

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0745

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 26, 2018 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105955). Claimant filed a timely request for hearing. On July 24, 2018, ALJ Jarry conducted a hearing, and on July 25, 2018 issued Order No. 18-UI-113795, affirming the Department's decision. On July 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) TravelCenters of America employed claimant as a bartender from June 1, 2017 until May 30, 2018.

(2) The employer prohibited employees, including claimant, from gambling or playing the lottery or other games of chance or video games in the workplace while on the clock. The employer's prohibition was set out in its employee handbook and orally communicated to its employees. Claimant received a copy of the handbook and understood the employer's expectations. Claimant also enforced the employer's prohibition on other employees since the employer's lottery, gaming and gambling machines were located in the lounge, which was where claimant tended bar.

(3) On or about May 19, 2018, the general manager of the lounge was informed that a customer had been vaping in the lounge on May 19th while claimant was on duty. Shortly after, the general manager reviewed surveillance videos of the lounge and observed that, while on duty, claimant took some keno tickets, filled them out, ran them through the keno machine and then placed the keno tickets in her purse. Soon after reviewing the video, the general manager spoke to claimant and reminded her that employees were not allowed to drink alcohol or gamble while on the clock.

(4) Shortly after May 26, 2018, the general manager reviewed the video of claimant's shift on May 26, 2018 to learn claimant's activities that day. The general manager observed that claimant clocked in late, at 11:10 a.m. and, before opening and allowing customers to enter, removed some keno tickets from her purse that were already filled out and ran those tickets through the employer's keno machine. After reviewing the video, the general manager contacted the Oregon Lottery to confirm that claimant had

been playing keno on May 26, 2018. The general manager was informed that the first keno that had been played on the employer's keno machine in the lounge on May 26, 2018 was at 11:11 a.m., which was before claimant had opened the lounge to customers and was alone in the lounge. Later, the general manager had the general manager and the assistant general manager of the restaurant review the videos of claimant's actions on May 19 and 26, 2018 and they corroborated what the general manager had observed.

(5) On May 30, 2018, the employer discharged claimant for playing keno, a lottery and gambling game, in the lounge while on duty on May 26, 2018.

CONCLUSIONS AND REASONS: 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) (January 11, 2018) 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. 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).

Despite the clarity of the employer's prohibition against gambling and playing lottery and other games of chance while on duty, and claimant's stated awareness of that prohibition, claimant suggested that the prohibition was actually limited to poker and did not extend to keno because it was not illegal for a bartender to play keno. Audio at ~37:30. However, an exception for keno from the employer's prohibition was not set out in the employer's handbook, which claimant received. Exhibit 1 at 11, 13. Claimant did not explain the basis for her belief that, despite the employer's prohibition against gambling, playing keno while on duty was nonetheless permissible for bartenders. EAB cannot locate any authority for the proposition that playing poker while on duty is illegal for bartenders, but playing keno is not. The preponderance of the reliable evidence shows that claimant understood that playing keno, like playing poker and other gambling games while on duty, violated the employer's standards.

While claimant denied that she played keno while on duty on May 19 and 26, 2018, both the general manager of the lounge and the assistant manager of the restaurant testified persuasively that they independently reviewed surveillance videos of the lounge for those days and they observed claimant doing so. Although claimant did not recall her actions on May 19, 2018, claimant contended she had purchased a keno play ticket on the way to work on May 26, 2018 and only ran the previously purchased ticket through the employer's keno machine shortly after 11:00 a.m. to check if that ticket had won. However, claimant's contention is belied by the information from the lottery commission that the first keno actually paid for and played that day on the employer's keno machine in the lounge was at 11:11 a.m., which was when claimant was alone in the lounge and before she opened it for customers. On this record, the reliable evidence shows more likely that not that claimant played keno while on duty on May 19 and 26, 2018. Claimant's behavior on both days was at least a wantonly negligent violation of the employer's standards.

While claimant's behavior may have been a wantonly negligent violation of the employer's standards, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under

OAR 471-030-0038(3)(b). Behavior may be considered an isolated instance of poor judgment if it was, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant's wantonly negligent behavior occurred on two separate days within a single week, and encompassed two distinct decisions to violate the employer's standards. Because claimant's wantonly negligent behavior was neither single nor infrequent, it may not be excused as an isolated instance of poor judgment.

Nor may claimant's behavior be excused as a good faith error under OAR 471-030-0038(3)(b). Given the clarity of the employer's prohibition against gambling and playing lottery and other games of chance while on duty and claimant's failure to explain the basis for her alleged belief that playing keno while on duty was nonetheless permissible for bartenders, the record fails to show that claimant's willful or wantonly negligent violation of the employer's standards was due to a good faith error.

The employer discharged for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Order No. 18-UI-113795 is affirmed.

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

DATE of Service: August 29, 2018

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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