

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0880**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90158). Claimant filed a timely request for hearing. On June 30, 2017, ALJ Logan conducted a hearing, and on July 5, 2017 issued Hearing Decision 17-UI-87207, concluding the employer discharged claimant, but not for misconduct. On July 25, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument and the entire hearing record.

**EVIDENTIARY MATTER:** During the June 30, 2017 hearing, the ALJ admitted the employer's guest services manual, employee manual, discharge letter and counseling form regarding January 18, 2017 into evidence as Exhibit 1. Transcript at 37. However, the ALJ did not mark the documents. Because the ALJ described the documents in sufficient detail, EAB was able to mark Exhibit 1 as a clerical matter.

**FINDINGS OF FACT:** (1) Spirit Mountain Gaming, Inc. employed claimant from July 11, 2000 until January 20, 2017 as a blackjack dealer.

(2) The employer expected claimant to deal blackjack to customers at the employer's casino and to follow reasonable directives from her managers.

(3) In 2016, the employer purchased new blackjack tables. The card dealers in the employer's casino dealt cards out of dealer shoes, which are gaming devices used to hold decks of cards. However, the dealer shoes were distorting the laminate on the new blackjack tables. Just prior to January 18, 2017, the employer put cork on the undersides of some of the dealer shoes to see if it would stop the distortion.

(4) On January 18, 2017, claimant arrived at work and began preparing a table for her shift. Claimant was dissatisfied with having cork on her dealer shoe because she regularly moved the shoe during games

and the shoe did not move back and forth easily on the table with cork on it. Claimant complained to her floor boss, who tested the shoe and went to find a replacement shoe without cork on it for claimant to use. Two customers arrived at claimant's table while claimant waited for her floor boss to return and claimant told them the table would be open shortly. Claimant told the customers where to find the games they wanted to play. The floor manager returned and told claimant she could not replace claimant's shoe. Claimant told the floor manager and a nearby assistant shift supervisor that she believed she would be injured from constantly moving the four-pound shoe with cork. The floor manager told claimant the employer was just testing the cork, and that it may not be permanent.

(5) The table games manager called claimant into his office and claimant complained about the cork on the dealer shoe. The manager explained the purpose of the cork was to protect the tables. Claimant refused to deal cards using the shoe with cork. The manager took claimant's badge while it investigated the incident, and escorted claimant from the premises.

(6) After claimant left, the managers reviewed the surveillance tape of claimant preparing her table that morning. Based on what they saw on the surveillance tape, which did not have audio, the managers believed claimant refused service to several guests. The table manager called claimant and discharged claimant, effective January 20, 2017, because claimant refused to deal blackjack and the employer believed claimant refused service to guests.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant 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. 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).

The employer discharged claimant, in part, because claimant allegedly refused to deal to several guests. To support its allegation that claimant refused service to several guests, the employer's table games manager testified that he reviewed surveillance footage showing claimant was not dealing cards and pointed to the dealer shoe when several customers approached her blackjack table. Transcript at 7. However, the surveillance footage did not have audio. Claimant was the only witness with firsthand knowledge of what occurred and what she stated to customers at her table on January 18. Claimant testified that her floor boss was looking for a replacement shoe, so she told the customers she would begin the game shortly and guided the customers to active games they wanted to play. Transcript at 20-21. The employer did not show that claimant's act of directing the customers to other active games while waiting for her floor boss to return with a different shoe was a willful or wantonly negligent disregard of an employer's interest. Thus, to the extent the employer discharged claimant for refusing service to several customers, the employer has failed to prove by a preponderance of the evidence that claimant did so.

The employer discharged claimant, in part, because she was insubordinate by refusing to deal blackjack unless the employer gave her a dealer shoe without cork. Claimant knew, as a matter of common sense, that she was expected to comply with the reasonable directives of her managers. The record does not show that the employer's use of cork on the dealer shoes, especially for a trial period, was unreasonable. Thus, claimant's refusal to use a dealer shoe with cork was insubordination. Claimant's conduct was a willful disregard of the employer's expectation that she comply with her manager's directive.

While claimant's refusal to use the modified dealer shoe may have been a willful violation of the employer's standards, it is excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). First, a claimant's behavior may be excused 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. OAR 471-030-0038(1)(d)(A). The record does not show that claimant had been insubordinate in the past. Nor does it show by a preponderance of evidence that claimant had engaged in other willful or wantonly negligent behavior. As a result, claimant's behavior meets the first part of the test to be excused as an isolated instance of poor judgment.

To be excused, the behavior at issue must also not have been of a type that exceeded "mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Considering the circumstances surrounding claimant's conduct, we conclude that it did not exceed mere poor judgment. Viewed objectively, claimant's behavior did not create an irreparable breach of trust in the employment relationship. Claimant's refusal to use the dealer shoe with cork on it was at least in part due to her concern that she would develop a repetitive motion injury and be less capable of keeping the table secure. Transcript at 22-23, 26-27. A reasonable employer would conclude that claimant's concerns could be resolved, particularly when the employer also presumably wanted to avoid employee injuries and security issues. We also find that claimant's conduct did not make a continued employment relationship impossible. There is no evidence in the record that claimant's refusal to use the dealer shoe on January 18 damaged the employer's business. Because claimant's behavior meets both parts of the test necessary to be excused as an isolated instance of poor judgment, it was not misconduct.

The employer discharged claimant, but not for misconduct. She is not disqualified from the receipt of unemployment benefits based on this work separation.

**DECISION:** Hearing Decision 17-UI-87207 is affirmed.

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

**DATE of Service:** August 15, 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](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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