

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0850

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100139). Claimant filed a timely request for hearing. On April 16 and 23, 2014, ALJ Upite conducted a hearing, and on May 1, 2014 issued Hearing Decision 14-UI-16638, affirming the Department's decision. On May 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Goodwill Industries employed claimant as a store donation attendant from October 9, 2012 to February 18, 2014.

(2) On April 14, 2013, the employer's store manager warned claimant that employees were prohibited from using, or even carrying, their personal cell phones while on duty. After April 14, 2013, claimant repeatedly carried and used his personal cell phone while on duty.

(3) On February 14, 2014, claimant again carried and used his personal cell phone while on duty. The employer suspended, and then discharged, claimant for that reason.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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 prohibit employees from using, or even carrying, their personal cell phones while on duty. At hearing, claimant asserted he was never warned he would be suspended or discharged for carrying or using his personal cell phone while on duty, and that other employees, including supervisors, sometimes carried and used their cell personal cell phones while on duty. Transcript (April 16, 2014) at 19-23. However, it is undisputed that claimant understood from the warning he received on April 14, 2013 that carrying and using his personal cell phone while on duty violated the store manager's, and therefore the employer's, expectations. Thus, in carrying and using his personal cell phone while on duty on February 14, 2014, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore willfully violated those expectations.

Claimant's conduct was not an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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). Claimant repeatedly carried and used his cell phone while on duty after being warned on April 14, 2013 that doing so was prohibited. His exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct was not a good faith error. Claimant knew carrying and using his personal cell phone while on duty violated the store manager's, and therefore the employer's, expectations. Claimant's conduct therefore was not the result of a good faith error in his understanding of those expectations.

DECISION: Hearing Decision 14-UI-16638 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.