

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0602

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On October 22, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #94339). Claimant filed a timely request for hearing with the Office of Administrative Hearings (OAH). On November 27, 2013, OAH mailed a notice of a hearing scheduled for December 17, 2013. On December 26, 2013, ALJ Lohr issued Hearing Decision 13-UI-07093, dismissing claimant's request for hearing for failure to appear. On January 8, 2014, claimant filed a request to reopen the hearing. On February 27, 2014, ALJ Triana conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14423, allowing claimant's request to reopen the hearing, and affirming decision #94339. On April 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No party appealed the portion of Hearing Decision 14-UI-14423 allowing claimant's request to reopen. EAB therefore limited its review to whether the employer discharged claimant for misconduct. EAB considered the entire hearing record when making this decision.

FINDINGS OF FACT: (1) Peacehealth employed claimant from December 14, 2001 to September 18, 2013 as an interpreter.

(2) The employer expected interpreters to log in to work at their personal computers in their offices, be at their individual workstations at the beginning of their shifts, accurately report their time worked, and refrain from falsifying their time records. Claimant understood those expectations.

(3) On December 18, 2012, the employer had scheduled claimant to interpret for a family in one of its facilities. The family was not present for the appointment, so claimant left the employer's facility to interpret for a patient at a facility not operated by the employer. Claimant did not report to the employer

that she did not complete the employer's scheduled appointment, or that she had left the employer's facility. Claimant's time sheet falsely showed she was working for the employer while she was interpreting for approximately 35 minutes at the non-employer facility. Exhibit 4.

(4) On July 11, 2013, claimant's supervisor told all the interpreters, including claimant, that the employer required them to clock in and out using their personal computers at the beginning and end of their shifts. Interpreters were permitted to use their badges to clock in at a badge reader machine only if they were assigned to start working a face-to-face interpreting assignment upon arrival for their shift. Exhibit 5.

(5) On August 21, 2013, claimant asked her supervisor if she could log in for work at the badge reader in the urgent care lobby because her computer was slow, sometimes preventing her from being able to log in for approximately ten minutes. The supervisor told claimant that she was required to log in for work at her personal computer, and that she should have two programs disabled on her computer so that the computer started faster. Claimant knew the employer provided an "exception log" for employees to use to document occasions when they were unable to clock in at the time they began work. Exhibit 4.

(6) On September 13, 2013, claimant was scheduled to begin work at 8:00 a.m. She drove to the "pull through" area for the front entrance of the urgent care department, exited her car, logged in at 8:00 a.m. at the badge reader in the urgent care lobby, and then returned to her car. She left the front entrance of the urgent care building, parked her car in the urgent care parking lot, and returned to work at 8:09 a.m. through an urgent care building entrance located near the interpreters' offices.

(7) On September 18, 2013, the employer discharged claimant because she failed to report to her workstation at the beginning of her shift, and logged in to work at a badge reader, and failed to accurately report her time worked.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to be at her workstation at the beginning of her shift, log in to work through her computer rather than the lobby badge reader, and accurately report the time she began working. Claimant understood the employer's expectations. Transcript at 49 to 50. Claimant testified at hearing that on September 13, 2013, she drove to the urgent care entrance, used her badge to log in at the lobby badge reader, and then drove to park her vehicle before reporting to her workstation

because it was “convenient” for her. Transcript at 46, 48. Claimant preferred to use the badge reader in the lobby because her workstation computer was slow, causing her to log in late. Transcript at 46, 48. However, claimant knew the employer provided an “exception log” for employees to use to document occasions when they were unable to clock in at the time they began work. *See* Exhibit 4. Claimant did not allege, and the record does not show, she was assigned to a face-to-face appointment in urgent care at 8:00 a.m. on September 13, 2013. She testified that she considered the time she spent parking to be paid time, much like a “coffee break,” without coffee, upon arrival at work. Transcript at 50. However, claimant also testified that she knew the employer expected her to begin performing her work duties at the beginning of her shift. Transcript at 49. Nor does the record show that the employer’s written policies or workplace procedures permitted claimant to use work time to park her vehicle. By failing to be at her workstation at the beginning of her shift, and log in to work through her personal computer, claimant consciously engaged in conduct she knew violated the employer’s expectations, and was indifferent to the consequences of her actions. Claimant’s conduct therefore was, at best, wantonly negligent.

Claimant’s failure log in and report for work at her workstation on September 13, 2013 cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered “isolated,” it must be 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). On December 18, 2012, claimant claimed work time for time she spent working at a facility not operated by the employer. Claimant’s failure to notify her supervisor that she had left the employer’s facility and had not worked for the employer during that time was at least wantonly negligent. Thus, claimant engaged in a prior willful or wantonly negligent violation of the employer’s time reporting expectations. Because claimant’s conduct on September 13, 2013 was a repeated act of willful or wantonly negligent conduct, her conduct was not isolated, and cannot be excused as an isolated instance of poor judgment.

Claimant’s conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record does not show claimant sincerely believed, or had a factual basis for believing, the employer would condone her failure to log in for work at her personal computers, to be at her individual workstations at the beginning of her shift, or to accurately report her time worked. Her conduct therefore was not the result of an error in his understanding of those expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14423 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D. E. Larson, not participating.

DATE of Service: May 16, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.