

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0293

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for an isolated instance of poor judgment, and not misconduct (decision # 92432). The employer filed a timely request for hearing. On March 12, 2015, ALJ Frank conducted a hearing, and on March 13, 2015 issued Hearing Decision 15-UI-35120, concluding the employer discharged claimant for misconduct. On March 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) AT-T Mobility services LLC employed claimant as a retail sales consultant from November 8, 2002 to January 16, 2015.

(2) The employer's written code of conduct prohibiting employees from engaging in conflicts of interest, failing to follow procedures, providing poor customer service, and processing transactions in the financial interest of the employee, and not the customer. Claimant received annual training on the employer's code of conduct.

(3) In 2012, a customer purchased a \$700 computer tablet from the employer. The customer also purchased a protection plan, which allowed the customer to obtain a replacement tablet if the purchased tablet malfunctioned after the warranty expired.

(4) In June 2014, the customer brought the purchased tablet to the employer's store. The customer told claimant that tablet continued to malfunction despite his attempts to resolve issues through technical support. The tablet's warranty had expired. In such a situation, the employer expected claimant to advise the customer to obtain a replacement tablet through the protection program. However, it was going to cost the customer \$200 to replace the tablet through the protection plan. Claimant therefore attempted to repair the tablet, but was unable to do so.

(5) With the customer's permission, in August 2014, claimant kept the tablet at the store to continue attempting to repair the tablet in her spare time. With the customer's permission, claimant took the tablet home in October 2014 and continued attempting to repair the tablet in her spare time. One of claimant's managers was aware she had the tablet, and claimant did not believe her conduct violated the employer's expectations.

(6) On November 15, 2014, claimant returned the still malfunctioning tablet to the customer after her assistant manager told her that the customer had visited the store, and wanted the tablet back. The customer thanked claimant for attempting to repair the tablet. On November 30, 2014, the customer's wife complained to the employer about claimant's failure to return the tablet sooner. The employer discharged claimant, in part, for attempting to repair the tablet in her spare time instead of advising the customer to obtain a replacement tablet through the protection program.

(7) On December 16, 2014, another customer told claimant that she wanted to upgrade her son's computer tablet. Although the customer was an authorized user on her son's account, her son was the only account holder. Claimant determined that her son's account was not yet "out of contract," and that she therefore would have to activate a new line of service for the new tablet until the contract expired. Transcript at 33. Claimant knew she was prohibited from activating a new line on an account without the account holder's authorization. However, she wanted to help the customer and her son, and therefore activated a new line of service for the new tablet. The employer discharged claimant, in part, for her conduct on December 16, 2014.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant for two isolated instances of poor judgment, and not 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).

In Hearing Decision 15-UI-35120, the ALJ concluded that claimant's conduct during the two incidents resulting in her discharge was wantonly negligent because, even if she was attempting to help the customers, that "did not entitle her to substitute her own judgment for that of the employer and disregard any policy she considered inconvenient."¹ The ALJ further concluded that because the incidents were

¹ Hearing Decision 15-UI-35120 at 4.

“repeated,” they could be excused as an isolated instance of poor judgment, and that claimant “should” not have believed in good faith the employer would condone her conduct.²

We agree with the ALJ that claimant’s conduct on December 16, 2014 was a wantonly negligent violation of the employer’s expectations. At hearing, claimant testified that she knew activating a new line on an account without the account holder’s authorization violated the employer policy and procedure. Transcript at 34. Thus, although claimant was attempting to help a customer and the account holder on December 16, 2014, she knew or should have known that activating a new line on the account holder’s account without his authorization probably violated the employer’s expectations. Claimant’s conscious decision to violate the employer’s policy and procedure demonstrated indifference to the consequences of her actions, and therefore was wantonly negligent.

We also agree with the ALJ that claimant’s conduct during the prior incident was a wantonly negligent violation of the employers’ reasonable expectations. Claimant should have known as a matter of common sense that spending five months attempting to repair the first customer’s tablet in her spare time probably violated the employer’s expectations. Claimant’s conscious decision to engage in such conduct demonstrated indifference to the consequences of her actions, and therefore was wantonly negligent.

However, we disagree with the ALJ and conclude that the employer discharged claimant for two isolated instances of poor judgment, and not misconduct. An act is isolated if the exercise of poor judgment is 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). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A).

In the present case, the record fails to show that claimant repeatedly attempted to repair malfunctioning products in her spare time, or that she repeatedly activated new lines on accounts without the account holders’ permission. The record instead shows only two unrelated instances of poor judgment, several months apart, during claimant’s 12 years working for the employer. Although claimant’s exercise of poor judgment was not a single occurrence, it was an infrequent one, and did not amount to a pattern of willful or wantonly negligent behavior. Finally, claimant’s conduct did not violate the law, was not tantamount to unlawful conduct, and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship. Nor did the employer assert, or does the record show, that claimant’s conduct otherwise made a continued relationship impossible.

We therefore conclude that the employer discharged claimant for two isolated instances of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-35120 is set aside, as outlined above.

² *Id.*

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

DATE of Service: May 5, 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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