected to be alert and awake during work. Exhibit 1 at 10. Claimant wrote "No com[ment]" in a section of the warning where he could have expressed any disagreement with it. *Id.* The warning notified claimant that a failure to stay awake in the future would result in his discharge. Exhibit 1 at 10.

(5) On December 12, 2013, claimant's first day back at work after his suspension, he was again the dealer for the Pai Gow table. During claimant's shift, the table games manager and the shift manager observed claimant again falling asleep at the gaming table. From the roulette table, the shift manager had an unobstructed view of claimant and saw that claimant's eyes were drooping and his head was nodding. The table games manager observed claimant from the craps table. The table games manager walked up near claimant and told claimant to wake up.

(6) On December 13, 2013, the employer discharged claimant for falling asleep during his shift on December 12, 2013.

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

Claimant did not dispute that he was aware of the employer's expectation that he remain alert while working at gaming tables and that he refrain from falling asleep. Audio at ~23:02. He also should have been aware of this expectation as a matter of common sense. Although there may be instances where falling asleep at work would not be misconduct since it was beyond the conscious or reasonable control of the employee and was not foreseeable to the employee, claimant did not take the position at hearing. *See* OAR 471-030-0038(1)(c). Claimant contended that the managers were mistaken and he did not fall asleep at the gaming table on either December 5, 2013 or December 12, 2013. Audio at ~22:22, ~23:12. Claimant did not contend that he was overwhelmed by a desire to sleep on December 5, 2013 or December 12, 2013 or that he experienced on those days symptoms of some sleeping disorder. Absent evidence to the contrary, it can only be concluded that, more likely than not, it was within claimant's reasonable control to refrain from falling asleep.

Claimant did not deny that the table games shift manager had verbally warned him several times before December 5, 2013 to remain awake while at work and did not issue a written warning to avoid jeopardizing claimant's job. Audio at ~14:47. Based on those prior warnings, it should have been foreseeable to claimant that he might start to fall asleep again at the gaming table, and that he should reasonably have taken some measures to avoid falling asleep at work. Although claimant denied that he was asleep at work on either December 5 or December 12, 2013, it is not likely that at least three people – the surveillance department, the table games manager and the table games shift manager - would all be

wrong on two successive days about their observations of claimant. It also appears from the shift manager's testimony that he wanted very much to retain claimant as an employee, and from this, we infer that he was careful in his observations before determining that claimant had fallen asleep again at work. Audio at ~ 14:47; ~20:00. Claimant did not present evidence at hearing that the shift manager or the table games managers were in physical locations in the workplace on either December 5, 2013 or December 12, 2013 where claimant's behavior in falling asleep was not visible to them. Equally significant is that claimant did not tell the shift manager when he received the written warning on December 8, 2013 that he had not fallen asleep on December 5, 2013 and did not express any disagreement with the basis for the warning on the warning document itself. Exhibit 1 at 10. Although claimant testified that he did not disagree with the warning when it was issued to him because the situation was "intimidating," it did not appear from his self-possession while testifying that he was a person readily intimidated into silence. Audio at ~24:27. The preponderance of the evidence demonstrates that, on December 5, 2013 and December 12, 2013, claimant was falling asleep during his work shifts at the Pai Gow table. Given that claimant had been warned on several previous occasions about falling asleep at work and he did not indicate he had taken any steps to avoid falling asleep on December 5, 2013 and December 12, 2013, claimant's behavior in falling asleep at work on both those days was at least wantonly negligent.

Claimant's behavior in falling asleep at work on December 12, 2013 was not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent event rather than as repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In this case, claimant's wantonly negligent behavior in falling asleep at work occurred on two separate days, December 5, 2013 and December 12, 2013, separated only by one week. Because claimant's wantonly negligent behavior was not isolated, the final incident on December 12, 2013 cannot be excused from constituting misconduct as an isolated instance of poor judgment. Nor was claimant's behavior on December 12, 2013 excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert at hearing or present evidence showing that he sincerely believed, or had a factual basis for believing, the employer would condone him falling asleep while working at a gaming table. Moreover, that the employer had clearly warned claimant on many occasions about falling asleep during a shift, belies the plausibility of any assertion that he sincerely believed the employer would permit him to fall asleep while at work.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-12034 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: April 1, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.