

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1352

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 75639). The employer filed a timely request for hearing. On October 28, 2016, ALJ L. Lee conducted a hearing, and on November 4, 2016 issued Hearing Decision 16-UI-70557, concluding the employer discharged claimant for misconduct. On November 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ stated at hearing that she marked Exhibit 1, including 24 pages submitted by the employer. Audio recording at ~ 9:33. The ALJ did not, however, mark the identified pages or formally admit them into evidence. Because it was apparent on the record that the ALJ intended to admit the documents into evidence without objection from claimant, and described them sufficiently for the documents to be marked correctly, EAB corrected the error as a clerical matter, marking each of the documents as Exhibit 1. EAB considered Exhibit 1 in its entirety when reaching this decision.

FINDINGS OF FACT: (1) Options Counseling Services employed claimant from July 8, 2015 to June 10, 2016 as a full-time information technology (IT) support person.

(2) In January, 2016, claimant's supervisor at that time gave claimant a written warning directing him to refrain from using social media sites during work time because the employer received reports that claimant was using work time to view social media sites on the employer's computer. Exhibit 1 at 4. Claimant's supervisor at that time directed claimant to complete a weekly tracking spreadsheet to document his progress on the tasks assigned to him. Claimant was assigned a new supervisor in late January 2016.

(3) In February, 2016, claimant's new supervisor told claimant she would continue to require claimant to update the tracking spreadsheet. At claimant's suggestion, the spreadsheet was stored in a network server accessible to claimant and his supervisor ("in the cloud"), and contained the assignment dates,

descriptions, and due dates for the tasks. The supervisor and claimant agreed that claimant would update the spreadsheet daily in the cloud before he left work to show the work he completed each day, Monday through Friday. Claimant understood the employer's expectations.

(4) On March 13, 2016, claimant's supervisor sent him an email notifying him that his tracking spreadsheet had not been updated since March 9, 2016. The supervisor stated in the email that, "these updates are crucial so that I know how we might be able to support your time to complete projects." Transcript at 29.

(5) Claimant did not save his tracking sheet in the cloud where his supervisors could view it on April 12, and for seven work days from April 26 through May 4, 2016. Exhibit 1 at 5. On May 9, 2016, claimant's supervisor reminded him to update his tracking spreadsheet when he failed to do so.

(6) On May 11, 2016, claimant's supervisor gave claimant a final written warning for failing to update his tracking spreadsheet on a daily basis. The supervisor reviewed its expectations regarding the tracking spreadsheet with claimant, reminding him that, before leaving work each day, claimant had to update the tracking spreadsheet and save it in the cloud so his supervisor could review it. Exhibit 1 at 3, 6.

(7) On May 27, 2016, claimant told his supervisor that he knew how to save the tracking sheet so that his supervisor could access it in the cloud. He explained to his supervisor that "all he had to do was to re-save the document under a different name and it would reload [in the cloud]." Transcript at 57.

(8) Claimant did not save his tracking sheet in the cloud where his supervisors could view it from June 3 through June 9, 2016.

(9) On June 10, 2016, the employer discharged claimant because he failed to provide the employer with daily updated tracking sheets.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that 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 connected with work. 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, good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer expected that claimant would update and save his tracking spreadsheet before he left work each day onto the employer's network server, making it immediately accessible to his supervisor so she

could supervise his progress on his assignments. Claimant knew about and understood the employer's expectation. During the period from June 3 through June 9, 2016, claimant failed to save his tracking spreadsheet in the cloud where his supervisor could view it. On June 10, 2016, the employer discharged claimant for failing to meet its tracking spreadsheet requirement.

Claimant admitted that he did fail to update his tracking spreadsheet in the cloud from June 2 through June 9. Transcript at 35. Claimant, however, asserted that he did not update his tracking spreadsheet because there was a "design flaw" in the way the computer program saved his tracking sheet, and that it was a "technical issue that was preventing [his] copy of the tracking sheet from updating and arriving in the cloud level where [his supervisor] was able to view it." Transcript at 44, 35. Claimant's assertion lacks credibility in light of the employer's evidence that the employer's 250 employees use the same computer program as claimant and had not reported the document saving problems claimant described. Transcript at 61. Even assuming, however, that claimant had encountered a problem saving his tracking spreadsheet, as an IT support person, the employer could reasonably expect claimant to use his skills to find a method to overcome the technical problem and save the tracking spreadsheet in the cloud. Claimant himself testified that "all [he] had to remember to do was to remember to save it with a proper name at the end of the day [to save it in the cloud]." Transcript at 36. Claimant also stated that he could avoid the saving problem by writing down his daily activities on paper and transferring and saving the information once, at the end of the day, in the cloud. Transcript at 44.

Claimant also asserted that he understood the employer expected him to update his tracking spreadsheet daily, but not that it expected him to save his tracking spreadsheet in the cloud where his supervisor could view it. Transcript at 46-47. Claimant's assertion is not plausible given his supervisor's verbal instructions and final warning and reminders to claimant to update the sheet when claimant failed to save his updates to the cloud. Claimant's failure to update his tracking spreadsheet so his supervisor could review it on at least five occasions constituted a conscious violation of the standards of conduct with which the employer expected claimant to comply. Claimant's conduct was, at least, wantonly negligent behavior.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The record establishes that claimant failed to save his tracking spreadsheet repeatedly in April and May, and five times in June 2016, after he received the final warning and told his supervisor on May 27 that he knew how to save the spreadsheet effectively in the cloud. Thus, claimant's actions were neither single nor infrequent, and cannot be excused as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. The record does not show that claimant sincerely believed, or had a rational basis for believing, that the employer would excuse his failure to update his tracking spreadsheet in the cloud each day.

We therefore conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-70557 is affirmed.

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

DATE of Service: January 5, 2017

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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