

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0709**

*Late Application for Review Allowed*  
*Hearing Decision 17-UI-83855 Affirmed*  
*Disqualification, Wage Cancellation*

**PROCEDURAL HISTORY:** On January 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant's benefit rights based on wages earned prior to the date of discharge were cancelled (decision # 121846). Claimant filed a timely request for hearing. On May 19, 2017, ALJ Seideman conducted a hearing and on issued Hearing Decision 17-UI-83855, affirming the Department's decision. On June 1, 2017, claimant filed a second request for hearing on decision # 121856 with the Department. On June 8, 2017, the Office of Administrative Hearings (OAH) issued a letter order notifying claimant that his second hearing request was not effective since a hearing had already been held and a hearing decision issued. On June 9, 2017, claimant filed by fax an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Connect Wireless employed claimant from March 23, 2015 until December 21, 2016, last as a store manager.

(2) Sometime after November 2, 2016, one of the employer's cell phone carriers notified the employer that one of its store managers was adding cell phones to customers' accounts when customers had not ordered cell phones and without their knowledge. The employer began an investigation and concluded that claimant was the store manager whom the cell phone carrier had described. The employer concluded that on at least eleven occasions claimant had added cell phones to customers' accounts without their knowledge, and that he subsequently had removed those cell phones from the employer's premises and taken them home.

(3) On December 21, 2016, certain employer representatives, including the area manager, met with claimant to discuss the results of the investigation. Claimant told the representatives that he had added cell phones that customers had not ordered to customers' accounts because he felt pressured to improve the sales he generated. Claimant orally admitted he had added phones to customers' accounts without their knowledge or consent. Claimant also signed written statement admitting what he had done. On

December 21, 2016, the employer discharged claimant. On that same day, law enforcement personnel arrested claimant for theft based on the employer's investigation and claimant's admissions.

(4) Sometime after December 21, 2016, claimant pleaded guilty to the crime of theft in the first degree, a class C felony, before the circuit court for Washington County, Oregon. The criminal charges were based on the employer's investigation and claimant's admissions.

**CONCLUSIONS AND REASONS:** Claimant's late application for review is allowed. The employer discharged claimant for misconduct.

**Late Application for Review.** Claimant filed his application for review of Hearing Decision 17-UI-83855 on March 9, 2017, which was one day after the March 8, 2017 deadline for the timely filing of that application. *See* ORS 657.270(6). Instead of promptly filing an application for review form after he received Hearing Decision 17-UI-83855, which was mailed on May 19, 2017, claimant called the Department on June 1, 2017. Although Department records show that the Department processed claimant's call as a second request for a hearing on decision # 121846, we infer that the purpose of claimant's call actually was to initiate a review of Hearing Decision 17-UI-83855. That the Department did not inform claimant that a call to the Department was not a proper way to request a review of Hearing Decision 17-UI-83855 is apparent from the fact that a Department representative completed a "Telephone Request for Hearing" form and faxed it to OAH, apparently for the scheduling of another hearing<sup>1</sup>. While claimant might have intended in good faith to commence the process for a review of Hearing Decision 17-UI-82855 by EAB by making that call on June 1, 2017, OAR 471-041-0060(2) (April 12, 2008) provides that an application for review may be filed only in person, by mail or by fax to EAB or to any Department office or to any employment security agency in any other state or jurisdiction where a party is claimant benefits. Since the telephone call that claimant placed to the Department on June 1, 2017 does not satisfy any of the requirements to constitute an application for review, it may not be construed as an application for review even if it was his intention to request a review of Hearing Decision 17-UI-82855.

OAR 471-041-0070(2) (October 29, 2006) allows EAB to extend the 20 day period in which an application for review must be filed for a reasonable time after the mailing of the hearing decision upon which review is sought if the party requesting that review demonstrates that the party had "good cause" for the untimely filing of its application. "Good cause" is defined as a showing that factors or circumstances beyond the party's reasonable control prevented the party from a timely filing and, in addition, the party must also show that the party took action to file the application for review within seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2). However, claimant did not technically satisfy the requirements for an extension of the 20 day period to file his application for review under OAR 471-041-0070 since he did not include a statement along with his application for review that he filed with EAB on June 9, 2017 describing the circumstances that prevented him from timely filing his application for review. *See* OAR 471-041-0070(3). There is no regulation other than OAR 471-041-0070 that explicitly authorizes EAB to allow an untimely application for review.

---

<sup>1</sup> We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

Despite the limitation of the Department's regulations, we infer that claimant tried to initiate EAB's review of Hearing Decision 17-UI-03855 well within the 20 day period in which the application for review would have been timely filed when he phoned the Department on June 1, 2017. Based on the manner in which he requested a hearing on decision # 121846, we infer claimant was under the impression that a telephone request was an appropriate means to seek review. We further infer that, had the Department informed him during the June 1, 2017 call that a phone call was not an appropriate way to seek review of a hearing decision, claimant would have filed an application for review in one of the ways specified by OAR 471-041-0070(2), and would have done so within the 20 day period allowed. That the Department representative did not so inform claimant, but took his phone request as if it were a valid means to file an application for review, was a factor or circumstance beyond claimant's reasonable control and on which he presumably relied in not taking further steps to file an application for review in an appropriate form until he received OAH's letter order of June 8, 2017 informing him that the June 1, 2017 telephone request was not a valid application for review. Fundamental fairness and due process concerns require that claimant not be penalized for his reliance on the error of the Department representative in purporting to process his telephone request for a review of Hearing Decision 17-UI-83855 and that he not be deprived of a review by EAB of Hearing Decision 17-UI-83855 due to the Department's failure of process. Claimant's untimely application for review therefore is allowed.

**The Discharge.** 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. 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 did not dispute that he signed up customers for services they had not requested and that he took home the phones he fraudulently added to the services for those customers. Audio at ~22:00, ~25:16, ~27:28. Although claimant justified his actions on what he alleged was pressure from the employer to inflate his sales figures, and that other employees were similarly inflating their sales, that does not explain why claimant surreptitiously took home the phones he had added to customers' accounts without their knowledge or consent. Audio at ~25:44, ~25:56. It can only be inferred that claimant took those phones for some reason, either to benefit himself or someone else, and he intended to deprive the employer of those phones. Claimant's behavior in adding services to customers' accounts without their knowledge and in taking home the phones that he added to customers' accounts without their permission was a willful violation of the standards of behavior which an employer has the right to expect of an employee.

Claimant's behavior on the eleven occasions at issue after November 2, 2016, when he added services to customers' accounts without their knowledge and took home the phones he had added surreptitiously added to their accounts, may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as an "isolated instance of poor judgment," the behavior to be excused must have been 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). As well, the behavior at issue must not have exceeded "mere poor judgment" by, among other things, violating the

law, being tantamount to unlawful behavior or causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). Here, claimant admitted he engaged in adding services to customers' accounts without their consent and taking home phones that he supposedly distributed to customers on at least seven occasions after November 2, 2016. By his own admission, claimant's behavior in willful violation of the employer's standards was not a single or infrequent occurrence. As well, by taking home the phones that he fraudulently assigned to customers' accounts, claimant committed the crime of theft within the meaning of ORS 164.015(1) since he knowingly deprived the employer of those phones that it owned and took, appropriated or withheld them from the employer. It makes no difference the claimant did not appropriate the phones for "personal gain" as he contended because all that statute requires is that claimant intended to deprive the owner, in this case the employer, of its property. Since claimant's behavior in violation of the employer's standards was not an isolated act and it violated Oregon criminal statutes, claimant's behavior exceeded that which qualifies to be excused as an isolated instance of poor judgment.

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). While claimant contended that he added services to customers' account surreptitiously, in part, due to pressure from the employer to improve the sales he generated and because others were behaving similarly for identical reasons, that does not and cannot explain why claimant took those phones home and deprived the employer its property. It simply is not plausible that claimant thought the employer would approve of his theft of its property or that it would condone it. For this reason, claimant's behavior is not excused on this record as a good faith error. Because claimant willfully violated the employer's standards and his behavior is not excused on any ground, claimant engaged in misconduct and is disqualified from benefits.

**Cancellation of Benefit Rights.** ORS 657.176(3) provides that an individual who was discharged for misconduct because the individual committed a felony of theft in connection with work, all benefit rights based on wages that the individual earned prior to the date of discharge shall be cancelled if the employer notified the Department of the individual's discharge within ten days following the issuance of the Department's notice that a claim was filed and, among other things, claimant was convicted of the crime of theft in a court of competent jurisdiction.

In response to claimant having filed a claim for unemployment insurance benefits, the Department mailed a Form 220 to the employer seeking its response to claimant's claim on or before January 9, 2017. On January 6, 2017, the employer responded that claimant was discharged on December 21, 2017 due to a theft related to work. Audio at ~7:54. It was not disputed that the employer responded within ten days following the issuance of the Form 220. It also is not disputed that the events that led to claimant's discharge caused claimant to be convicted of the crime of theft in the first degree by the Circuit Court for Washington County, Oregon. Based on these undisputed facts, it is appropriate to cancel claimant's benefit rights based on wages earned prior to the date of discharge.

**DECISION:** Hearing Decision 17-UI-83855 is affirmed.

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

**DATE of Service:** July 14, 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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.