

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1000

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 100454). The employer filed a timely request for hearing. On August 10, 2016, ALJ Triana conducted a hearing, and on August 12, 2016 issued Hearing Decision 16-UI-65530, concluding the employer discharged claimant for misconduct. On August 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with her application for review and on September 21, 2016. However, claimant failed to certify that she provided a copies of her arguments to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The arguments also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Claimant's September 21, 2016 written argument also was not received by EAB within the time period allowed under OAR 471-041-0080(1) (October 29, 2006). EAB therefore did not consider claimant's written arguments, and considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Washington Federal Savings employed claimant from October 16, 2014 to April 29, 2016. Claimant worked for the employer in La Pine, Oregon.

(2) On April 19, 2016, claimant arrived for work and overheard two employees talking about her. Without the employees' knowledge or consent, claimant hid in a closet and recorded their conversation on her personal cell phone. Claimant remained in the closet for approximately three hours, and then left work when the employees went into another office.

(3) The employer discharged claimant for recording the employees' conversation without their knowledge or consent.

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

Here, claimant knew or should have known as a matter of common sense that hiding in a closet for three hours after reporting for work, recording the conversation of two employees on her personal cell phone without their knowledge and consent, and then leaving work probably violated the standards of behavior which an employer has the right to expect of an employee. Claimant's conscious decision to engage in such behavior demonstrated indifference to the consequences of her actions, and therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant's conduct was tantamount to a violation of ORS 165.540(1)(c), which prohibits a person from obtaining the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained. Claimant's conduct therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that the employer would condone her behavior.

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

DECISION: Hearing Decision 16-UI-65530 is affirmed.

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

DATE of Service: September 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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