

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0901

Reversed
Disqualification
(Descalificación)

PROCEDURAL HISTORY: On February 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74745). The employer filed a timely request for hearing. On April 18 and May 7, 2014, ALJ Kirkwood conducted a hearing, and on May 7, 2014 issued Hearing Decision 14-UI-17036, affirming the Department's decision. On May 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

In written argument, the employer requested that the hearing before the ALJ be reopened, asserting that its witness, the employer's labor relations manager, was unable to testify at the hearing on May 7, 2014 due to "illness/surgery." The employer's request is construed as a request for EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable prevented the party from offering the information into evidence at the hearing. However, the labor relations manager testified at the hearing on April 18, 2014, and the employer did not state what additional information she would have provided at the hearing on May 7, 2014. The employer therefore failed to establish that the new information is material to EAB's determination, and its request for EAB to consider new information therefore is denied.

FINDINGS OF FACT: (1) Virginia Garcia Memorial Health Center employed claimant from May 1, 2008 to January 17, 2014.

(2) As of July 11, 2011, claimant worked for the employer as a community health worker at the employer's wellness center and clinic in Cornelius, Oregon. As such, claimant worked with patients who were victims of domestic violence, some of whom were illegal immigrants, did not speak English,

and had few economic resources. The employer prohibited employees from accepting money from patients. Claimant understood the employer's expectations.

(3) In June or July 2011, claimant asked for and received \$150 for assistance with a visa application from a patient who was a victim of domestic violence, an illegal immigrant, did not speak English, and had few economic resources. Claimant knew her conduct violated the employers' expectations. Three months later, claimant asked for, and received, a \$100 loan from the patient. Claimant knew her conduct violated the employer's expectations.

(4) In September 2013, claimant asked for and received \$100 for assistance with a visa application from another patient who was a victim of domestic violence, an illegal immigrant, did not speak English, and had few economic resources. Claimant knew her conduct violated the employer's expectations.

(5) On October 13, 2013, the second patient reported claimant's conduct to the employer, which conducted an investigation. On October 16, 2013, the employer interviewed the second patient, who confirmed claimant's conduct in 2013.

(6) On October 24, 2013, the employer interviewed claimant. The employer expected claimant to cooperate with its investigation by answering its questions honestly. Claimant understood that expectation. However, claimant denied accepting money from the second patient. Claimant knew her denial violated the employer's expectation that she cooperate with its investigation by answering its questions honestly.

(7) On December 2, 2013, the employer interviewed the first patient, who confirmed claimant's behavior in 2011. On December 5, 2013, the employer interviewed claimant, who denied accepting money from the first patient. Claimant knew her denial violated the employer's expectation that she cooperate with its investigation by answering its questions honestly.

(8) On January 9, 2014, the employer notified claimant that it intended to discharge her for her behavior in 2011 and 2013, and scheduled a meeting for January 17, 2014 to allow claimant to dispute the allegations or present mitigating circumstances. After the meeting on January 17, 2014, the employer discharged claimant for accepting money from the patients.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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. 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).

The employer had a right to prohibit claimant from accepting money from patients. Claimant understood that expectation. In Hearing Decision 14-UI-17036, the ALJ asserted that she “must accord greater probative value to claimant’s first-hand testimony” that she did not accept money from patients than to the employer’s second-hand, hearsay-based testimony” that she did, and that “[a]bsent a reasonable basis for concluding that claimant is not a credible witness, I cannot find that her first-hand testimony is outweighed by the employer’s second-hand hearsay testimony.” However, the ALJ’s analysis overlooks the fact that the employer’s witness’ testimony that claimant accepted money from the patients is supported by the employer’s contemporaneous documentation of its three-month investigation into the matter. *See* Exhibit 2. The documents included detailed notes of the employer’s interviews with both patients. Exhibit 2 at 15-17, 22-23. The patients’ statements were detailed, internally consistent, and consistent with each other. *Id.* In contrast, claimant’s statements during her interviews with the employer too often were vague or evasive. *Id.* at 17-20, 24-28. Absent a reasonable basis for concluding that the patients were not credible, that the employer’s investigation notes were unreliable, or that the employer’s witness was not credible, we find it likely that claimant accepted money from the patients. In doing so, claimant consciously engaged in conduct she knew violated the employer’s expectations, and therefore willfully violated those expectations.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. 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). In this case, claimant’s exercise of poor judgment in accepting money from a patient was a repeated act and part of a pattern of willful behavior, including two willful violations of the employer’s reasonable expectation that she cooperate with the employer’s investigation by answering its questions honestly. Claimant’s exercise of poor judgment therefore was not a single or infrequent occurrence.

Claimant’s conduct cannot be excused as a good faith error. Claimant understood the employer prohibited her from accepting money from patients. Her conduct therefore was not the result of a good faith error in her understanding of the employer’s expectations.

DECISION: Hearing Decision 14-UI-17036 is set aside, as outlined above. *Decisión de la Audiencia 14-UI-17036 se deja a un lado, de acuerdo a lo indicado arriba.*

DATE of Service: July 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en court.oregon.gov. En este sitio web, haga clic en "Help" para acceso a información en español.

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