

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0767

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On March 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 73438). Claimant filed a timely request for hearing. On April 15, 2014, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 28, 2014 to the parties at their addresses of record with the Department. On April 28, 2014, ALJ Sime conducted a hearing at which claimant failed to appear, and on April 29, 2014 issued Hearing Decision 14-UI-16304, concluding the employer discharged claimant for misconduct. On May 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant asked for a new hearing on the grounds that she never received the notice of hearing. Claimant's request is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party presenting the information shows that it was prevented by circumstances beyond its reasonable control from offering the information at the hearing.

OAH mailed notice of the hearing to claimant's address of record with the Department. Documents sent through the US Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520 (January 31, 2012). Claimant provided no evidence regarding circumstances that might have resulted in non-delivery of the notice of hearing, other than the assertion that she never received it. That statement alone is insufficient evidence to rebut the presumption that claimant received the notice of hearing. Accordingly, claimant failed to establish that circumstances beyond her reasonable control prevented her from appearing at the hearing and offering information at that time. Claimant's request for EAB to consider new information therefore is denied.

FINDINGS OF FACT: (1) Northwest Senior & Disability Services employed claimant as a case manager from January 20, 2005 to March 3, 2014.

(2) On July 16, 2013 one of claimant's clients died. Claimant became aware of the client's death on or before August 21, 2013. The employer expected claimant to close the client's case file. Claimant understood that expectation, but forgot close the client's case file, and forgot that he had died.

(3) The employer expected its case managers to make direct or indirect contact with their clients on a monthly basis, and to document those contacts accurately. Claimant understood those expectations.

(4) On August 29, 2013, claimant falsely documented that she contacted the dead client's nursing home and confirmed that the client's needs were being met, and that his care plan was adequate. On September 27, 2013, claimant falsely documented that she visited the client's nursing home, spoke with the client, and confirmed that his care plan was adequate. On November 1, 2013, claimant falsely documented that that she contacted the client's nursing home, confirmed that the client was doing well, and that no changes were necessary. On November 27, 2013, claimant falsely documented that she contacted the client's nursing home, confirmed that the client was doing well, and that his care plan was adequate.

(5) The employer discharged claimant for falsely documenting that she made direct and indirect contact with the client on a monthly basis.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). To be isolated, 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. OAR 471-030-0038(1)(d)(A).

The employer had a right to expect claimant to make direct or indirect contact with her clients on a monthly basis, and to document those contacts accurately. In falsely documenting that she made direct and indirect contact with the dead client on a monthly basis, claimant consciously engaged in conduct she knew violated the employer's expectations, and therefore willfully violated those expectations. Claimant's conduct was not an isolated instance of poor judgment because she falsely documented contacting the client on four separate occasions in three months, and her exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence. Claimant's conduct was not the result of an error in her understanding of the employer's expectations, and therefore cannot be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-16304 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 9, 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>.

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.