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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

848
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0125

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 13, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 130737). Claimant filed a timely request for hearing. On January 14, 2014, ALJ Micheletti conducted a hearing, and on January 16, 2014, issued Hearing Decision 14-UI-08629, affirming the Department's decision. On January 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) DePaul Treatment Centers Inc. (DePaul) employed claimant as a client counselor from March 13, 2012 to October 25, 2013.

(2) The employer expected employees to follow its policies, rules, and instructions of supervisors, to be courteous and professional towards clients and coworkers and to refrain from disparaging the employer, clients or coworkers both at work and in online social media. Exhibit 1. The employer's expectations were contained in its handbook, a copy of which claimant acknowledged receiving, reviewing and understanding at hire. Exhibit 1. Claimant was aware of the employer's expectations.

(3) On or about October 8, 2013, claimant watched a softball game during work in violation of an employer rule. When confronted by her supervisor that day, claimant admitted her conduct and that she was aware it violated an employer rule. Claimant was also counseled about her "sub-standard job performance" in relation to customer service, teamwork and communication style which both clients and coworkers reported as "rude." Exhibit 1.

(4) On October 15, 2013, the employer placed claimant on a "Work Improvement Plan" that referenced the October 8 discussions and required claimant to both improve her job performance, which the employer intended to "continuously monitor[ ]", and complete various courses by November 15, 2013. Exhibit 1. The plan advised claimant that her failure to demonstrate "immediate and sustained

improvement" in job performance or "abide by agency policies" would lead to further disciplinary action, up to and including termination of employment.

(5) On October 24, 2013, claimant's supervisor met with her to discuss additional complaints from a coworker and an anonymous client about her "communication." Exhibit 1. The complaints upset claimant and she remained upset when she left work.

(6) Claimant had a private Facebook page on which she had listed Depaul as an employer which information, along with her posts, was accessible to a "hundred or so friends" who she understood "could do anything with" the Facebook information. Transcript at 21. Shortly after claimant left work on October 24, she posted the following comment on her Facebook page:

> "I hate, hate, HATE Fake ass people…..especially at my place of employment! Fuck you!!!! Keep your enemies close!!!"

Exhibit 1.

(7) On October 25, 2013, a coworker of claimant's reported to claimant's supervisor that claimant had posted the quoted comment on her Facebook page. The supervisor forwarded the information to the employer's human resources department, and later that day, the employer discharged claimant for violating the expectations of her Work Improvement Plan and the employer's social media policy by posting the Facebook comment in question.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ. 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to follow its rules and policies, including its social media policy which required claimant and other employees to refrain from disparaging the employer or coworkers on online social media. Exhibit 1. The employer's expectations were contained in its handbook, a copy of which claimant acknowledged receiving, reviewing and understanding at hire. Exhibit 1. Claimant consciously violated that policy on October 24 when she wrote the Facebook post in question knowing that DePaul was listed on her Facebook page as an employer and that her post would be accessible to a "hundred or so friends" each of whom "could do anything with" her Facebook post. The post disparaged the employer's workplace and employees and on its face was directed to one or more coworkers one of whom reported the post to the employer the following day. Claimant's

conduct in writing and posting the comment, which she did not dispute, demonstrated conscious indifference to the consequences of her conduct for the employer and was at least a wantonly negligent violation of the employer's social media policy.

Claimant's October 24 conduct cannot be excused as an isolated instance of poor judgment. An act is isolated only if the exercise of poor judgment is 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). Claimant also exercised poor judgment on or about October 8, 2013, when she watched a softball game during work knowing her conduct violated an employer rule. Because claimant's October 8 conduct was also wantonly negligent, claimant's exercise of poor judgment on October 24 was part of a pattern of wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct in posting the Facebook comment cannot be excused as a good faith error in her understanding of the employer's social media policy. Claimant acknowledged receiving, reviewing and understanding the policy at hire, admitted at hearing that she had at least thumbed through it and did not express surprise to the employer when she was terminated on October 25 for violating the policy. Claimant did not sincerely believe or have a factual basis for believing the employer would tolerate such conduct.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-08629 is affirmed

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: <u>February 20, 2014</u>

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.