

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1110

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 165445). Claimant filed a timely request for hearing. On June 16, 2014, ALJ Murdock conducted a hearing, and on June 20, 2014 issued Hearing Decision 14-UI-20024, reversing the Department's decision. On June 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 14-UI-20024 at 1, the ALJ admitted into evidence as Exhibit 1 certain documents that the employer offered at hearing. However, those documents were not marked as an exhibit and do not appear in the hearing record. Because those documents are readily identifiable in the general record, EAB has marked them as EAB Exhibit 1 and admitted them into evidence to complete the hearing record. A copy of EAB Exhibit 1 is included with this decision. Any party who objects to the admission of EAB Exhibit 1 into evidence must submit such objection to this office in writing setting forth the party's objection within ten days of the mailing of this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such an objection is received and sustained, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant as a customer service representative from February 10, 2014 until May 5, 2014.

(2) The employer expected employees to refrain at all times from accessing the personal accounts that they or their family members and friends held with the employer. The employer also expected employees to refrain entering any information or changes to their own, family members or friends' accounts. The employer's prohibition applied during the time an employee was in training and using the employer's computerized "training environment" and also after the employee had graduated from

training to the work floor and was using the computerized "live environment." Transcript at 7, 8. Claimant was aware of the employer's expectations.

(3) During the first four weeks of his employment, claimant was in training and using the training environment. The training environment allowed claimant to access all existing customer accounts that were in the live environment and to practice inputting information and entering changes to those accounts. The training environment did not save the changes that claimant made to accounts while using it. When an employee was using the training environment, a bold red banner appeared on the main computer screen identifying that the account access was through the training site. To gain access to the training environment, claimant was assigned a log-in and a generic password. When in the training environment, employees customarily selected accounts to practice on by generating random names such as "John Smith." On approximately March 10, 2013, after claimant completed his training, claimant was assigned a different log-in and created his own unique password to use the live environment.

(4) On April 9, 2014, claimant accessed his personal account with the employer through the live environment and entered a referral credit of \$10, which would discount the next bill he received by this amount. On April 11, 2014, claimant again accessed his personal account and entered two \$10 referral credits, which would further reduce his next bill. Also on April 11, 2014, claimant changed to the identity of the holder of his account to his fiancée, and then he changed it back.

(5) On May 5, 2014, the employer's billing team reported to claimant's supervisor that claimant had accessed his own personal account and entered changes to it on April 9 and April 11, 2014. Claimant's supervisor discussed these entries with claimant. Claimant told her that, on those days, he decided her needed to practice how to enter referral credits on accounts and how to change the identity of the person who was financially responsible for an account. Claimant told the supervisor that he had mistakenly thought that he was in the training environment when he made those changes and entered the referral credits, and he had thought that the changes he had entered would not be saved or effective.

(6) On May 5, 2014, the employer discharged claimant for accessing his personal account and entering referral credits to it.

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. 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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute that he made the changes to his personal account that the employer contended on April 9 and April 11, 2014. Claimant also agreed that he knew the employer prohibited him from accessing his personal account and entering changes at any time, whether the access was obtained

through the live environment or the training environment. Transcript at 17. Although claimant contended that he thought was making those changes in the training environment and they would not be saved or effective, this contention does not explain why he accessed his own account in the first place to practice making these changes when he knew the employer prohibited that access, and when he reasonably could have selected any number of random accounts to use for this alleged practice session. While claimant referred throughout his testimony to the "accident" and "mistake" he made, it is apparent that claimant was not confused that he had accessed his own personal account and knew that he had done so. Transcript at 20, 28, 35. Assuming that claimant thought he was making changes in the training environment, his behavior in accessing his own personal account was nonetheless, at a minimum, a knowing and wantonly negligent violation of the employer's standards.

Claimant's behavior in accessing his personal account on April 9 and 11, 2014 was not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent behavior. In this case, claimant accessed his personal account on two separate days and, in total, made four changes to it. Claimant made at least two wantonly negligent decisions, one on each day, to violate the employer's expectations. Because they were repeated wantonly negligent acts, claimant's behavior on April 9 and April 11, 2014 is not excused as an isolated instance of poor judgment. Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence showing that he subjectively believed that the employer would allow him use his own personal account to practice making account changes in the training environment. Since claimant not contend that the acts for which he was discharged were the result of a mistaken misunderstanding of the employer's expectations, he did not make the threshold showing to excuse them as good faith errors.

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

DECISION: Hearing Decision 14-UI-20024 is affirmed.

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

DATE of Service: July 29, 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.

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