

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1714

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On September 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130056). Claimant filed a timely request for hearing. On October 9, 2014, ALJ Monroe conducted a hearing, and on October 16, 2014 issued Hearing Decision 14-UI-27035, affirming the Department's decision. On November 1, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Brown-Brown, Inc. employed claimant from December 1, 2010 to July 25, 2014 as a marketing analyst. Claimant's job duties did not require claimant to communicate with customers by email.

(2) The employer expected employees to refrain from using the employer's equipment and work time for personal use. Claimant understood that expectation.

(3) On or about July 23, 2014, the employer reviewed claimant's work email as part of a workplace investigation. The employer discovered that, during the course of his employment, claimant had sent more than 800 emails from the employer's computer to a personal friend, who was not the employer's employee or customer. Claimant had sent more than 50 of those emails during work hours on the morning of July 21, 2014, between 7:33 a.m. and 11:44 a.m. Claimant sent additional emails to another personal friend the same morning. None of the emails claimant sent to personal friends on July 21, 2014 were business-related.

(4) On July 25, 2014, the employer discharged claimant for using the employer's computer and work time for personal use.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ. 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).

The employer discharged claimant because he used the employer's computer and work time to send personal emails. The employer had a right to expect claimant to refrain from doing so. Claimant understood the employer's expectations.

On the morning of July 21, 2014, claimant sent more than 50 personal emails from his work computer during work time. Most of the emails were to one of claimant's friends. Claimant did not allege, and the record did not otherwise show, that claimant's friend was a customer. Claimant had sent more than 800 emails to the same friend since hire. Claimant testified that he had sent personal emails to his friends while he was at work, but that he did not recall sending the personal emails on July 21. Audio Record at 29:17 to 29:56, 32:33 to 32:48. Claimant also implied that he sent the emails to his friends for a business purpose, testifying that the employer encouraged employees to contact friends to obtain new customers, and that he had sent emails to all his friends during work "at one time or another" for that purpose. Audio Record at 30:43 to 32:30. However, we find it implausible that claimant sent more than 50 emails to one friend over a four-hour period on July 21 for the purpose of obtaining a new customer, without recalling having done so, and after having sent 750 prior emails to the same friend. In addition, the employer's marketing director testified that she had read the July 21 emails, and they were all personal in nature. Audio Record at 18:50 to 19:08. The preponderance of the evidence shows claimant used the employer's computer on July 21, 2014 to send personal emails to his friends during work time. In doing so, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore willfully violated the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an isolated instance of poor judgment, an act must be a single or infrequent occurrence rather than a repeated act. OAR 471-030-0038(1)(d)(A). Claimant sent more than 800 emails to a friend during the course of his employment, including 50 personal emails on July 21, 2014. Thus, claimant violations were not a single or infrequent occurrence, and are not excusable as an isolated act of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record fails to show claimant sincerely believed, and had a rational basis for believing, the employer would condone his numerous personal emails sent during work time.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-27035 is affirmed.

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

DATE of Service: December 15, 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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