EO: 200
BYE: 201601

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0425

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152840). Claimant filed a timely request for hearing. On March 26, 2015, ALJ Yee conducted a hearing at which the employer did not appear, and on March 30, 2015 issued Hearing Decision 15-UI-35975, affirming the Department's decision. On April 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments in which he requested that EAB reopen the hearing to allow him to present information about an alleged incident that occurred after his discharge. An occurrence after claimant's discharge is not relevant to whether the employer discharged claimant for behavior that constituted misconduct at the time he was discharged. OAR 471-041-0090(1) (October 29, 2006). Moreover, given EAB's disposition of this case in claimant's favor on review, it is not necessary for EAB to consider claimant's new information.

The employer submitted two written arguments in which it presented information on its own behalf since it did not appear or present evidence at the hearing. EAB construes the employer's request as one to have EAB consider new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if it is relevant and material to EAB's decision and the requesting party shows that factors or circumstances beyond its reasonable control prevented it from offering that information into evidence at the hearing. However, the employer did not certify that it provided its written arguments to claimant as required by OAR 471-041-0080(2)(a) (October 29, 2006). Also, some of the new information that the employer presented addressed claimant's alleged behavior after he was discharged. As with claimant's attempt to reopen the record to introduce new information, incidents occurring after the discharge are not relevant to the issue of whether the employer discharged claimant

for misconduct. OAR 471-041-0090. With respect to the new information that the employer proffered about the incident that led to claimant's discharge, the employer did not explain why it did not appear at the hearing to present this information, and did not show that factors or circumstances beyond its reasonable control prevented it from doing so. For these reasons, EAB did not consider the employer's new information when reaching this decision.

FINDINGS OF FACT: (1) Springfield Veterans Association, Inc. employed claimant as the canteen manager at Veterans of Foreign Wars (VFW) Post 3695 from May 4, 2004 until January 14, 2005.

(2) The canteen that claimant managed served alcoholic beverages and had video poker and other video lottery games available for the customers to play on the premises. The employer prohibited claimant and other employees from playing the video lottery games while on duty. Claimant was aware of the employer's prohibition.

(3) Claimant usually worked Mondays doing bookkeeping and other miscellaneous tasks from 10:00 a.m. until 2:00 p.m., when the canteen opened for business. At 2:00 p.m., a bartender arrived to serve the customers. On Tuesdays, claimant worked from noon until 2:00 p.m., when the canteen opened and a bartender arrived at work. Claimant generally had Wednesdays and Thursdays off from work. On Fridays, claimant worked either from 9:00 a.m. until noon, when the canteen opened, or from 9:00 a.m. until 5:00 p.m. On alternate Fridays, claimant served the customers in the canteen between noon and 5:00 p.m. On Saturdays, claimant worked from 11:00 a.m. until 5:00 p.m., and served customers after the canteen opened at noon. On Sundays, claimant usually worked from 8:00 a.m. until 3:00 p.m. and sometime after 8:00 a.m. served customers in the canteen.

(4) A few days before Thursday, November 20, 2014, claimant's assistant manager, who usually performed bookkeeping tasks on Thursdays between 10:00 a.m. and noon and acted as bartender from noon until 2:00 p.m., asked claimant if she could take November 20, 2014 off from work. Claimant agreed. Claimant arranged to cover the assistant manager's bookkeeping work from 10:00 a.m. until noon and arranged for a relief bartender to cover the balance of her shift, from noon, when the canteen opened, until 2:00 p.m.

(5) On November 20, 2014, claimant clocked in at 10:00 a.m. to perform the bookkeeping work for the assistant manager and clocked out at noon, as arranged. The relief bartender did not arrive at noon and claimant remained on the premises waiting for him to report for work. The relief bartender did not contact claimant or notify him that he was going to be late or absent from the noon to 2:00 p.m. shift. When claimant began waiting, there were no customers in the canteen. Claimant went to the back room of the canteen to pass the time with the post quartermaster, who was playing a lottery game, until the relief bartender arrived. The quartermaster was second in authority to the post leader. Having nothing to do, claimant deposited $20 in a video poker machine and began playing. The quartermaster saw what claimant was doing and did not comment on it. At approximately 12:45 p.m., claimant heard someone enter the canteen and left the video poker machine to investigate. Claimant saw that two customers had arrived, took their order and served them. After he waited on the customers, claimant went to the back room and exited the video poker game. At that time, claimant realized that it was likely the relief bartender was not going to arrive as planned, and he would need to work until the usually-scheduled bartender reported for work at 2:00 p.m. Claimant did not play any lottery games after 12:45 p.m. because he knew he would need to serve any customers who entered the canteen before the 2:00 p.m.

bartender arrived. Although claimant was performing work for the employer during this time, he did not clock back in to work. At 2:00 p.m., the bartender arrived and claimant left the workplace. Later, claimant learned that the relief bartender did not arrive at noon because he had traded the shift starting at noon on November 20, 2014 with another employee and he had neglected to tell that employee that the shift started two hours earlier than usual.

(6) Except for November 20, 2014, claimant never played any of the employer's video lottery games when he was on duty.

(7) On January 14, 2014, the employer discharged claimant for playing the video poker game on November 20, 2014 when he was still on duty.

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. A claimant's good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-35975, the ALJ concluded that claimant's behavior in playing video poker games was a wantonly negligent violation of the employer's standards prohibiting employees from playing video games while on duty. The ALJ reasoned that claimant had no reasonable explanation for clocking out at noon, before the relief bartender reported for work, and at the time he played the video poker game, although he was waiting for his relief to arrive, he was technically "performing services for the employer and, whether on or off the clock, he was, in fact working" and he reasonably knew or should have known that he was prohibited from playing any lottery games. Hearing Decision 15-UI-35975 at 4. The ALJ also concluded that claimant's behavior in playing the video poker game was not, among other things, excused as a good faith error because more likely than not, he did not act in good faith because "he wanted to play video poker and he simply rationalized his decision to gamble, either before or after the fact." Hearing Decision 15-UI-35975 at 4. We disagree.

In reaching her conclusions, the ALJ did not give proper weight to the undisputed evidence surrounding claimant's playing the video poker game for a short period of time on November 20, 2014. At the time claimant clocked out from work, he had no reason to expect that the relief bartender would not promptly show up, as arranged, to take over work in the canteen. There was no evidence in the record that claimant planned to play video poker before he started to wait for the relief bartender's arrival and the most likely inference to be drawn from the evidence is that claimant decided to play the game after he stopped working and to pass the time until the relief bartender arrived. The ALJ's inference that claimant consciously disregarded the employer's prohibition against playing lottery games because he strongly "wanted to play" is not supported by this record. Indeed, that claimant exited the video poker game and stopped playing it when he first became aware that the relief bartender was unlikely to arrive strongly suggests that claimant had no intention of evading the employer's expectations when he knew

he was working for the employer. The bottom line issue in this case is whether claimant was aware that the employer would consider him to be on duty and prohibited from playing the video poker game for a short period of time between noon and 12:24 p.m. on November 20, 2014 when he had clocked out from work and was anticipating the arrival of the relief bartender. Claimant's contention that he did not know that he was technically on duty until the relief bartender actually arrived was not implausible. Audio at ~34:16, ~40:07, ~40:30, ~46:35. Although certain laws and regulations might define "on duty" to include such waiting time, there is no evidence in the record that the employer so informed claimant of this definition, and it is not clear that an untutored employee would be reasonably aware of it. *See e.g.*,OAR 845-005-0348(1)(b) (December 1, 2013) (OLCC defines "on duty" prohibition against drinking to include any time when the employee is performing acts on behalf of the licensee on the licensed premises, whether or not those acts were scheduled and whether or not the employee is compensated.)

In *Goin v. Employment Department*, 203 Or App 758, 126P3d 734 (2006), the type of "good faith error" that is excused from constituting misconduct under OAR 471-030-0038(3)(b) was defined as "some sort of mistake made with the honest belief that one is acting rightly" under circumstances where the individual did not believe that he needed to investigate further before concluding that his behavior was permissible. Nothing in this record suggests that claimant did not honestly believe he was off duty, and complying with the employer's requirements when he played the video poker game. The failure of the quartermaster to even comment on claimant's behavior when he played the video game strongly suggests that claimant's belief about its propriety was corroborated, since the second in command of the post would have been expected to register disapproval if claimant's playing video poker was clearly prohibited under the circumstances. In addition, the record shows that claimant stopped playing the video poker game when he realized around 12:45 p.m. that the relief bartender was not going to show up as planned. These facts further corroborate claimant's belief that he was off-duty when he was playing the game and only later realized that he needed to be on duty until the 2:00 p.m. bartender arrived. Although the employer might have concluded that claimant was technically on duty until the actual arrival of the relief bartender, the preponderance of the evidence in this record shows that claimant sincerely and honestly believed that he was off duty and did not violate the employer's standards, when he played the video poker game after he clocked out at noon and before 12:45 p.m., when he realized he would be working until 2:00 p.m. To the extent that claimant's behavior on November 20, 2014 violated the employer's standards, it is excused from constituting misconduct as a good faith error.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-35975 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

Service: <u>June 10, 2015</u>

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete**.**

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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