

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0684

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81424). Claimant filed a timely request for hearing. On June 1, 2017, ALJ Meerdink conducted a hearing at which the employer did not appear and issued Hearing Decision 17-UI-84677, affirming the Department's decision. On June 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc., employed claimant from June 14, 1988 until March 10, 2017, last as a computer operator.

(2) The employer expected claimant would not use its computers during work time for purposes that were not work-related. Claimant understood the employer's expectations.

(3) Sometime between approximately July and September 2016, there was a disruption in the management of claimant's department and claimant was no longer closely supervised. Sometime after, claimant began visiting various non-work-related websites during work time using the employer's computers. Claimant visited these websites for recreational purposes and they included sites on which he played online video games or read books and articles. Claimant visited these websites an average approximately one or two days per week.

(4) On March 6, 2017, a supervisor saw claimant accessing a non-work-related website during work time. On that day, the employer suspended claimant pending an investigation of his computer use.

(5) On March 10, 2017, the employer discharged claimant because he used his computer for recreational rather than work-related purposes during work time.

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 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

Claimant testified that he was aware of the employer's policy prohibiting the use of company computers to visit websites for other than work purposes during work hours. Audio at ~6:15. Claimant admitted he had used company computers to visit websites during those hours for recreational purposes, and estimated he did so at least one or two work days each week beginning sometime between July and September 2016. Audio at ~8:08. Because claimant's behavior in choosing to visit these websites for recreational purposes was not a mistake or an accident, but was knowing and deliberate, claimant's behavior in visiting those sites was a willful violation of the employer's standards.

Although claimant's behavior was a willful violation of the employer's standards of the employer's standards, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is excusable as an isolated instance of poor judgment if, among other things, it was 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 standards. OAR 471-030-0038(1)(d)(A). Here, claimant conceded he accessed websites for non-work related purposes, on average, once or twice per week over a six to eight month period, or between approximately twenty four to thirty two times total. Because claimant's willful violation of the employer's standards was neither single nor infrequent, it may not be excused as an isolated instance of poor judgment.

Nor is claimant's willful behavior excused from constituting misconduct as a good faith error under OAR 471-020-0028(3)(b). Claimant did contend or suggest that he accessed the websites that he did for recreational purposes due to a misunderstanding of the employer's standards or a belief that the employer would condone his behavior in doing so. The evidence in the record does not show that claimant made a good faith error in choosing to behave as he did.

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

DECISION: Hearing Decision 17-UI-84677 is affirmed.

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

DATE of Service: June 29, 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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