

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0636

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On January 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #114604). Claimant filed a timely request for hearing. On April 2, 2014, ALJ Murdock conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-14943, affirming the Department's decision. On April 16, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant from October 4, 2010 to December 13, 2013 as a pharmacy technician.

(2) The employer prohibited pharmacy employees from processing or purchasing their personal prescriptions within the pharmacy, and required them to purchase all personal prescriptions outside the pharmacy, in the same manner as if they were non-employees. The employer prohibited employees from diverting prescriptions for their own use. The employer's computer use policy prohibited employees from using the employer's computers to look up their own health records. The employer also expected employees to be truthful during workplace investigations. Claimant understood the employer's expectations.

(3) Claimant had a prescription for a controlled substance with the employer's pharmacy that she was permitted to refill no more frequently than every 28 days. On November 26, 2013, claimant's refill was delivered to the pharmacy where she was working, and was placed into a "quarantined" area until claimant was eligible to purchase her prescription on December 6, 2013. The pharmacy procedure was to keep prescriptions containing controlled substances in a separate area until the morning of the day the prescription became eligible for purchase. Transcript at 8.

(4) The employer used a computerized system to store and track prescriptions available for purchase. On December 5, 2013, claimant left the computer where she had signed into the pharmacy storage system. Claimant used a coworker's computer, and did not sign on, while the coworker was logged into

the storage system. Approximately six minutes later, claimant handled her prescription and diverted it to herself.

(5) On December 6, 2013, before she reported to work, claimant attempted to purchase her prescription. Two pharmacy employees looked for the prescription at that time, but were unable to find it. Claimant reported to work.

(6) Later during her shift on December 6, 2013, claimant gave the pharmacy manager the missing prescription bottle she had taken. The bottle was missing 12 tablets and contained some halved tablets.

(7) On approximately December 10, 2013, the documents that originally accompanied the prescription were found in a box in the back of the pharmacy. Claimant placed them there when she was in that area on December 5, 2013.

(8) On December 13, 2013, claimant met with representatives from the employer's compliance department about the refill incident. During the meeting, claimant denied that she had used a coworker's login while using the employer's computer on December 5, 2013. Later during the meeting, claimant said she had lied, and that she had used a coworker's login to access her personal health record to check on the status of her prescription refill for December 6, 2013.

(9) On December 13, 2013, the employer discharged claimant for violating the pharmacy policy regarding the handling of personal prescriptions, and for being untruthful during the investigation regarding the refill incident.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d) provides that in order for conduct to constitute an isolated instance of poor judgment, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). 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 for handling her own prescription, diverting it for her own use, and lying during the investigation about the incident. The employer had the right to expect claimant to refrain from processing her own prescriptions and diverting them for her own use, and to be truthful during workplace investigations. Claimant understood these expectations. On December 5, 2013,

claimant handled her own prescription within the pharmacy, and the pharmacy was subsequently unable to locate it until claimant allegedly found it herself. Claimant testified that she may have handled her prescription on December 5, 2013, but that it was inadvertent because she did not recognize it as her own prescription. Transcript at 29. Claimant denied having removed any of the prescription for her own use. Transcript at 33. However, the weight of the evidence shows that it was more likely than not that claimant intentionally handled her own prescription and diverted it for her own use on December 5, 2013. Several facts are persuasive. The mishandled prescription belonged to claimant, who was also the last person to handle it before it was allegedly lost. Claimant's supervisor testified that the prescription was not supposed to be part of the work flow until December 6, 2013, but was removed from storage a day early for no apparent reason. Transcript at 8 to 9, 41, 44. Claimant used a coworker's computer access, in violation of policy, at approximately the same time that she handled her own prescription, and subsequently lied about having done so. On December 5, 2013, claimant was in the area of the pharmacy where the paperwork for the prescription was found, separate from the prescription. Claimant found the prescription herself. Twelve tablets were missing from the prescription bottle. The record shows that it was more likely than not that claimant willfully violated the employer's reasonable expectations by handling and diverting the prescription on December 5, 2013. Her subsequent conduct in lying about using a coworker's computer access was another willful violation of the employer's reasonable expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant exercised poor judgment when she willfully violated the employer's drug diversion policy, and again when she lied during the subsequent investigation about violating the employer's computer use policy. Claimant's exercise of poor judgment therefore was not a single or infrequent occurrence. Moreover, acts that create irreparable breaches of trust in the employment relationship exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's attempt to conceal the December 5 incident by lying about her computer use violation was an act of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Moreover, it is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice. ORS 475.840(3). Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record does not show, nor did claimant allege, that she sincerely believed diverting a prescription for her own use or lying during a workplace investigation would be deemed acceptable by the employer.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14943 is affirmed.

Susan Rossiter and J.S. Cromwell, *pro tempore*;
Tony Corcoran and D. E. Larson, not participating.

DATE of Service: May 21, 2014

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>.

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