

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0689**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140538). Claimant filed a timely request for hearing. On May 31, 2017, ALJ Wyatt conducted a hearing, and on June 2, 2017, issued Hearing Decision 17-UI-84789, concluding the employer discharged claimant, but not for misconduct. On June 7, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) S & N Communications, Inc. employed claimant as a utility locator from August 17, 2015 to February 28, 2017.

(2) The employer expected its employees to refrain from using its electronic devices and internet access for personal reasons, specifically including accessing pornographic material. The employer's expectations were set forth in its internet policy, which was included in its employee handbook and which claimant acknowledged receiving on August 19, 2015. Claimant was aware of the employer's expectations.

(3) On or about February 27, 2017, during work hours, claimant used his employer provided cellular phone as a mobile "hot spot" to access the internet for personal use – specifically to stream and download pornographic material to his personal iPad. During an audit related to high cellular data usage, the employer discovered claimant's improper use of his employer issued cellular phone.

(4) On February 28, 2017, the employer discharged claimant for using a company device to access and download pornographic material during work hours on February 27, 2017.

(5) Prior to discharging claimant, the employer had not disciplined claimant in any way for violation of an employer policy or expectation.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment and not 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

At hearing, claimant asserted that he was unaware that using the employer's cellular phone as a hotspot to access and download pornography to his personal iPad would show on the employer's system that he used the employer's device for that reason in violation of the employer's policy. Audio Record ~ 31:15 to 32:00. Although claimant's assertion demonstrated that he believed such use would not be detected, it failed to establish that he was unaware that such use of the employer's device probably violated the employer's policy. More likely than not, claimant was consciously indifferent to that fact when he engaged in the conduct for which he was discharged and, for that reason, his conduct was at least wantonly negligent.

However, OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The employer did not assert or show that claimant had been disciplined for any other violations of the employer's policies or expectations. Accordingly, on this record, claimant's February 27 internet policy violation was no more than an isolated instance of wantonly negligent conduct.

OAR 471-030-0038(1)(d)(D) provides that some conduct, even if isolated, such as conduct that is unlawful, tantamount to unlawful conduct, causes a breach of trust or otherwise makes a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused. Here, the record fails to show that claimant's February 27 use of the employer's cellular phone to access the internet for personal reasons was either unlawful or tantamount to unlawful conduct. Nor can we conclude, viewing the facts objectively, that claimant's improper internet use on February 27, 2017 was so egregious that it made a continued employment relationship impossible, particularly given that apparently no coworker observed and was offended by claimant's conduct and it was only discovered through an employer audit of claimant's high cellular data usage that day. Under those circumstances, the employer failed to establish that claimant's conduct was such that it caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 17-UI-84789 is affirmed.

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

**DATE of Service: July 10, 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](http://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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