

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1140

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101927). Claimant filed a timely request for hearing. On June 17, 2014, ALJ S. Lee conducted a hearing, and on June 25, 2014 issued Hearing Decision 14-UI-20372, affirming the Department's decision. On July 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Granbury Restaurant Solutions employed claimant from December 14, 2009 to May 12, 2014 as a support technician.

(2) Claimant was responsible for taking inbound telephone calls to help customers with technical support issues. Claimant worked remotely from his home office.

(3) The employer expected claimant to be on time for his shifts and to inform management if he was unable to work. The employer also expected claimant to take support calls, complete the support tasks, and maintain communication with the customer and the employer while working. Once a support task is completed, the employer expected claimant to confirm with the customer that the computer system was functioning properly. Claimant understood the employer's expectations.

(4) On March 30, 2014, the employer had scheduled claimant to work from 3:00 p.m. to 12:00 a.m. Claimant's internet, including his home telephone, was not working before he began his shift. At 2:45 p.m., claimant went to the library and sent a text message to the employer stating his internet and telephone were not working. Claimant did not confirm the employer received the message. The employer did not receive the message, and tried to contact claimant repeatedly by text message and telephone. At 8:00 p.m., claimant and the manager communicated. Claimant learned the employer had

not received his text message from earlier that day, and the manager learned claimant had no internet service. Claimant stated he should be able to begin work at 9:00 p.m. when he could work at a friend's house that had internet service. Claimant did not contact the employer again until he began work at 10:45 p.m.

(5) The employer warned claimant that his March 30, 2014 conduct violated the employer's expectations and told him the employer expected him to maintain communication with the employer during his shift.

(6) On May 7, 2014, claimant was assigned to complete a software conversion project for a customer. The employer expected him to convert software on three workstations for the customer. He began work at 5:30 a.m., and completed installation of one of the workstations. The customer, a restaurant, asked claimant to stop the installation during lunch. Claimant told the customer he would call them back and ended the call. Claimant left a message for the customer's owner, but did not communicate with the customer or employer after he ended the call at 11:00 a.m. on May 7, 2014. Claimant went to sleep at approximately 11:30 a.m. The customer called claimant's manager at 4:00 p.m. and said it was dissatisfied because claimant had not called them back. The employer tried to contact claimant, and was unable to do so.

(7) The employer rescheduled the completion of the software installation for May 8, 2014, and claimant's manager completed the work on the two remaining workstations. After the manager completed the work, the manager contacted claimant and asked him why he did not contact the customer after ending the initial call with the customer. Claimant told the manager he had fallen asleep. The manager told claimant he was dissatisfied with claimant's performance.

(8) On May 10, 2014, claimant took a service call from a customer. Claimant fixed the customer's first issue regarding its power supply within thirty minutes. Claimant knew the initial power supply issue, once corrected, caused database issues. Claimant's manager checked the employer's computer system, and saw claimant was signed on to the system as having been working on the same case for four hours. The customer claimant was allegedly assisting during that time had made four additional calls for service assistance during the four hours claimant was assigned to their case. The manager contacted the customer. The customer told the manager that claimant fixed the first issue, but had not contacted the customer again since that time. The manager attempted to contact claimant via the employer's internet chat system, but claimant did not respond. The manager fixed the customer's remaining issues within approximately five minutes.

(9) The manager called claimant and asked claimant why he had not contacted the customer for the last 3.5 hours he had been signed on to the case. Claimant told the manager he was working on the case.

(10) On May 12, 2014, the employer discharged claimant for failing to complete his work tasks and remain in communication with the employer and customers during service calls.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had a right to expect claimant to complete his assigned tasks and maintain communication with the employer and customers he was assisting while working. On May 10, 2014, claimant consciously failed to stay in communication with both the employer and his customer while he was allegedly working on the customer's case for 3.5 hours. Had claimant been in communication with the customer and logged into the employer's system, he would have known that the customer made four additional service requests during that time, and that the manager had resolved the customer's issues before the manager called claimant. Moreover, claimant did not show why the problem he allegedly had been working on for 3.5 hours took the manager only five minutes to resolve. Because claimant showed indifference to the consequences of his conduct when he knew his actions would probably violate the employer's reasonable expectations about staying in contact with the employer and customers while completing a service call, claimant's failure to do so was, at best, wantonly negligent.

Claimant's conduct on May 10, 2014 cannot be excused as an isolated instance of poor judgment. 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). On March 30, 2014, claimant failed to adequately communicate to the employer that he was unable to work due to internet problems. Even when he finally made contact with the employer at 8:00 p.m. that day, he said he would begin work at 9:00 p.m., but again failed to communicate with the employer when he did not begin work until 10:45 p.m. While the cause of his inability to work at home was beyond his control, it was within claimant's control to notify the employer of his situation. On May 7, 2014, claimant failed to maintain contact with the employer and a customer during a software conversion assignment. Claimant knew the employer expected him to change software on three workstations. However, claimant did not maintain contact with the employer and customer to ensure he completed the work on the remaining two workstations. Claimant's conduct on March 30 and May 7 was, at best, wantonly negligent. Claimant's conduct on May 10, 2014 therefore was a repeated act and pattern of wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct on May 10, 2014 cannot be excused as a good faith error. Claimant understood the employer expected him to complete his assigned work, and maintain communication with the employer and customer during service calls. The employer reminded claimant on May 7 of the importance of maintaining communication with customers. Claimant's conduct was not the result of an error in his understanding of the employer's 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-20372 is affirmed.

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

DATE of Service: July 30, 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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