

**AMENDED EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0917-A**

*Affirmed
Disqualification*

NOTE: This amended decision is being issued solely to correct clerical errors in the procedural history. The corrections appear in bold, below. Any party who disagrees with this decision has the right to appeal it to the Oregon Court of Appeals. A notice of appeal rights is included on pages 3-4 of this decision.

PROCEDURAL HISTORY: On June 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 94140). Claimant filed a timely request for hearing. On June 13, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for June 27, 2018. On June 27, 2018, claimant failed to appear at the hearing and ALJ Amesbury issued Order No. 18-UI-112203, dismissing claimant's request for hearing due to his failure to appear. On July 3, 2018, claimant filed a timely request to reopen the hearing. On July 30, 2018, ALJ Amesbury conduct a hearing on claimant's request to reopen the hearing, and on August 1, 2018 issued Order No. 18-UI-114162, denying claimant's request to reopen the hearing. On August 6, 2018, claimant filed a timely application for review of Order No. 18-UI-114162 with the Employment Appeals Board (EAB). On August 24, 2018, EAB issued decision 2018-EAB-0767, allowing the request to reopen and remanding the matter to OAH for hearing on the merits of decision # 94140. On September 11, 2018, ALJ Amesbury conducted a hearing, and on September 19, 2018 issued Order No. 18-UI-116832, affirming the Department's decision # 94140. On September 22, 2018, claimant filed an application for review of Order No. 18-UI-116832 with the Employment Appeals Board (EAB).

On August 15, 2018, the Oregon Employment Department (the Department) served notice of another administrative decision concluding the employer discharged claimant for misconduct (decision # 104112). Claimant filed a timely request for hearing. On September 11, 2018, ALJ Amesbury conducted a hearing, and on September 17, 2018 issued Order No. 18-UI-116635, affirming the Department's decision # 104112. On September 20, 2018, claimant filed an application for review of # 104112 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Order No. 18-UI-116832 and Order No. 18-UI-116635. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2018-EAB-0916 and 2018-EAB-0917).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider claimant's argument when reaching this decision.

On *de novo* review and pursuant to ORS 657.275(2), Order No. 18-UI- 18-UI-116832 is **adopted**. The remainder of this decision pertains only to Order No. 18-UI-116635.

FINDINGS OF FACT: (1) Express Employment Professionals employed claimant as a sign holder from May 1, 2018 until May 17, 2018.

(2) Claimant's job initially involved holding an advertising sign outside of the employer's place of business. Claimant developed some health issues and was restricted from holding the sign. The employer provided claimant with a stand for the sign and claimant walked or stood near the sign.

(3) The employer had a policy that prohibited employees from using their cells phones while working, including to browse the internet, for e-mail or to listen to music, except for emergencies. Claimant was not informed of this policy upon hire.

(4) On May 2, 2018, the employer observed claimant using his cell phone while working. The employer informed claimant of its policy and instructed claimant not use his cell phone, except for emergencies.

(5) On May 8, 2018, the employer observed claimant using his cell phone. The employer warned claimant not to use his cell phone while working, except for emergencies.

(6) On May 14, 2018, the employer observed claimant using his cell phone while working. The employer warned claimant not to use his cell phone while working again, except for emergencies. The employer told claimant that this was his third and last warning.

(7) On May 17, 2018, the employer observed claimant on two separate occasions talking on his cell phone while he was working. During the second the phone call, the employer went out to confront claimant and found him standing under some trees behind a neighboring business. At the time claimant was experiencing serious medical issues related to sun exposure. Claimant required shade to help mitigate his medical issues. The only trees near the employer's business were behind some bushes on a neighboring business. Claimant explained to his employer that he was calling his doctor's office. At no time did claimant tell his employer that he was making an emergency phone call.

(8) On May 17, 2018, the employer discharged claimant for his violation of its phone policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and the Department that claimant was discharged 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) (January 11, 2018) 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 conduct and knew or should have known that his 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he consciously chose to use his cell phone on two separate occasions on May 17, 2018, for non-emergency calls, after receiving a final warning on May 14, 2018 that using his cell phone during working hours would result in his termination. Recording at 22:00-24:00, 35:00-36:30. The May 14 warning occurred because claimant intentionally used his cell phone on that occasion for non-emergency reasons after having previously received two warnings for engaging in the same conduct. At the hearing claimant acknowledged that he had received warnings from the employer, which reminded him that he was not to use his cell phone while working, except for emergencies. Recording at 42:00-43:30. Claimant therefore willfully violated the employer's reasonable expectations by refusing to abide by the employer's policy.

OAR 471-030-0038(3)(b) defines exceptions to "misconduct," including isolated instances of poor judgment and good faith errors. OAR 471-030-0038(1)(d)(A) defines an isolated instance of poor judgment as a "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior". As stated above, claimant's conduct consisted of repeated willful violations of the employer's policy and cannot be excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment.

Claimant's behavior on May 17, 2018, cannot be excused as a good faith error under OAR 471-030-0038(3)(b). At hearing, claimant stated that he felt that talking to his doctor "was a priority". Recording at 45:00-46:00. Claimant described an important situation, but not an emergency. Claimant knew that his acts were not consistent with the employer's expectations.

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

DECISION: Orders No. 18-UI-116832 and No. 18-UI-116635 are affirmed.

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

DATE of Service: January 17, 2019

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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