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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1860

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130030). Claimant filed a timely request for hearing. On November 17, 2014, ALJ Micheletti conducted a hearing, and on November 20, 2014 issued Hearing Decision 14-UI-29100, reversing the Department's decision. On December 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to introduce as new evidence a copy of its handbook that claimant acknowledged having received on January 7, 2012. The employer also asserted new facts in its written argument that it apparently was seeking to introduce as additional evidence. The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and the employer did not explain why it did not offer that information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) US Off-Track employed claimant as a mutual agent in its call center from March 20, 2009 until September 26, 2014. Claimant answered phone calls from people placing bets on horse and dog races.

(2) The employer had a written policy that required employees to turn off and stow away personal cell phones when they were at their workstations and in other locations where incoming calls might disrupt the work flow, and prohibited employees from using their personal cell phones at all such locations. The employer's written policy also stated that personal cell phone use during work hours without the permission of a supervisor was prohibited, including for personal emergences. Despite the language of

its written policy, the employer allowed employees to place their cell phones on "silent mode" rather than turning them off, and to use their cell phones on the employer's premises or outside when they were on breaks. Audio at ~9:18, ~13:12. Claimant understanding of the employer's policy was that it prohibited cell phone use at workstations, allowed cell phones at workstations if they were stored off the desktop and set to "vibrate," and allowed cell phone use outside the employer's premises. Audio at ~15:11, ~15:38, ~16:10.

(3) On June 30, 2009, the employer gave claimant a verbal wanting for sending a text message from her cell phone at her workstation. The warning stated that "cell phone use while you are not on break or lunch" violated the employer's cell phone policy. Exhibit 1 at 41. On October 26, 2009, the employer gave claimant a verbal warning for using her cell phone at her work station by sending a text message. The warning stated that claimant had violated the employer's cell phone policy, "which is in place to avoid making mistakes while at your station." Exhibit 1 at 39. On March 14, 2010, the employer gave claimant a verbal warning for using her cell phone "while at your [work]station." Exhibit 1 at 37. That warning made the same reference to the purpose of the employer's cell phone policy as in the October 29, 2009 warning. Exhibit 1 at 37. On January 27, 2012, the employer gave claimant a verbal warning for reading a text message on her cell phone at her workstation. The warning stated that "[i]f you need to use your cell phone, please do so on your lunch or break, in the kitchen or outside." Exhibit 1 at 35. On December 17, 2013, the employer gave claimant a final written warning for composing a text message on her call phone while at her work station. This warning stated only that claimant's behavior was a "violation of the cell phone policy." Exhibit 1 at 24.

(4) Before September 25, 2014, claimant had observed different coworkers on several occasions leave their workstations to go outside the employer's premises to return cell phone calls that they had received. Claimant also had gone outside to return calls received on her cell phone while she was at her workstation. Audio at ~20:06.

(5) On September 25, 2014, claimant received a cell phone call from her adult daughter when she was on a break. The daughter was "frantic." Audio at ~ 17:24. The daughter told claimant that she and claimant's four year grandson had been stopped in a traffic tie-up on the freeway for over an hour as the result of a truck fire, traffic remained stalled and a warning light on the car's instrument panel had been indicating for some time that the gasoline level was low. The daughter was concerned that she was going to run out of gasoline and that she and her young son were going to be stranded on the freeway. Claimant told her daughter to call her back if that happened and the daughter could not reach anyone else, and claimant would help her. Claimant then went back to her work station with her cell phone set to vibrate if an incoming call was received and placed the phone in her purse. Claimant did not think to obtain permission from a supervisor to receive a call from her daughter because it was an emergency.

(6) On September 25, 2014, when her shift was nearly over, claimant was on her work phone with a bettor. Claimant heard the cell phone in her purse vibrate but did not look at the phone or take it out of her purse. Claimant continued with and completed that business call. Claimant then put her work phone on "not ready" mode, indicating that she was away from her work station and not able to receive calls, left her workstation with her cell phone and went outside to determine if the call she had not answered was from her daughter. It was, and claimant's daughter had left a voicemail message stating that her car had run out of gasoline and she and her young son were stranded on the freeway. Claimant then returned her daughter's call and said she would come to help. The employer's general manager saw

claimant using her cell phone outside during this time. Claimant was outside the workplace only long enough to have the brief phone conversation with her daughter. Claimant immediately returned to her workstation and logged out from work approximately five minutes before her shift was scheduled to end. Claimant then drove to her daughter's location to assist her and her grandson.

(7) On September 26, 2014, the employer discharged claimant for violating its cell phone policy by returning her daughter's second call to September 25, 2014 when she did not have a supervisor's permission to receive or return that call.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to show by a preponderance of the evidence that claimant engaged in unexcused misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As can best be discerned from the hearing record, it was the employer's position that claimant should be imputed to have been aware of all aspects of its cell phone policy, as written, and required to comply with all of them. However, the issue is not limited to the express written terms of the employer's policy and what it allowed and prohibited, but what claimant reasonably should have understood of that policy. Under any reasonable construction of the employer's cell phone policy, as written, claimant did not need supervisor approval before her daughter could permissibly leave a voicemail message on her personal cell phone. To the extent that the employer construed its own policy to require prior supervisor approval before returning cell phone calls about emergencies, if returning the call was otherwise allowed, the policy was unreasonable. We will not find that claimant's failure to abide by that aspect of such a construction of the employer's policy was misconduct. *See* OAR 471-030-0038(1)(d)(C) (conscious decision not to comply with an unreasonable employer policy is not misconduct). Although claimant's cell phone was not off when claimant was at her work station during the mid-afternoon of September 25, 2014 awaiting a possible call from her daughter, but was set to "vibrate," the employer did not rule out that claimant's cell phone was on the "silent mode" that the employer's witness testified was equivalent to turning the phone "off." Audio at ~13:12. Since it was not disputed that on September 25, 2014, when claimant's phone vibrated, the cell phone was stowed away in her purse and she did not access the cell phone to look at it until she was outside the workplace, nothing about claimant's behavior at her work station could possibly constitute a violation of the employer's cell phone policy, as reasonably construed.

Despite its strict language, the employer interpreted its cell phone policy to allow personal cell phone use on its premises, away from workstations, during breaks and while outside. Audio at ~9:18, ~13:12. The terms of the warnings that claimant received before September 25, 2014, which were likely the principal means by which the employer's policy was communicated to claimant, also strongly suggest that the focus of the policy was prohibiting personal cell phone use at workstations, and tend to corroborate claimant's stated understanding that the policy was limited to the actual personal use of cell

phones at workstations. Exhibit 1 at 24, 35, 37, 39, 41; Audio at ~21:30. The employer's written policy did not, at least by its literal terms, prohibit an employee from leaving the workplace to return a cell phone call that the employee received during a work period. Exhibit 1 at 3. Notably, the employer did not dispute claimant's contention that she and other employees had on past occasions gone outside to return incoming calls to their cell phones while on duty at their stations and without apparent supervisory approval. Audio at ~20:06. Nor did the employer dispute claimant's contention that the employer permitted employees to place their work phones on "not ready" for brief periods to allow them to leave their workstations for personal reasons, such getting food or beverages, using the restroom, *etc*. Audio ~16:56. Under these circumstances, claimant's belief that was permitted to leave the workplace briefly, even if she was not on break, to look at her cell phone to determine the source of an incoming to that phone and to return it, if necessary, was not implausible. Equally plausible was claimant's belief that the employer would permit her to leave the workplace briefly to return a call to her daughter who was having unanticipated difficulties and which claimant perceived as an emergency situation. Even if claimant violated the literal terms of the employer's cell phone policy by leaving her workstation and going outside to use her cell phone on September 25, 2014, claimant's behavior was excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). *See Goin v. Employment Department*, 203 Or App 758, 126 P3d 758 (2006) (behavior that otherwise would be misconduct is excused as a good faith error if claimant had an honest, albeit mistaken, belief that behavior would be allowed, had no fraudulent motive and under the known circumstances, claimant was not on notice that the belief required further investigation before acting on it). Here, the employer did not suggest that claimant's stated belief was implausible, that claimant had a fraudulent intention or that there were any circumstances known to claimant that required her to investigate further before concluding that the employer would allow her to deviate from its written cell phone policy in the way that she did and under the circumstances that she did on September 25, 2014. On this record, claimant's behavior either did not constitute a wantonly negligent violation of the employer's standards or, if it did, it was excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b).

The employer did not meet its burden to show, more likely than not, that claimant engaged in misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-29100 is affirmed.

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

DATE of Service: <u>January 28, 2015</u>

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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