

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0394

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135910). Claimant filed a timely request for hearing. On March 18, 2015, ALJ Han conducted a hearing, and on March 19, 2015, issued Hearing Decision 15-UI-35393, affirming the Department's decision. On April 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant contended that the ALJ erred in considering the employer's assertion that it discharged claimant, in part, for an unauthorized order of a personal item using the employer's business account, because that basis for her discharge was not mentioned in decision # 135910, and "so it was technically not on appeal." Written Argument at 3-4. Claimant's argument is without merit. The Notice of Hearing stated that the issues to be considered at hearing were, "Shall claimant be disqualified from the receipt of benefits because of a separation, discharge suspension or voluntary leaving from work?" Record Document, Notice of Hearing. The ALJ was required to conduct a full inquiry into the facts necessary for consideration of that issue, and not merely the findings of fact set forth in decision # 135910. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986).

EAB considered the remainder of claimant's written argument to the extent it was based on the record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Sky Heating and Air Conditioning Inc. employed claimant, last as its office manager, from December 13, 2012 to December 30, 2014.

(2) As office manager, claimant's duties included preparing the employer's payroll, entering rebate information on manufacturer online sites, and ordering office supplies from Office Depot, with whom the employer had a business account. During the "middle of 2014", one of the employer's owners (Smith) came across an Office Depot invoice that he questioned claimant about. Transcript at 109. The invoice contained a purchase order for an item that was for personal, rather than company, use that claimant ordered using an Office Depot discount coupon. After claimant explained to Smith that

through the use of the coupon there was no charge to the employer, Smith told her, “I do not want anything else charged to the company...[that is] not used for the company. We should not be bringing these items in because I cannot accurately verify that they are free.” *Id.* Claimant was aware of the employer’s expectation that she refrain from ordering personal items using the employer’s Office Depot account.

(3) In October 2014, while claimant was off work sick, Smith accepted a package from Office Depot that contained a laptop computer. When Smith questioned the employer’s service manager about the laptop delivery, she told him, “[Claimant] said that I’m not supposed to tell you and that I was supposed to give it directly to her.” Transcript at 37-38. When claimant returned to work, Smith questioned her about the laptop and claimant responded, “[O]h, I forgot to tell you I was ordering that for my daughter.” Smith again told claimant “purchases on Sky Heating company accounts are not for any sort of personal use. That is illegal and you cannot do that.” *Id.* Claimant gave Smith a check for the cost of the laptop.

(4) On December 29, 2014, after claimant called in sick, Smith accepted an Office Depot package delivered to the office that contained a barbecue tool set that was not for company use and that claimant had ordered without authorization.¹ On December 30, 2014, Smith discharged claimant, in part, for the unauthorized order of a barbecue tool set for personal use using the employer’s account.²

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

¹ In written argument, claimant asserts the evidence shows the “alleged unauthorized purchase” of the barbecue tool set did not come to the employer’s attention until after claimant was terminated and therefore could not have been a basis for her discharge. Written Argument at 4. However, although claimant presented hearsay evidence that she was told by the service manager on December 30 before she was discharged that the service manager was unaware of any recent Office Depot deliveries, Smith testified that he “intercepted” the delivery at the employer’s office before he made the decision to discharge claimant. Accordingly, on this record, we find it likely that the service manager was unaware that the delivery had been made.

² Smith also discharged claimant for paying herself for unauthorized overtime after being instructed not to do so and for statements she made to him the day before about the status of rebate information she had been instructed to enter onto a manufacturer site before \$7,000 in rebates expired. However, because we conclude that claimant’s unauthorized order of a personal use item using the employer’s account constituted misconduct, as described below, we need not, and do not, address the employer’s other reasons for discharging claimant.

As a preliminary matter, we agree with the ALJ's implied finding that claimant was not a credible witness. Claimant's testimony that "every order was authorized by Travis [Smith]" was internally inconsistent with her testimony that he specifically questioned her about her order of a personal use item that appeared on an Office Depot invoice he came across in the middle of 2014 as well as her order of the personal laptop computer from Office Depot delivered in October she was required to reimburse the employer for. *Compare*, Transcript at 38, 88, 109. Her explanation to Smith when he questioned her about the laptop order, that she "forgot" to tell him about it, was inconsistent with her undisputed instructions to the service manager that upon the computer's delivery she was "not supposed to tell [Smith]" and "was supposed to give it directly to [claimant]." Transcript at 37-38. When specifically asked by Smith at hearing if she received his authorization prior to ordering the laptop on the employer's account, claimant's response that "we discussed it" was evasive. Transcript at 93, 102. Because claimant was not a credible witness, we found facts in dispute in accordance with undisputed evidence.

The employer had a right to expect claimant to refrain from ordering items "for any sort of personal use" using the employer's Office Depot account. Claimant did not dispute that Smith gave her that specific instruction in October 2014 after objecting to her order of a personal laptop computer using the account. Claimant violated that expectation in December 2014 when she ordered a barbecue tool set from Office Depot using a discount coupon for the office. Claimant did not assert or show that the employer ever put on barbecues for its employees and her assertion that she ordered the item was for company use because "you know, I used cake pans at the office" was unpersuasive. Transcript at 90. Claimant's testimony showed that she consciously used the employer's discount when ordering the tool set after receiving a clear warning against doing so for items "for any sort of personal use" in October. We therefore conclude that claimant willfully violated the employer's expectations.

Claimant's December conduct cannot be excused as an isolated instance of poor judgment. An act is isolated only 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). Claimant also exercised poor judgment in October 2014, when she ordered an expensive laptop computer for her daughter using the employer's business account without obtaining any prior authorization. Claimant's instruction to the service manager to refrain from notifying the owner of the order, and to notify only her when it came in, shows she knew her conduct violated the employer's expectations, and therefore establishes that she willfully violated those expectations. Claimant's exercise of poor judgment in December therefore was a repeated act, and cannot be excused an isolated instance of poor judgment.

Claimant's conduct in ordering the barbecue tool set for personal use using the employer's account cannot be excused as a good faith error. Claimant received a clear warning in October that "purchases on Sky Heating company accounts are not for any sort of personal use." The record fails to show claimant sincerely believed or had a factual basis for believing the employer would tolerate such conduct.

The employer discharged claimant for misconduct. 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-35393 is affirmed.

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: June 9, 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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