

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0734

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160412). Claimant filed a timely request for hearing. On April 21, 2014, ALJ Han conducted a hearing, and on April 22, 2014 issued Hearing Decision 14-UI-15756, affirming the Department's decision. On May 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Spirit Mountain Gaming Inc. employed claimant as a cage cashier from July 22, 2008 to March 6, 2014.

(2) The employer expected employees to refrain from taking more than their allotted break or meal time, and leaving their work station while on duty without authorization.

(3) In 2012, the employer gave claimant several oral warnings for taking more than her allotted break and meal time. On October 6, 2013, gave claimant a written warning in which she was told that she was expected to refrain from taking more than her allotted break or meal time, and leaving her work station while on duty without authorization.

(4) On December 16, 2013, claimant took more than her allotted break and meal time, and left her work station while on duty without authorization. On December 23, 2013, the employer gave claimant a written warning for her conduct on December 16.

(5) On December 25, claimant again took more than her allotted break and meal time, and left her work station while on duty without authorization. On January 1, 2014, claimant again took more than her allotted break time. On January 5, 2014, the employer gave claimant a written warning and three day suspension for her conduct on December 25 and January 1.

(6) On February 12 and 18, 2014, claimant again took more than her allotted break and meal times, and left her work station while on duty without authorization. On March 6, 2014, the employer discharged claimant for her conduct on February 12 and 18.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to refrain from taking more than her allotted break or meal time, and leaving her work station while on duty without authorization. Claimant knew or should have known from prior warnings that taking more than her allotted break and meal times, and leaving her work station while on duty without authorization, on February 12 and 18, 2014 probably violated the employer's expectations. Claimant's conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions and was, at best, wantonly negligent.

Claimant's conduct was not an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In this case, claimant repeatedly exercised poor judgment in taking more than her allotted break and meal times, and leaving her work station while on duty without authorization, on February 12 and 18, 2014, and similarly exercised poor judgment on December 16 and 25, 2013, and on January 1, 2014. Claimant's exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct was not a good faith error. The record fails to show that claimant sincerely believed, and had a rational basis for believing, that the employer condoned her taking more than her allotted break and meal times, or leaving her work station while on duty without authorization.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-15756 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 4, 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.