

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1776

*Reversed
Disqualification*

PROCEDURAL HISTORY: On October 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 72252). The employer filed a timely request for hearing. On November 5, 2014, ALJ R. Frank conducted a hearing at which claimant failed to appear, and on November 7, 2014 issued Hearing Decision 14-UI-28392, affirming the Department's decision. On November 13, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Rory & Ryan II LLC employed claimant as a front desk agent at its hotel from May 1, 2012 to August 26, 2014. Claimant lived and worked for the employer in central Oregon.

(2) The employer had a written policy in its employee handbook stating that employees were prohibited from socializing with guests at work, and leaving their work area to visit guests in their rooms. Claimant received and signed a copy of the employee handbook when hired by the employer. Claimant understood the employer's policy and expectations.

(3) During the last two months of her employment, claimant engaged in a romantic relationship with a person who sometimes stayed at the employer's hotel. Claimant sometimes socialized with the guest at work, and left her work assignment and area to visit the guest in his room.

(4) Absent illness or other exigent circumstances, the employer expected employees to work as scheduled. The employer expected employees requesting time off from work to honestly state the reason for the request. Claimant understood those expectations.

(5) On August 22, 2014, asked to leave work early and for the next two days off from work, asserting that she was ill due to a change in her medications, and needed the time off to sleep while she adjusted to the change. On August 22 or 23, however, claimant drove to eastern Oregon to visit the guest with whom she had a romantic relationship, and then to Idaho.

(6) The employer discharged claimant for socializing with the guest at work and leaving her work area to visit the guest in his room, and for lying to the employer to obtain time off from work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant, in part, for socializing with a guest at work and leaving her work area to visit the guest in his room. The employer had a right to expect claimant to refrain from such conduct. Absent evidence to the contrary, we infer claimant understood that expectation from the policy stated in the employee handbook, which claimant had received and signed when hired by the employer. In Hearing Decision 14-UI-28392, the ALJ found that the employer did not receive reports from employees indicating that claimant violated that expectation until after claimant was discharged, and the employer therefore was unaware of any specific violations at the time of the discharge.¹ However, the employer's witness testified that the employer received the reports before claimant was discharged. Audio Record at 30:30. In either event, the reports are sufficient to show that claimant likely socialized with the guest at work and left her work area to visit the guest in his room. Claimant knew or should have known her conduct probably violated the employer's expectations, and her conscious decisions to engage in such conduct demonstrated indifference to the consequences of her actions. Claimant's conduct therefore was, at best, wantonly negligent.

The employer also discharged claimant for lying to the employer to obtain time off from work. Absent illness or exigent circumstances, the employer had a right to expect claimant to expect claimant to work as scheduled, and to honestly state the reason for her request for time off. Absent evidence to the contrary, we infer that claimant understood those expectations as a matter of common sense. In Hearing Decision 14-UI-28392, the ALJ concluded that the employer failed to show that claimant lied when requesting time off from work from August 22 through 24, 2010.² However, claimant asserted to the employer that she was ill due to a change in her medications, and needed the time off to sleep while she adjusted to the change. In fact, claimant used the time off to drive to eastern Oregon to visit the guest with whom she had a romantic relationship, and then to Idaho. Claimant knew or should have known

¹ Hearing Decision 14-UI-28392 at 2, 4.

² *Id.* at 4.

her lying to the employer to obtain time off from work probably violated the employer's expectations, and her conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions. Her conduct therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as 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). The record shows that during claimant's last two months of claimant's employment, she likely socialized with the guest at work and left her work area to visit the guest in his room on more than one occasion. Claimant also exercised poor judgment in lying to the employer to obtain time off from work. Claimant's exercise of poor judgment therefore was a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. The record fails to show she sincerely believed, or had a rational basis for believing, her conduct complied with the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-28392 is set aside, as outlined above.

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

DATE of Service: December 18, 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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