

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0228

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110107). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Shoemake conducted a hearing, and on February 23, 2016, issued Hearing Decision 16-UI-53595, affirming the Department's decision. On February 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) The Killers employed claimant from December 19, 2013 to November 24, 2015 as a secretary.

(2) The employer had a written policy prohibiting employees from using electronic devices, including the employer's computers, for personal use except during break or lunch times. Claimant received a copy of the policy at hire.

(3) During 2015, the employer's office manager warned claimant verbally for her excessive personal use of electronic devices at work. On March 24, 2015, the employer's operations manager (an owner), gave claimant written warnings stating that claimant was prohibited from using electronic devices, including computers, for personal use at work except during designated breaks and lunch time. After the warnings, claimant stopped bringing her personal tablet computer to work.

(4) The employer's busiest time of year was from March through September. During October and November 2015, claimant used the employer's computer for personal matters throughout the day, whenever she considered work to be "slow." Audio Record at 24:35 to 24:43.

(5) On November 24, 2015, the operations manager found hundreds of personal files on claimant's work computer showing claimant used the computer for personal use at many times of the day other than lunch or break times.

(6) On November 24, 2015, the employer discharged claimant because she used the employer's computers during work time in violation of its policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for violating its policy prohibiting the personal use of computers during work time. Although the employer gave claimant its written policy prohibiting such conduct at hire, claimant asserted that she did not understand she was prohibited from using the employer's computer for personal use because the wife of one of owners told claimant she could use the employer's computers for personal use during "down time." Audio Record at 20:27 to 20:40. Claimant considered "down time" to be most of the work day during the months of October through February, when the employer's business was less busy. *Id.* However, the record shows that whatever uncertainty claimant may have had about the employer's policy, the employer clearly informed her through verbal and written warnings that she was prohibited from using computers and other electronic devices for personal use, except during her lunch and rest breaks. Claimant showed she understood the warnings because she stopped bringing her personal tablet computer to work in response to the warnings.

Despite the warnings, claimant used the employer's computer for personal use during all hours of the work day, when she allegedly had little work to do. Audio Record at 23:32 to 23:55. The employer's operations manager testified that there were no "slow times" when claimant had no work to do because the office was always busy, and claimant was often behind in her work. Audio Record at 31:47 to 34:19. Moreover, given the extent of claimant's personal use of the computer, as revealed by the hundreds of documents on the employer's computer, we find claimant's contention that she believed the employer permitted such prolonged use "to kill the time," improbable. *See* Audio Record at 24:04 to

24:11. We conclude that it was more likely than not that claimant knew or should have known that the employer prohibited her from using the employer's computer for personal matters during work time, and that she violated this expectation repeatedly during October and November 2015. Claimant's conduct was, at a minimum, a wantonly negligent violation of the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For claimant's exercise of poor judgment to be considered an isolated instance, it must have been 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). The record shows that claimant's conduct consisted of repeated instances involving her use of poor judgment many times a day spanning at least October and November 2015. Her conduct was therefore not isolated.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Given the extent of claimant's misuse of the employer's time and computer, claimant could not have reasonably believed that the employer would condone her conduct. Therefore, her violations were not the result of a good faith error in her understanding of the employer's expectation.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-53595 is affirmed.

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

DATE of Service: March 24, 2016

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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