

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0029

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 1, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 72943). The employer filed a timely request for hearing. On October 23, 2014, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for November 6, 2014 at 9:30 a.m. On November 6, 2014, ALJ Frank issued Hearing Decision 14-UI-28295, dismissing the employer's request for a hearing for failure to appear at the hearing. The employer filed a timely motion to reopen. On December 17, 2014, ALJ R. Davis conducted a hearing, and on December 23, 2014, issued Hearing Decision 14-UI-30933, concluding that the employer showed good cause for reopening the hearing, and affirming the administrative decision. On January 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was relevant and based upon the record.

No party appealed the portion of Hearing Decision 14-UI-30933 allowing the employer's request to reopen. We therefore limit our review to whether the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) Spirit Mountain Casino employed claimant as a bartender from February 28, 2013 through August 29, 2014.

(3) Claimant understood that Oregon Liquor Control Commission (OLCC) administrative rules required that each customer's purchase of alcoholic drinks be limited to no more than two alcoholic drinks at any one time, and that customers could not be permitted to serve themselves alcoholic beverages. Claimant also understood that the employer's policy required that she comply with all applicable laws and rules.

(4) On December 25, 2013, the employer gave claimant a final written warning and a five day suspension for inappropriate behavior with a customer. Claimant was disciplined because during her

work hours and while in uniform, she sat with a customer during her breaks and hugged and touched the customer.

(5) On August 24, 2014, claimant was working at the bar in the employer's main restaurant area. A server told claimant the server needed 20 bottles of beer to serve to a group of 20 customers, and that the customers wanted the beer to be delivered to their table on ice. Claimant and another employee filled a plastic container with ice, opened 20 bottles of beer, placed them in the container and put them on a cart so the server could take them to the customers' table. Claimant expected that the server would take the beers from the container and give them to the customers. Transcript at 31.

(6) After taking the first container of beer to the customers, the server asked claimant for a second container of 20 beer bottles on ice for a group of 20 customers. After the server provided the second container of beer to the group of customers, claimant noticed that the server was leaving the cart with the container on it next to the table where the customers were sitting. Claimant knew that this situation could result in customers serving themselves, contrary to OLCC rules and the employer's expectations, but was too busy to remove the container and took no action. Transcript at 31-32.

(7) Approximately five to ten minutes after the server provided customers with the second container of beer, the employer's food and beverage supervisor noticed the cart with the container on it; the supervisor moved it behind the bar. The food and beverage supervisor also concluded that it appeared that the customers at the table next to the cart had been served more than two alcoholic drinks at a time.

(8) On August 29, 2014, the employer discharged claimant for violating OLCC rules and the employer's expectations by allowing customers to serve themselves alcoholic drinks and by serving customers more than two alcoholic drinks at a time.

CONCLUSION AND REASONS: We agree with the ALJ that 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because it asserted that she violated OLCC rules and the employer's expectations by serving customers more than two alcoholic drinks at a time, and by permitting

customers to serve themselves alcoholic drinks. In regard to the charge that claimant violated the two drink rule, the employer failed to meet its burden to show that claimant consciously violated this rule. Claimant testified that she was unaware that the beer orders placed by the server were excessive because the server told claimant they were to be provided to two parties of 20 customers. Transcript at 41 and 45. Claimant also testified that the server was responsible for and expected to keep track of the number of alcoholic drinks each customer ordered; as a result, claimant did not know and would not have known that the customers to whom the beer was provided had also ordered mixed drinks at the same time. Transcript at 34 and 38. Although the employer's food and beverage supervisor testified that she observed the container of beer next to a table of approximately eight customers, some of whom appeared to have been served more than two alcoholic drinks at a time, the supervisor admitted that she never questioned the server about the orders the server had given to claimant. In addition, the food and beverage supervisor never denied that the server, and not claimant, was responsible for keeping track of the number of alcoholic drinks ordered by the server's customers.

In regard to the charge that claimant allowed customers to serve themselves, claimant testified that when she prepared the first container of beer, she expected that the server would provide the beer to the customers and not permit the customers to help themselves. Only after claimant prepared and the server provided the second container of beer did claimant realize that the server had left the container on a cart near the table. Transcript at 31-32. Although claimant knew this could result in a violation of OLCC rules and the employer's policy,¹ she was too busy either to remove the container or ask that another employee do so. Claimant's actions can be excused as an isolated instance of poor judgment, however.

OAR 471-030-0038(1)(d) provides:

As used in this rule, the following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must 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.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

¹Claimant admitted that the second bucket of beer looked "terribly tacky" and "did not look right." Exhibit 4, p. 7.

The conduct for which claimant was discharged met all the criteria for an isolated instance of poor judgment. Her failure to remove the container of beer, or ask a manager or security employee to do so, involved poor judgment because it involved a conscious decision not to take action to ensure compliance with OLCC rules, contrary to the employer's expectation. As a result, claimant's conduct was at least wantonly negligent. Her exercise of poor judgment was a single occurrence. The only other discipline claimant received was administered in December 2013 for an inappropriate interaction with a customer. This conduct was too remote in time and different in nature from the conduct for which claimant was discharged to constitute a repeated pattern of wantonly negligent behavior. Finally, claimant's actions neither violated the law nor were not tantamount to unlawful conduct. Claimant failed to correct a situation that could have resulted in a violation of the OLCC administrative rule prohibiting self-service; there is no evidence in the record that she violated this rule by permitting customers to serve themselves alcoholic drinks.

Because the conduct for which claimant was discharged was an isolated instance of poor judgment, it did not constitute misconduct. Claimant is not disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-30833 is affirmed.

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

DATE of Service: February 23, 2015

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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