

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0348

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 12, 2016 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141755). Claimant filed a timely request for hearing. On March 15, 2016, ALJ Vincent conducted a hearing, and on March 21, 2016 issued Hearing Decision 16-UI-55488, affirming the Department's decision. On March 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant filed a written argument, but failed to certify that he provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Deschutes County employed claimant from July 6, 1998 until January 5, 2016, last as a corrections deputy at its jail. Claimant was assigned to the jail's work center, which housed sentenced inmates and inmates who were allowed to work off the jail premises.

(2) The employer expected claimant to refrain from possessing his personal cell phone while on duty on the jail premises unless he had the employer's permission. The employer also expected claimant to refrain from disclosing information about anticipated jail operations or the movements of particular inmates unless the person to whom the disclosure was made had a legitimate professional reason to know the information. Claimant understood the employer's expectations.

(3) On January 13, 2015, claimant was on duty when a high profile inmate was assaulted and needed to be transported to a local hospital emergency room for treatment. Claimant phoned an acquaintance, who was a physician and who happened to work in that emergency room, and told him about the upcoming transport of the inmate. The physician was also a personal friend of the inmate who was taken to the hospital. When claimant placed the call, the physician was not on duty, and had not been involved in the inmate's medical care. At that time, claimant also knew that another deputy had already contacted the emergency room charge nurse who was on duty to prepare the hospital to receive the inmate. No one

instructed or asked claimant to phone anyone about the movement of the inmate from the jail to the hospital.

(4) On February 20, 2015, while on duty, claimant took his personal cell phone into the control room of the jail's work center. The control room was a locked and secured room in the jail. Claimant had his cell phone with him to take photographs of himself in his work surroundings while in his uniform. Claimant wanted to send the photograph to a female he had never met in person but had been communicating with by email. Claimant took the picture in the control room and emailed it to the female.

(5) On approximately February 21, 2015, the employer discovered, among other things, that claimant had taken his cell phone into the control room without permission. On that day, the employer placed claimant on administrative leave pending an investigation of his behavior on February 20, 2015.

(6) On January 5, 2016, the employer discharged claimant for his behavior on February 20, 2015, including taking his personal cell phone into the control room.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant agreed that he was aware of the employer's policy prohibiting him from taking his cell phone into the control room, he contended that it was an "extremely common practice" for deputies to possess their cell phones in the control room and that it was a "low security" area of the jail in which possession of a cell phone would not pose a security risk. Transcript at 31, 33. Notably, however, claimant testified that his supervisors never did anything to suggest it was permissible to ignore the employer's prohibitions against cell phones in the control room, stated that the employer's policy did not exempt any areas of the jail from the prohibition, and did not contend that he misunderstood the parameters of the employer's policy. Transcript at 32. As well, claimant affirmatively testified he did not think his possession of a cell phone in the control room on February 20, 2015 would be allowed by the employer. Transcript at 32. Claimant's after-the-fact rationalization that his possession of the cell phone in the control room did not lead to any of the harms or risks that the employer's policy was designed to avert (e.g., an inmate obtaining the phone) is beside the point. Transcript at 33, 55-56. The employer's across-the-board prohibition was rationally related to safety objectives, and claimant knew that his possession of his personal cell phone in the control room was a violation of that policy. That claimant supposedly knew other employees had or were violating the employer's policy also does not excuse claimant's violation of the policy since he was not under any misapprehension that the employer had come to condone the possession of personal cell phones in the control room. Because claimant knowingly took his cell phone into the control room on February 20, 2015 when he was aware such

behavior contravened the employers' policy, his behavior was a willful or wantonly negligent violation of the employer's expectations.¹

While claimant's behavior on February 20, 2015 was at least wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior that would otherwise constitute misconduct can be excused as an isolated instance of poor judgment if it was, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's expectations. OAR 471-030-0038(1)(d)(A). Here, the employer contended that claimant's behavior in calling the physician on January 13, 2015, approximately one month before the final incident, was a prior willful or wantonly negligent violation of the employer's expectations. Claimant testified that he knew at the time he called the off-duty physician to tell him that a particular inmate was being transported to the hospital emergency room that his behavior was a violation of the employer's expectations. Transcript at 50. Claimant did not contend that he had any professional purpose in alerting the physician to the transport or that he needed medical assistance from the physician for the inmate. Claimant also candidly admitted that he was aware another deputy had already called the emergency room to alert its personnel to the arrival of the inmate. Transcript at 38-39. While claimant contended he called the physician as a "courtesy," it is difficult to conceive of a reason why a physician who was off-duty needed to know about the transport to the emergency room, or how good manners might have motivated claimant's call to the off-duty physician. Transcript at 38, 49. That claimant disclosed the movements of an inmate to a physician who had no professional reason to know about them was at least a wantonly negligent violation of the employer's expectations. Since claimant's wanton negligence on February 20, 2015 formed a pattern with his wanton negligence on January 13, 2015, it was a repeated act or pattern of conduct in violation of the employer's expectations, and may not be excused as an isolated instance of poor judgment.

Claimant's wantonly negligent behavior on February 20, 2015 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that when he acted on February 20, 2015, he misunderstood the employer's prohibition against taking his personal cell phone into the jail without permission. Furthermore, for the reasons discussed above, any such justification would be implausible. Claimant's behavior on February 20, 2015, was not excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-5548 is affirmed.

¹ At hearing, claimant took the position that he had a "mild dissociation disorder" on February 20, 2015 which he contended caused "poor decision-making," and apparently led him to take the cell phone into the control room that day without regard to the employer's expectations. Transcript at 44-46. As claimant described the symptoms he experienced, however, it is not plausible that his judgment was too impaired for him to understand what he was doing on February 20, 2015. Transcript at 44-46. There is insufficient evidence to show claimant was not able to control his behavior on that day, or that he did not possess the mental state for willful or wantonly negligent behavior. Despite claimant's assertions, the reliable evidence shows his behavior on February 20, 2015 was willful or wantonly negligent.

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

DATE of Service: April 27, 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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