

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1660

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On August 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162034). Claimant filed a timely request for hearing. On October 8, 2014, ALJ Seideman conducted a hearing, and on October 14, 2014, issued Hearing Decision 14-UI-26877, affirming the Department's decision. On October 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Peacehealth employed claimant from February 22, 2002 to July 18, 2014 as a supply chain specialist and fork lift operator.

(2) The employer prohibited employees from using personal cell phones while on duty, and from using foul language at work.

(3) In February 2014, staff members told the employer they had seen claimant use his cell phone while on duty, and heard him use foul language while working. Claimant told human resources personnel he used his cell phone during work time as a calculator and to respond to personal text messages. Exhibit 2. Claimant also told the employer he used the word "fuck" regularly during work. On February 28, 2014, the employer gave claimant a written warning directing him to stop using his cell phone and foul language during work time. The employer also gave claimant a calculator.

(4) On July 7, 2014, claimant used his cell phone during work time, and claimant's lead worker reported the incident to human resources. On or about July 10, 2014, members of claimant's work team told human resources that claimant continued to use foul language regularly while working. On July 17, 2014, when the employer asked claimant if he continued to use "profanity" at work, claimant replied, "I should just say no." Exhibit 1.

(5) On July 18, 2014, the employer discharged claimant for using his cell phone while working, and for using foul language at work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant was discharged 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 also discharged claimant, in part, because he used his cell phone while working. The employer had a right to prohibit employees from using their personal cell phones while working. At hearing, claimant asserted that other employees, including managers, sometimes used their personal cell phones while on duty. Audio Record at 21:47 to 22:07. However, it is undisputed that claimant understood from the warning he received on February 28, 2014 that using his personal cell phone while working violated the employer's expectations. Thus, in using his personal cell phone while on duty on July 7, 2014, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore willfully violated those expectations.

The employer discharged claimant, in part, for using foul language while working. Claimant asserted at hearing that his coworkers, including managers, used foul language at work, and the employer's policy prohibiting the use of foul language, to be fair, should apply equally to all employees. Audio Record at 21:36 to 22:07. Here, again, it is undisputed that claimant understood the employer prohibited the use of foul language at work. The employer warned claimant on February 28, 2014 to "immediately stop using profanity during work time." Exhibit 2. In continuing to use foul language while working, 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 used his cell phone while on duty after being warned on February 28, 2014 that doing so was prohibited. He also continued to use foul language on a regular basis at work. The instances when claimant exercised poor judgment by using his cell phone and foul language at work were repeated acts, and not single or infrequent occurrences. Thus, claimant's conduct was not an isolated instance of poor judgment.

Claimant's conduct was not a good faith error. At hearing, claimant alleged other employees used their personal cell phones while working, and used foul language at work. However, the fact that other employees did not follow the employer's policies is insufficient to show that claimant sincerely believed, or had a factual basis for believing, that the employer would excuse or condone his conduct. The employer gave claimant a written warning in February 2014 that directed claimant to immediately refrain from using his cell phone and foul language during work. Claimant did not sincerely believe or have a factual basis to believe that the employer would excuse his conduct.

We therefore agree with the Department and the ALJ that the employer discharged claimant for misconduct, and that claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-26877 is affirmed.

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

DATE of Service: December 2, 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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