

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1074

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 73405). Claimant filed a timely request for hearing. On August 31, 2015, ALJ M. Davis conducted a hearing, and on September 1, 2015, issued Hearing Decision 15-UI-43769, reversing the Department's decision and concluding that the employer discharged claimant, but not for misconduct. On September 8, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wildhorse Resort and Casino employed claimant as a radio security officer from October 27, 2014 until July 10, 2015.

(2) The employer's policies prohibited security officers from personal use of their cell phones during work hours. The employer's policies also prohibited security officers from contacting surveillance operators, who were responsible for maintaining surveillance over all activity in the employer's casino and at its resort.

(3) On November 30, 2014, claimant's supervisor counseled him about failing to promptly report to his duty station. Claimant, who worked the graveyard shift, would often clock in for his shift and then go to the break room for a cup of coffee and some cereal before going to his duty station. Claimant's supervisor told claimant that he was expected to report to his duty station immediately after he clocked in for his shift.

(4) On March 24, 2014, claimant's supervisor orally reprimanded him for three incidents of inappropriate behavior. The supervisor told claimant that he had violated the employer's expectations by: taking his breaks with his girlfriend in an area other than the designated break room; making a sexually suggestive remark to a female coworker; and engaging in an angry confrontation with another security officer. Transcript at 12.

(5) On May 22, 2015, claimant's supervisor suspended him without pay for a number of incidents of inappropriate behavior that occurred between May 9 and May 18, 2015. Among the behaviors for which claimant was disciplined were: speaking disrespectfully to his supervisors, socializing with coworkers during his work shift, and refusing to escort an employee to deposit cash in the employer's "vault." Transcript at 15. Claimant appealed this disciplinary suspension to the employer's director of security.

(6) By letter dated June 11, 2015, the director of security overturned claimant's suspension and reinstated his pay for the two days he was suspended.

(7) On July 6, 2015, the employer's director of surveillance told claimant's supervisor that claimant had been observed resting (and possibly sleeping) in one of the employer's trucks. The supervisor spoke to claimant and told him that he needed to be patrolling the employer's property on a bicycle, not resting in the truck. After his supervisor spoke to claimant, claimant sent the following text message to a surveillance operator, a personal friend with whom he regularly exchanged text messages during work hours: "I knew you dined me out." (By stating that the surveillance operator "dined me out," claimant meant that the employee told claimant's supervisor that he was in the truck). Transcript at 31. Claimant intended the text to be a joke. Claimant's supervisor subsequently learned about this text.

(8) On July 10, 2015, the employer discharged claimant for violating its policies by using his personal cell phone during his work shift, and for contacting a surveillance operator.

CONCLUSION AND REASONS: We agree with the ALJ. We conclude that 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. 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).

The employer discharged claimant, a security officer, for using his personal cell phone during his work shift to send a message to a surveillance operator on July 6, 2015, in violation of its policies that prohibited security officers from using personal cell phones while on duty and also prohibited them from contacting surveillance operators. The record does not show, and the ALJ did not inquire, whether claimant knew about the employer's policy prohibiting security officers from contacting surveillance operators. Claimant's admission that "I shouldn't have been on my cell phone" on July 6¹, however, indicates he was aware of the employer's policy regarding cell phone usage while on duty. By sending a text message on his cell phone on July 6, claimant demonstrated a conscious indifference to one of the employer's policies. His behavior was at least wantonly negligent.

¹ Transcript at 23.

Claimant's conduct must be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b), however. Conduct is considered an isolated instance of poor judgment if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Although the employer disciplined claimant by suspending him without pay for a number of incidents that occurred in May 2015, this discipline was overturned and claimant's salary was reinstated for the two days he was suspended. The record is silent regarding the reason why the employer decided to rescind the suspension. We reasonably infer, however, that the employer concluded that claimant did not engage in the conduct for which he was disciplined; as a result, these May incidents cannot be considered part of a pattern of other willful or wantonly negligent conduct. Claimant did engage in inappropriate behavior prior to his discharge. In November 2014, his supervisor warned him that needed to promptly report for duty after he clocked in, and in March 2015, his supervisor orally reprimanded him for making a sexually suggestive remark to a female security officer, angrily confronting another security officer, and taking too breaks in areas in which he was not supposed to take breaks. Finding of Fact 4. We conclude that claimant's behavior in November 2014 was too distant in time from the conduct for which he was discharged in July 2015 to form part of a pattern of willful or wantonly negligent conduct. In regard to the March incidents, there is insufficient evidence in the record to demonstrate that they resulted from claimant's conscious disregard of the employer's reasonable expectations and therefore constituted willful or wantonly negligent behavior. Because the record fails to show that July 6 incident which resulted in claimant's discharge was part of a pattern of other willful or wantonly negligent conduct, we conclude that it was an isolated instance of poor judgment.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-43769 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 1, 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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