

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0609**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 72843). The employer filed a timely request for hearing. On May 4, 2016, ALJ Wyatt conducted a hearing, and on May 12, 2016 issued Hearing Decision 16-UI-59466, affirming the Department's decision. On May 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of that argument to claimant as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Wildhorse Resort & Casino employed claimant as a slot floor worker from February 24, 2014 until February 19, 2016.

(2) As part of her job, claimant was required to walk the floor of the casino with a "slot wallet" comprised of cash and coins. Claimant was expected to exchange customers' paper money bills for coins they could use in the slot machines. Another of claimant's duties was to pay out slot machine jackpots of \$500 or more from the cash wallet. Accuracy in cash handling and avoiding cash shortages or overages in the slot fund was an aspect of claimant's performance that was monitored. Throughout her shift, claimant also picked up cash tips from customers on the casino floor. Claimant was to deposit the tip money she collected into a lock box at the end of her shift, to later be divided up and distributed between the employees who worked the same shift.

(3) The employer expected claimant would deposit all tips she collected during her shift into the lock box. The employer also expected claimant would not transfer money from the tip pool to make up for shortages in the slot machine fund. Claimant understood the employer's expectations.

(4) On December 20, 2015, claimant's ending slot fund varied by \$1.00 from what it should have been to balance. On January 14, 2016, claimant's ending slot fund varied \$80 from what it should have been

to balance. The employer suspended claimant without pay for one day as a result of the January 14 discrepancy. On January 22, 2016, claimant's ending slot fund varied \$10 from what it should have been to balance. The employer suspended claimant without pay for three days as a result of this error. Under the employer's policies, claimant would be suspended for five days without pay if within 60 days there was another discrepancy in her slot fund.

(5) On February 15, 2016, at the end of her shift, claimant counted her slot fund and determined that it was \$1.00 short from what it should have been to balance. Claimant knew that, if her slot fund varied at all from what it should have been, the employer's progressive disciplinary policy required that she automatically receive a five day suspension without pay regardless of the underlying reason for the variance. To avoid the automatic suspension, claimant removed \$1.00 from the tip pool money she had collected and put it in the slot fund, intending to eliminate the variance and cause the slot fund to balance. Claimant then took the slot fund to the employer's cashier for a second counting and to be deposited. The cashier determined that claimant's slot fund was actually \$1.00 over. Because the cashier had found a variance, the employer investigated its source. The employer determined from viewing surveillance video that claimant had taken \$1.00 from the tip pool money and placed it with the slot fund, apparently erroneously believing that the slot fund was otherwise \$1.00 short.

(6) On February 19, 2016, the employer discharged claimant for removing \$1.00 from the tip pool to make up for a perceived \$1.00 shortage in the slot fund.

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

Although claimant contended that she did not transfer \$1.00 from the tip pool to the slot fund on February 15, 2016, the graveyard slot manager, the swing shift slot manager and a video surveillance officer all observed claimant on the video from that night taking what appeared to be a dollar bill from the tip pool envelope and placing it in the slot fund. Audio at ~44:44; Exhibit 1 at 11, 12. It is highly unlikely that on the same night the cashier determined claimant's slot fund was \$1.00 over, the three employees viewing the video would coincidentally, erroneously and independently believe they had observed claimant transferring \$1.00 from the tip pool to the slot fund. On this record, it is most likely that claimant removed \$1.00 from the tip pool to make up for what she believed was a \$1.00 shortage in the slot fund. Claimant could only have known what she was doing when she transferred the money and it could not have been inadvertent or accidental. Claimant violated the employer's standards with at least wanton negligence when she transferred \$1.00 between the tip pool and the slot fund on February 15, 2016.

Although claimant's behavior on February 15, 2016 was a willful or wantonly negligent violation of the employer's standards, it may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior is excusable as an "isolated instance of poor judgment" if it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(10)(d)(A). For behavior to be excused as an isolated instance of poor judgment, it must not have exceeded "mere poor judgment" by, among other things, violating the law, being tantamount to a violation of the law or causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(C). In this case, the employer's witness testified claimant had never before transferred money between the categories of funds in her possession to make up for a deficiency in the slot fund, and the only prior acts of claimant in which she allegedly violated the employer's standards were the three previous variances in the slot fund, on December 20, 2015, January 14, 2016 and January 22, 2016. Accepting that claimant's slot fund did not balance on those days, the employer did not present any evidence ruling out that the slot fund was off due to an accident or an error, both of which would be inadvertent occurrences. Absent evidence that claimant's behavior underlying the violations on those days was attributable to claimant's willful or wantonly negligent mental state, it cannot be concluded that any of them constituted misconduct. Because no prior willful or wantonly negligent violations of the employer's standards by claimant were demonstrated, her willful or wantonly negligent behavior on February 15, 2016 was a single occurrence. As such it meets the first requirement to be excusable behavior.

With respect to whether claimant's behavior on February 15, 2016 exceeded mere poor judgment and may not be excused even if was an isolated event, the employer argued that claimant's behavior met all of the elements to constitute the theft of \$1.00 from the tip pool. Audio at ~22:05. Under Oregon law, a person commits theft when, regardless of the value, a person takes or withholds property *with the intent to deprive another of that property*. ORS 164.015 (emphasis added). ORS 161.085(5) defines "intent" to mean that a person was acting with the conscious objective to cause the result or engage in the conduct that is described in the statute defining the offense. On the facts in this case, we infer, most likely, that claimant did not take the dollar bill from the tip pool consciously aiming to deprive the other participants in the tip pool of that dollar, but did so with the conscious objective of making up for what she believed was the shortage in the slot fund in order to avoid a five day unpaid suspension. Because claimant's aim was not to deprive the rightful owner of his or her property when she transferred the dollar bill, she lacked the requisite mental state to commit the crime of theft. Claimant's behavior on February 15, 2016 did not fall outside that which is excusable as an isolated instance of poor judgment because it violated the law or was tantamount to a legal violation. Nor did claimant's behavior reasonably exceed "mere poor judgment" because it caused an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. The reason claimant transferred money from the tip pool to the slot fund was understandable. The amount of the shortage (and the amount she needed from the tip pool) was negligible - \$1.00 - and the consequences to her if it was not corrected were disproportionate - the deprivation of an entire week's earnings. A reasonable employer would not have objectively concluded that removing such a *de minimus* amount from the tip pool to avoid such a punitive sanction signified that claimant could no longer be trusted in the workplace. Because claimant's behavior on February 15, 2016 meets all the requirements, it is excused from constituting misconduct as an isolated instance of poor judgment.

The employer did not demonstrate that it discharged claimant for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-59466 is affirmed.

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

**DATE of Service: June 29, 2016**

**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](http://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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