

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0686

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but her wage credits were not subject to cancellation (decision # 81757). Claimant filed a timely request for hearing. On April 17, 2014, ALJ Triana conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-15595, concluding claimant's discharge was not for misconduct. On April 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wildhorse Resort & Casino employed claimant as a bartender from October 7, 2009 to January 30, 2014.

(2) The employer's policies prohibited employees from accessing other bartenders' tills, and set forth the manner in which employees were supposed to handle cash. The employer reviewed its policies and expectations with staff on more than one occasion.

(3) Employees in the employer's bar did not adhere to the employer's cash-handling policies, and frequently accessed other bartenders' tills for a variety of reasons including making change for customers, checking each other's tills for change, or exchanging large denominations of cash for smaller denominations they were nearly out of in their own tills. Bartenders would usually tell or ask other bartenders before entering the other bartenders' tills, unless the other bartenders were too busy. There was nothing unusual about one bartender using or accessing another bartender's till.

(4) On January 23, 2014, claimant removed a \$20 bill from her till, intending to use it to exchange tips approximately 30 minutes later, but then put it back because she thought it was not a good idea to have removed the money for that reason. Claimant opened the other bartender's till to see if the bartender was short on \$5 and \$10 bills. In a separate transaction, she exchanged some of the \$5 and \$10 bills from her own till with larger denominations from the other bartender's till. Claimant accessed the other bartender's till another time to place quarters in the till in exchange for some bills from claimant's till.

Claimant told the other bartender each time she accessed the other bartender's till to check on the cash supplies or exchange money with her own till, in accordance with standard practice, and she did not remove any money from the other bartender's till.

(5) On January 23, 2014, an employee told the bar manager that claimant had taken a \$20 bill from a till, and that the employee later saw a \$20 bill with claimant's personal belongings. The bar manager then watched surveillance video of claimant's shift and saw claimant access another bartender's till and exchange money between her own till and the other bartender's on four occasions. When the bar manager counted the tills that night, the other bartender's till was short \$16. The employer suspected that claimant had taken the money, and concluded that claimant had also violated the employer's other cash-handling policies and procedures by accessing the other bartender's till. The employer suspended claimant pending investigation.

(6) On January 30, 2014, the employer discharged claimant for suspected theft and violations of the employer's cash-handling policies.

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. 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. The employer bears the burden to establish misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant for suspected theft, the employer did not prove misconduct. While claimant removed a \$20 bill from her till, she realized her mistake and put the money back shortly thereafter. With respect to the \$16 missing from her coworker's till, the employer did not show that claimant was responsible for the shortage, and, even if she had been, the record fails to show that claimant took the money willfully or because she was indifferent to the employer's expectation that she refrain from theft.

To the extent the employer discharged claimant for violating its cash-handling policies, the employer did not prove misconduct. Although the employer had policies in place prohibiting employees from accessing each others' tills, and setting forth procedures for exchanging denominations, the preponderance of the evidence shows that employees did not customarily follow those procedures, and suffered no consequences for their failures to follow them. Moreover, it was a commonly accepted practice in the employer's bar for employees to access each other's tills for a variety of reasons, including the reasons claimant had for accessing the other bartender's till on January 23, 2014. Because claimant was acting in accordance with common practice, she had no reason to know, nor should she

have known, that the employer would not condone her conduct. Rather, claimant acted with the sincere belief that she was doing her job correctly, and that the employer would not object to her actions. Although claimant was wrong, and her conduct did constitute a violation of the employer's policies and procedures, because she acted in good faith, her violation of the employer's policies and procedures is not considered "misconduct" under Employment Department law.

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

DECISION: Hearing Decision 14-UI-15995 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 28, 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.