

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0926

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On April 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142317). Claimant filed a timely request for hearing. On April 28, 2014, ALJ R. Davis conducted a hearing, and on May 7, 2014, issued Hearing Decision 14-UI-17021, affirming the Department's decision. On May 27, 2014, Hearing Decision 14-UI-17021 became final without an application for review having been filed. On May 28, 2014, claimant filed by facsimile an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a phlebotomist from May 21, 2012 to March 24, 2014.

(2) The employer prohibited employees from cell phone and internet usage during scheduled work hours. The employer also prohibited employees from working while under the influence of any prescription medication that might impair the safe performance of their job duties, and required employees to disclose their drug use to the employer before working under the influence of such medication. The employer notified claimant of its expectations upon hire. Claimant was aware of the employer's expectations. Transcript at 6, 7, 17.

(3) On March 17, 2014, claimant had sole responsibility for interacting with patients visiting the lab, identifying them correctly, finding their lab orders, and processing their lab orders, all of which, as a matter of common sense, required focus and attention to detail. Claimant worked during that shift while she was under the influence of prescribed narcotic pain medication. Late in the shift, claimant posted a photograph to her social media website showing herself wearing her lab coat, in the employer's lab, with the caption, "two triple shots, coffees, a Red Bull and Vicodin make a 10-hour shift, lack of sleep and a horrible toothache manageable." Transcript at 41. Claimant later posted another caption that stated, "As

you can see my cheeks are super red. That means the pain pills are working. LOL. * * * I'm good for now." *Id.*

(4) One of claimant's coworkers reported claimant's photograph and captions to the employer out of concern about the potential effect the photograph and captions could have on the employer's image and claimant's patients. On March 19, 2014, the employer suspended claimant to investigate the complaint, and, on March 24, 2014, the employer discharged claimant.

(5) On May 28, 2014, claimant filed an application for review by facsimile. On her application for review, claimant explained it was late "because the day before I received the letter from the ALJ in the mail I received a 72 hr notice and now my children and I are homeless. I lost all my paperwork in the move."

CONCLUSIONS AND REASONS: To be timely, an application for review must be filed within 20 days of the date that the Office of Administrative Hearings mailed the hearing decision sought to be reviewed. EAB will dismiss a late application for review; however, the filing period may be extended a reasonable time upon a showing of good cause. "Good cause" is defined as factors or circumstances beyond the applicant's reasonable control that prevented timely filing. ORS 657.875; OAR 471-041-0070 (October 29, 2006). By providing evidence that circumstances beyond her reasonable control prevented her from timely filing her application for review, claimant has established good cause to file an untimely application for review. We proceed next to the merits of claimant's case. 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 connected with work. 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 is conscious of her conduct and knew or should have known that her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The employer had the right to expect claimant to refrain from using her cell phone or internet during work hours and being under the influence of prescription narcotics while at work. Claimant admitted that she understood those expectations. When claimant used her cell phone and the internet during work hours to post a photograph and captions, she violated those expectations. Claimant argued that other employees and her supervisor used their cell phones, took pictures, used the internet, and checked their social media websites while at work, and the evidence shows claimant is, more likely than not, correct. Transcript at 28, 26 and 43-44. However, claimant did not assert or show that any of those individuals used their cell phones, took pictures, used the internet, or used their social media websites while at work to repeatedly demonstrate that they were under the influence, and showing physical signs of use, of narcotic pain medication while working.

The employer had the right to expect claimant to avoid posting photographs or captions to her social media website that affected or could have an effect on the integrity of the employer's staff or the services

the employer provided to patients. Claimant knew or should have known that expectation as a matter of common sense. By posting a photograph of herself in her lab coat, at the work site, stating that she was under the influence of narcotic pain medication and pointing out that her "super red" cheeks demonstrated the physical signs of being under the influence, claimant demonstrated that she was indifferent to the consequences her conduct might have with respect to herself, her coworkers, the employer, and the employer's patients. Claimant's conduct with respect to her cell phone and internet use, and her social media website posting, was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not assert or show that she sincerely believed or had a factual basis for believing that the employer would condone her use of her cell phone and internet to post a photo and comments to her social media website proclaiming she was under the influence of narcotic pain medication while on duty. Although claimant's conduct on March 17th was a single occurrence in the employment relationship, and therefore isolated, her conduct is inexcusable because it caused a breach of trust in the employment relationship. *See* OAR 471-030-0038(1)(d).

When at work, claimant was solely responsible for handling patient intake, identifying the patients and what type or types of lab work they needed, ensuring they received the proper tests and care, handling patient records, inserting needles into patients, and other highly detailed tasks. The nature of her work also required that claimant behave in such a manner that the employer's patients developed or maintained trust in her services and in those of the employer's business, and that the employer and claimant's coworkers be able to trust claimant to work independently. By intentionally posting an image of herself while on duty, in her lab coat, in the employer's facility, claiming her "super red" cheeks showed the prescription narcotics she had taken were "working," to a website that claimant's coworkers could access, claimant caused an irreparable breach in the employer's ability to trust her to exercise good judgment and avoid acting in a manner that caused harm to the employer's image among coworkers and, potentially, patients. Because claimant's conduct caused an irreparable breach of trust in the employment relationship, her conduct cannot be excused as an isolated instance of poor judgment.

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-17021 is affirmed.

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

DATE of Service: July 8, 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.