EO: 200
BYE: 201723

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
2016-EAB-1073

Reversed
Disqualification

PROCEDURAL HISTORY: On July 7, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 85525). The employer filed a timely request for hearing. On August 18, 2016, ALJ R. Frank conducted a hearing, and on August 26, 2016 issued Hearing Decision 16-UI-66417, affirming the Department's decision. On September 15, 2016, 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 based on the record.

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant as a swing-shift valet training attendant from September 24, 2013 to June 13, 2016.

(2) The employer's policy handbook required employees to be completely honest with respect to work. The employer prohibited employees from borrowing money from each other. The employer also had a policy that valets were to pool and share their tips, and prohibited anyone from counting valet tips without a second person present. The employer required that all tips be placed in a box with two locks, and provided valets with access to one key and supervisors or lead workers with access to the other. The employer distributed a copy of its policy handbook to claimant and informed him he was expected to review it. Claimant received the policy handbook and skimmed its contents.

(3) On June 6, 2016, someone reported to the employer that claimant, while acting as a valet supervisor, had counted the valet tips alone and refused employees' offers to help him count. The employer removed claimant from the work schedule to investigate. The employer subsequently learned that claimant had accessed both keys, opened the tip box, and counted the tips. He had refused offers of help from more than one employee and sent employees away from him while he continued to count the tips. Employees on all three shifts reported to the employer that claimant frequently discussed his money problems with coworkers. At least one reported that claimant had borrowed money from him.

(4) On June 8, 2016, the employer interviewed claimant. Claimant admitted he counted the tips alone and had sent employees who offered to help him back to work. Claimant said he believed that the employees offered to help him count tips too early in their shifts to shirk work. Claimant admitted the employer's policy looked familiar and that he had been trained to have someone with him when he counted tips, but he felt he did not need help counting tips when he was acting as a supervisor.

(5) During the interview the employer asked claimant if he had discussed his money problems at work. Claimant said he may have spoken with one or two coworkers. The employer told claimant employees from all three shifts reported that claimant had discussed his money problems with them. Claimant then said he had spoken with maybe four coworkers. Claimant later admitted that he had probably spoken once or twice per week with anyone who would listen to him.

(6) During the interview the employer asked claimant if he had ever asked to borrow money from coworkers. Claimant denied having done so, then changed his answer and admitted he had. Claimant initially denied borrowing money from them while on the employer's property then admitted he had. Claimant initially told the employer that he had borrowed a bunch of ones, then said he had borrowed fifty dollars, then said he had borrowed more than that.

(7) On June 13, 2016, the employer discharged claimant for violating the tip policy, borrowing money and failing to be completely honest during the investigation.

(8) During its investigation into claimant's conduct the employer learned that other valet department employees had also violated the employer's tip policy. Claimant's supervisor had repeatedly begun counting the valet tips without a second person present, but, unlike claimant, had never completed the tip count without a second person and had never refused help. The employer demoted claimant's supervisor and another employee for their violations of the tip policy.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 connected with work. 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was not for misconduct because, focusing exclusively on claimant's violation of the tip counting policy, claimant's conduct was excusable as a good faith error. Hearing Decision 16-UI-66417 at 3. The ALJ reasoned that because the preponderance of the evidence "strongly suggests" that employees routinely deviated from or misapplied the policy, claimant's failures to adhere to it himself were done in good faith. *Id.* at 4. We disagree. As a preliminary matter, the

employer did not discharge claimant solely based on his violations of the tip policy. The employer also discharged claimant for borrowing money from a coworker and being dishonest during the employer's investigation. Since all three allegations caused the employer to discharge claimant, all three must be analyzed before concluding that claimant's discharge was, or was not, for misconduct.

Although we agree with the ALJ that the record shows employees, including supervisors, routinely deviated from the employer's tip counting policy, we disagree that the record shows that all of claimant's violations were in good faith. The employer gave claimant a copy of the policy, claimant skimmed it, and claimant was responsible for knowing and adhering to it. Claimant also testified that he knew on some level that, regardless of his habits or practices, the employer used a locked box for tips and required two employees to access and count tips to ensure accuracy and prevent theft. Audio recording at ~ 34:30. Regardless how the keys were stored or whether they were both accessible to him, claimant knew two keys were required to access the box, knew that the keys were supposed to be in the custody of two different people, and knew that two people were supposed to count the tips together.

The record also shows that claimant refused employees' offers of assistance counting the tips on two occasions. Claimant did not refuse their assistance because he did not need it or did not think he was supposed to have a second person count tips with him, but because he suspected they were offering to help too early in the shift because they wanted to shirk their duties. Claimant's refusal was not logical or plausible. The employer's witness agreed that it was appropriate to count tips at that time of night, which means that it would be appropriate for another employee to assist claimant to count tips at that time of night, and the record does not show that claimant routinely refused employees' offers to help him count tips, just that he did it two times. Although claimant testified that he thought what he was doing was permissible, or at least that he should not have been discharged because his supervisor did the same thing on several occasions and was just demoted, the record fails to support his assertion. Audio recording at ~ 39:00. Claimant's supervisor did not do the same thing claimant did. Although she began counting tips alone on a couple of occasions, that was not her common practice because it only occurred a "couple" of or "several" times, she never finished counting alone, and she never refused employees' offers of help. *See* Audio recording at ~ 39:00, 40:25. For those reasons, we disagree with the ALJ that claimant violated the employer's tip policy on June 5th or June 6th in good faith. Rather, his violations were in conscious disregard of a standard of behavior he knew or should have known, and were, therefore, wantonly negligent violations of the employer's tip policy.

Turning to the employer's remaining allegations, that claimant was dishonest and borrowed money from a coworker, we again conclude that claimant's conduct involved willful or wantonly negligent violations of the employer's policies. Claimant knew, or at a minimum should have been aware of, the employer's policy requiring honesty based on his receipt of the employer's handbook, agreement to read it, and his review of it, but he chose to be dishonest. Specifically, he first reported to the employer that he only discussed his money problems with one or two coworkers, never borrowed money, only borrowed "a bunch of ones," and didn't borrow money while on the property. He changed his stories on those points several times before ultimately admitting that he discussed his money problems once or twice a week with anyone who would listen, borrowed money from a coworker, borrowed over $50, and did in fact borrow the money while on the property. Claimant alleged at the hearing that he changed his story when interviewed by the employer because he was nervous and his "brain shut[] down," but his excuse is not plausible or believable. Audio recording at ~ 29:00. Claimant's ultimate admissions to the employer were significantly different from his initial reports, and not the sort of small changes typical of

someone who is merely nervous, such as not answering questions, answering questions with questions, stuttering or hesitating over answers, or getting small details like dates wrong. We find it more likely than not that claimant was willfully dishonest during the employer's investigation.

With respect to borrowing money, although claimant testified that he did not know he was not allowed to borrow money from coworkers until after he did it, his claim is, again, implausible. Audio recording at ~ 28:00. It does not make sense that claimant would, initially, lie to the employer and deny he borrowed money from a coworker if he believed it was acceptable to do so. Nor does it make sense that claimant would repeatedly try to minimize the amount he had borrowed to minimize the severity of his conduct if he believed the conduct was not prohibited. It is more likely than not that claimant knowingly borrowed money despite his knowledge that the employer prohibited that conduct, making the conduct wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For the reasons explained, claimant did not act in good faith with respect to any of the incidents that resulted in his discharge. He knew or should have known each type of conduct would probably violate the employer's expectations, and chose to engage in the conduct anyway. He did not sincerely believe, or have a factual basis for believing, his conduct was consistent with that the employer expected of him. Claimant's conduct cannot be excused as an isolated instance of poor judgment because, as noted herein, it involved two wantonly negligent violations of the employer's tip policy, at least one wantonly negligent violation of the employer's policy against borrowing money, and several instances of willful dishonesty, making his conduct a pattern of willful or wantonly negligent misconduct.

For the foregoing reasons, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-66417 is set aside, as outlined above.

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

DATE of Service: <u>October 10, 2016</u>

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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