

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1693

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but her wage credits are not subject to cancellation (decision # 111623). Claimant filed a timely request for hearing. On October 16, 2014, ALJ R. Davis conducted a hearing, and on October 17, 2014 issued Hearing Decision 14-UI-27146, affirming the Department's decision. On October 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party applied for review of that portion of Hearing Decision 14-UI-27146 concluding that claimant's wage credits are not subject to cancellation. We therefore limit our review to whether the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) Terwilliger Plaza Inc. employed claimant as a caregiver for the employer's residents from January 31, 2013 to July 28, 2014.

(2) The employer prohibited caregivers from using residents' telephones.

(3) From June to September 2013, claimant used residents' telephones in their apartments on approximately five occasions to ask her husband to pick up their children after school when their childcare provider was unexpectedly unable to do so. Claimant worked in Salem, and her husband worked in Beaverton, where their children attended school. The residents allowed claimant to use their telephones to call her husband, and the calls lasted approximately two minutes each. They were long distance calls, and claimant knew the residents might incur small charges for the calls. The staff telephone was being used on each occasion. Claimant had seen other caregivers use residents' telephones. Claimant was not permitted to leave the residents unattended or neglect them while using the telephone.

(4) On July 25, 2014, claimant's supervisor asked claimant if she had used residents' telephones to call her husband's telephone number. Claimant told the employer she had.

(5) On July 28, 2014, the employer discharged claimant for using residents' telephones to make telephone calls.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, not 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for using residents' telephones to make personal calls. The employer had a right to expect claimant to refrain from using residents' telephones. In Hearing Decision 14-UI-27146, the ALJ concluded that claimant's use of the residents' telephones for personal long distance calls was wantonly negligent because claimant knew the calls cost the residents money, and thus should have known the employer expected her to refrain from making long distance calls from residents' telephones.¹ The ALJ found claimant's conduct cannot be excused as an isolated instance of poor judgment, because, having made calls on five separate occasions, her conduct was not isolated.² Nor was the ALJ persuaded that claimant's conduct was a good faith error.³ We disagree with the ALJ's conclusions that claimant's use of the residents' telephones for personal long distance calls was wantonly negligent, and that it cannot be excused as a good faith error.

The record fails to show that claimant knew or should have known through prior training, experience or warnings that using residents' telephones to make brief personal calls probably violated the employer's expectations. Nor do we find the employer's expectation that she refrain from using residents' telephones to make brief long distance calls so obvious that claimant knew or should have known as a matter of common sense. The record instead shows that claimant believed, and had a rational basis for believing, she was permitted to use residents' telephones for brief, emergency calls that did not cause her to neglect the residents' care. The residents permitted claimant to use their telephones, and claimant had seen other caregivers use residents' telephones. The staff telephone was being used, and claimant was not permitted to leave the residents to find another telephone. To the extent claimant erred in the belief that her calls were permissible, she erred in good faith. Good faith errors are not misconduct.

¹ Hearing Decision 14-UI-27146 at 3.

² *Id.*

³ *Id.*

Therefore, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 14-UI-27146 is set aside, as outlined above.⁴

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

DATE of Service: December 3, 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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⁴ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.