

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0136

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 92806). The employer filed a timely request for hearing. On January 29, 2015, ALJ R. Davis conducted a hearing, at which claimant failed to appear, and on January 30, 2015, issued Hearing Decision 15-UI-32702, concluding the employer discharged claimant for misconduct. On February 9, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Red Lion on the River employed claimant, last as a lobby attendant, from December 29, 2004 to October 23, 2014.

(2) The employer prohibited employees from using employer phones for personal calls during work hours, unless the employer specifically gave the employee permission to use an employer phone in the housekeeping office. Employees were never granted permission to use the phone at the front desk or in the purchasing area. The employer's personal phone call policy was set forth in writing, a copy of which claimant acknowledged receipt of at hire. Claimant was aware of the employer's expectations.

(3) Between March 5 and March 9, 2014, claimant used an employer phone on the loading dock and in the purchasing area for personal calls during work time. On March 9, 2014, the employer warned claimant in writing that any further violation of the employer's policy regarding personal phone calls could result in termination of her employment.

(4) On October 18, 2014, the assistant director of housekeeping observed claimant during her shift talking on a telephone in the purchasing area of the hotel during. When she confronted claimant about why she was using the phone, claimant stated, "I know that I'm not supposed to but I needed to check to see if my daughter had made my doctor's appointment." Audio Record ~ 8:00 to 9:35. She also admitted that she had made a call to her husband to let him know when to pick her up after work.

(5) On October 23, 2014, the employer discharged claimant for violating its personal phone call policy on October 18, 2014.

CONCLUSIONS AND REASONS: We agree with 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 the employer's interest. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for making personal phone calls on an unauthorized employer phone during her work shift on October 18, 2014. When confronted, claimant admitted she knew she was “not supposed to” use the employer phone in question for personal reasons but did so anyway for the reasons she explained. Claimant’s violation of the employer’s personal phone call policy was willful.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment or good faith error. 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’s conduct was not isolated. Claimant twice used employer phones for personal reasons without authorization between March 5 and March 9, 2014 and claimant acknowledged that she knew her personal calls violated the employer’s policy. Nor can claimant’s conduct be excused as a good faith error. The record fails to show that she sincerely believed, or had a rational basis for believing, the employer would condone her use of an unauthorized employer phone for personal calls during her shift on October 18 after being given numerous warnings about such conduct.

The employer discharged claimant for misconduct under ORS 657.176(2) and claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-32702 is affirmed.

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

DATE of Service: March 25, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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