

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1344

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163155). Claimant filed a timely request for hearing. On November 4, 2015, ALJ Wipperman conducted a hearing, and on November 9, 2015 issued Hearing Decision 15-UI-47388, affirming the Department's decision. On November 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent it was based on information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The Oregon Employment Department employed claimant from January 22, 2008 to July 22, 2015.

(2) Claimant generally worked as a business and employment specialist. Claimant's standard job duties included accepting calls from and referrals to contact Vietnamese-speaking customers. The employer paid claimant a wage differential because of her contact with Vietnamese-speaking customers.

(3) In March 2015, claimant accepted a developmental opportunity with expanded job duties. She knew she was still expected to complete her regular duties, including contacts with Vietnamese-speaking customers. Claimant's workload increased, and claimant had difficulty handling her new responsibilities in addition to the Vietnamese-speaking customer calls she was assigned. Claimant felt overwhelmed by her duties and thought the developmental duties were a "bad match." Audio recording at ~28:45. She chose not to discuss her difficulties with a supervisor or ask for assistance or to be

reassigned. Claimant was concerned that the supervisor would view her inability to handle the volume of work in a negative light.

(4) Over a two-month period beginning in April 2015, claimant intentionally disconnected calls with 172 Vietnamese-speaking customers. Claimant knew at the time she disconnected the calls that the employer expected claimant not to do so.

(5) In June 2015, claimant's supervisor removed her from the developmental opportunity project and returned her to her regular duties because claimant was under investigation. Claimant felt her work performance improved after she returned to her regular duties.

(6) On July 22, 2015, the employer discharged claimant for disconnecting calls. The employer considered lesser discipline, it decided to discharge claimant. Although claimant had apologized and promised not to disconnect calls in the future, the employer determined discharge was appropriate because claimant held a position of public trust, had disconnected a high volume of calls, and knew she was violating the employer's expectations when she disconnected the calls.

(7) Claimant subsequently filed a grievance about her discharge, and, in October 2015 settled the grievance with the employer with the condition that claimant was permitted to submit a resignation in lieu of termination.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Claimant and the employer agreed through a grievance settlement to characterize claimant's work separation as a resignation. However, at the time the employment relationship between claimant and the employer ceased, claimant was willing to continue working for the employer, but the employer would no longer allow her to do so. Therefore, for purposes of making an unemployment insurance benefit determination, claimant's work separation was a discharge.

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) 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.

The employer had the right to expect claimant, an employee whose duties included accepting calls from Vietnamese-speaking customers, to refrain from disconnecting those calls. Claimant violated that expectation on 172 occasions in a two-month period. Claimant argued that she disconnected the calls because she was overwhelmed by her expanded duties, did not have time for the calls, and felt she could not approach her supervisor. However, claimant also specifically testified at the hearing that she intentionally disconnected the calls even though she knew she should not have done so. She was, therefore, conscious of her conduct, and knew or should have known at the time of the conduct that it would violate the employer's expectations. Her conduct amounted to 172 separate wantonly negligent violations of the employer's expectations.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Although she disconnected the 172 calls in order to have time to devote to her other job duties, claimant knew at the time that she was violating the employer's expectation that she continue to take calls with Vietnamese-speaking customers. She also knew that the employer was paying her a wage differential to do so. Claimant did not claim that she sincerely believed the employer would consider her conduct acceptable, nor did she have any reasonable basis for believing that the employer would condone it.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered "isolated," it must have been a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). Here, however, claimant's conduct consisted of 172 separate wantonly negligent act, each of which was conscious and involved poor judgment. Her conduct was not isolated.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-47388 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 18, 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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