

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1380

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 125917). The employer filed a timely request for hearing. On November 10, 2016, ALJ Wyatt conducted a hearing, and on November 18, 2016 issued Hearing Decision 16-UI-71412, affirming the Department's decision. On December 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Spirit Mountain Gaming, Inc. employed claimant as a table dealer, last from July 10, 2012 to July 29, 2016.

(2) The employer expected claimant to provide customers with "great" service, conduct himself in a dignified manner, and treat guests with dignity and respect. Exhibit 1, 2012 Guest Service Training. In 2013, claimant violated the employer's expectation when he posted a statement on social media referring to a prominent Portland athlete as a "douchebag" who had "stiffed" a bartender and claimant by failing to tip them. Exhibit 1, May 28, 2013 Final Written Warning. The employer issued claimant a final written warning because of the incident, suspended him for five days, and cautioned him that further violations could result in termination of his employment.

(3) On July 25, 2016, claimant felt frustrated with the way a guest was playing cards at his table. The guest began to leave the table with 60 red chips, which would cause a shortage of red chips at claimant's table and require that he stop play to resupply his table with that denomination. Claimant repeatedly requested that the guest trade in his chips for fewer chips of a larger denomination. The guest refused his first two requests, then ignored his third request and walked away. Claimant slapped his hands on the game table and called the guest a "jackass." Exhibit 1, Separation form.

(4) The guest returned to the table and complained to claimant's floor supervisor, initially reporting that claimant had called him an "asshole" but later reporting that claimant called him a "jackass." *Id.* The employer had claimant prepare a written statement regarding the incident, in which claimant admitted calling the guest a "jackass." Exhibit 1, Employee Statement. On July 29, 2016, the employer discharged claimant.

CONCLUSIONS 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 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. The employer has the burden of proving by a preponderance of the evidence that claimant's discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to provide great service to guests and treat them with dignity and respect, and claimant violated the expectation by calling the guest a "jackass." Whatever claimant's frustrations with the guest were, there is no evidence in the record suggesting that they were so great or that claimant's ability to control his temper were so poor that he was unable to control himself. Nor does the record suggest that claimant lacked conscious awareness of his behavior. It appears more likely than not that claimant was conscious of his behavior and knew it probably violated the employer's expectations, making the conduct wantonly negligent.

Although the employer discharged claimant for a wantonly negligent act, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is defined, in pertinent part, a single or infrequent willful or wantonly negligent exercise of poor judgment that does not violate the law, is not tantamount to a law violation, and does not create an irreparable breach of trust in the employment relationship or make a continued employment relationship impossible. OAR 471-030-0038(1).

Claimant's conduct was not a single wantonly negligent act, given that he had exercised poor judgment in the past by referring to a guest as a "douchebag" who had "stiffed" claimant and his coworker, but it was infrequent because the prior incident occurred in 2013, over three years prior to the final incident, and the record lacks evidence suggesting that claimant violated the same, or other policies, in the two and a half years preceding the final incident. Calling a guest a "jackass," although an exercise of poor judgment in a customer service industry such as casino gaming, was not unlawful or tantamount to unlawful conduct, and, given that the employer testified that it discharged claimant because the incident because it was not his first time violating the same expectation, the employer did not establish that the conduct otherwise exceeded mere poor judgment. Audio recording at ~ 13:35.

The employer therefore did not establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-71412 is affirmed.

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

DATE of Service: January 10, 2017

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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