

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0988

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72014). Claimant filed a timely request for hearing. On June 2, 2014, ALJ Lohr conducted a hearing, and on June 3, 2014 issued Hearing Decision 14-UI-18807, affirming the Department's decision. On June 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 14-UI-18807, the ALJ stated that she was admitting Exhibit 1 into evidence, which was comprised of the documents that the employer offered at hearing. However, those documents were neither marked as an exhibit nor do they appear in the hearing record. Because the documents intended to comprise this exhibit are readily identifiable, EAB has marked them as EAB Exhibit 1 and admitted that exhibit into evidence to complete the hearing record. A copy of EAB Exhibit 1 is included with this decision. Any party who objects to the admission of EAB Exhibit 1 must submit any such objection to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received and sustained EAB Exhibit 1 will remain a part of the record.

FINDINGS OF FACT: (1) Three Rivers Casino & Hotel employed claimant as an environmental services technician from March 10, 2011 until April 17, 2014.

(2) The employer operated a tribal casino under the authority of the Confederated Tribes of Coos, Lower Umpqua and Suislaw Indians. The Confederated Tribes required that, as a condition of continued employment, all casino employees have and maintain a valid gaming license issued by the Confederated Tribes Gaming Commission (TGC). TGC performed investigations of casino employees, including their finances, and had the authority to require employees to correct debt delinquencies in order to obtain or maintain a gaming license. Claimant was aware at hire and thereafter that she needed to maintain a

valid low security gaming license to remain employed. Claimant was also aware that she might be required to resolve debt delinquencies as a condition to maintaining a valid gaming license.

(3) In February 2014, the TGC began conducting background investigations on claimant because her gaming license was due to expire in March 2014. On February 19, 2014, a TGC representative told claimant that her credit report showed an unpaid and delinquent debt and gave claimant a copy of the credit report. The representative told claimant that, in order to renew her gaming license, TGC required her to submit a written plan showing how she intended to repay the debt. Claimant drafted a repayment plan that generally stated she intended to contact the creditor listed on the credit report to determine with whom she needed to speak with to work out repayment terms. Transcript at 17. Claimant submitted this repayment plan to TGC on approximately February 27, 2014. EAB Exhibit 1 at 11.

(4) On February 28, 2014, a TGC licensing specialist met with claimant and told her that she needed to include more specific information in the repayment plan before TGC would renew her gaming license, including the names of the creditor representatives with whom she had discussed the debt repayment, their contact information and other specifics about the debt repayment. Claimant agreed to provide a more detailed written plan.

(5) On March 6, 2014, TGC notified claimant that it had provisionally renewed her gaming license subject to the condition that she submit to TGC within ten days a detailed written repayment plan to "resolve" the issue of the delinquent debt. EAB Exhibit 1 at 11, 15. On March 11, 2014, claimant submitted a new repayment plan that repeated the general language of the first plan, but which stated that she would provide more information about the holder of the debt as soon as she obtained it. Also on March 11, 2014, after TGC received claimant's second written plan, the TCF licensing specialist contacted claimant and told claimant that the second repayment plan did not satisfy what TGC had required. The representative asked claimant for the identity and contact information of the creditor. Claimant did not give her that information because she did not have it. Claimant told the representative she would provide that information in a "few days." Transcript at 28; EAB Exhibit 1 at 11, 15. After this conversation, the licensing specialist called claimant approximately two or three more times to obtain information about the creditor on the debt and claimant's progress in working out a repayment plan. Claimant told the representative each time, "I'm working on it." Transcript at 24-25.

(6) On March 24, 2014, TGF sent claimant a letter notifying her that it had suspended her gaming license for failing to submit an adequate written plan addressing the delinquent debt shown on her credit report. EAB Exhibit 1 at 11. The letter also notified claimant that proceedings had been started to permanently revoke her gaming license due to her failure to submit a repayment plan with the required detail. Around this time, claimant contacted the company listed on the credit report as the creditor for the delinquent debt, and learned that the debt had been sent to a collection agency. Transcript at 15. Shortly after March 24, 2014, claimant took to the licensing specialist a business card and a letter she had obtained from the company initially listed as the creditor on the delinquent debt to demonstrate that she was working to determine the identity of the creditor. The licensing representative told claimant that she needed to contact the collection agency to work out the repayment plan that TGC required. Between March 24, 2014 and April 17, 2014, claimant did not give TGC information about her contacts, if any, with the collection agency or any repayment plan that she had entered into with the collection agency.

(7) On April 17, 2014, TGC revoked claimant's gaming license for failing to provide the detailed information it had requested about claimant's plan to resolve the delinquent debt identified on her credit report. Also on April 17, 2014, the employer discharged claimant for failing to maintain her gaming license.

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 she was aware that she needed to maintain a valid gaming license to remain employed. Claimant also did not dispute that she knew TGC could require her to repay a delinquent debt or enter into a repayment plan as a condition of maintaining her gaming license. The principal issue in this case is whether claimant's behavior in not providing the information that the TGC representatives required to renew her gaming license was wantonly negligent.

Although claimant generally contended that the TGC representatives did not clearly inform her of the information she needed to provide to TGC, it appears from her testimony that she was well aware that they wanted information about the identity of the current holder of the debt and contact information for the holder, as well as some reasonably certain steps that she had taken toward entering into a repayment plan. *See* Transcript at 15, 16, 18, 22, 23, 24, 26, 28, 30, 32, 33. In addition, if claimant was truly confused about what TGC required, it appears that the TGC representatives were readily accessible to her and she could easily have contacted them for more specific guidance about what was needed. Claimant's failure to seek additional guidance was, at a minimum, wantonly negligent. From the record, it appears that, in reality, claimant did very little, if anything, to pin down the identity of the current holder of the delinquent debt from February 19, 2014 until sometime after March 24, 2014. This is the most likely conclusion since claimant testified that she did not take the card and letter that she had obtained from the original creditor into TGC until sometime after March 24, 2014 and it is implausible that claimant would not have taken in to TGC the most current information she had about the debt that was underlying the suspension of her gaming license. Transcript at 30. Claimant's subsequent failure to provide information to TGC about the collection agency that held the debt also strongly suggests that she did not take steps to try to contact that agency until near in time to the revocation of her gaming license. Transcript at 31. Claimant also did not provide evidence of any serious impediments in determining that the original debt had been sold to a collection agency or in making contact with that agency when she was finally motivated to do so, which might reasonably have explained claimant's delays in providing the information that TGC had requested. Transcript at 15, 16. It appears, most likely, that claimant did not seriously pursue obtaining the information that TGC wanted, even though TGC had given her first a ten day deadline to do so on March 6, 2014, when it conditionally renewed her gaming license, and even though TGC suspended her gaming license on March 24, 2014 and had notified her that it was then initiating license revocation proceedings. EAB Exhibit 1 at 11, 15. Absent a

plausible explanation, claimant's failure to make serious and sustained efforts to seek and provide the information that TGC had requested from February 19, 2014, when she met with the TGF representative first requested this information, through April 17, 2014, when her gaming license was revoked, was wantonly negligent. Claimant did not provide such a plausible explanation. Claimant's failure to maintain her gaming license, the reason underlying the employer's discharge of her, was due to her own wantonly negligent behavior.

Claimant's wantonly negligent failure to maintain her gaming license was not excused from constituting misconduct as an isolated act of poor judgment under OAR 471-030-0038(3)(b). An "isolated act of poor judgment" means a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct and must not have exceeded mere poor judgment by being an act that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). In this case, the maintenance of a valid gaming license was a condition of claimant's employment in a tribal casino and a fundamental requirement for the job that she held. When claimant's wantonly negligent behavior caused the revocation of her gaming license, that behavior made a continued employment relationship at the casino impossible. Nor was claimant's loss of her gaming license excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she believed that the employer would condone behavior that resulted in the loss of her gaming license. Claimant did not make the threshold showing needed to excuse her conduct as a good faith error.

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

DECISION: Hearing Decision 14-UI-18807 is affirmed.

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

DATE of Service: July 17, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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