

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0974

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On February 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121410). Claimant filed a timely request for hearing. On March 18, 2014, ALJ R. Davis conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13170, affirming the Department's decision. On March 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On April 15, 2014, EAB issued Appeals Board Decision 2014-EAB-0471, reversing Hearing Decision 14-UI-13170 and remanding the matter to the Office of Administrative Hearings (OAH) for lack of a complete record. On May 27, 2014, ALJ R. Davis conducted a hearing, and on May 29, 2014, issued Hearing Decision 14-UI-18617, again affirming decision # 121410. On June 5, 2014, claimant filed an application for review with EAB.

Claimant submitted written argument to EAB. At hearing and in her argument to EAB, claimant objected to the admission of Exhibit 2 and testimony related to Exhibit 2. At hearing, the ALJ excluded Exhibit 2, but did not exclude testimony related to Exhibit 2. EAB did not consider Exhibit 2 in reaching this decision. The ALJ did not err in allowing testimony related to Exhibit 2 to remain in the record. EAB considered the entire hearing record and claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) US Bank National Association employed claimant from March 29, 2004 to January 30, 2014 as a commercial banking client representative.

(2) The employer had a code of ethics and business conduct that prohibited employees from reviewing or disclosing confidential information gathered by the employer, including information about customers, employees, and business partners. Claimant was given the policy at hire, was required to review it annually, and had access to it on the employer's intranet. Claimant understood the policy.

(3) On January 27, 2014, claimant opened her direct manager's private desk drawer, then removed and read a coworker's confidential employee performance review. Claimant did not ask her manager if she could access the desk drawer, and the employer had not authorized claimant to open the manager's drawer or to read her coworker's employee performance review. The manager had never discussed another employee's performance review with claimant. The coworker did not give claimant permission to review the performance review.

(4) After reading the coworker's performance review, claimant made a comment about the coworker's performance review scores to another employee.

(5) On January 30, 2014, claimant told the employer she understood she had made a poor decision and apologized to the employer for opening the manager's drawer and reviewing the performance review. Claimant told the employer she reviewed the other employee's performance review because she was dissatisfied with her own recent performance review and wanted to see if the other employee received similar scores as claimant.

(6) Claimant had not violated the employer's confidentiality policy before January 27, 2014.

(7) Claimant had access to customers' and business partners' confidential information, and used it to perform her job duties.

(8) On January 30, 2014, the employer discharged claimant because she violated the employer's code of ethics regarding confidential information by reviewing an employee's confidential information without authorization, and sharing the information with another employee.

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

The employer had a reasonable code of ethics policy prohibiting employees from accessing and disclosing confidential information regarding coworkers. Claimant testified at hearing that she read her coworker's performance review, and discussed the coworker's performance ratings and compared them to her own because she disagreed with the ratings she received on her own recent performance review. Audio Record ~ 28:47 to 30:31. Claimant testified that she knew the employer expected her to refrain from opening the manager's private desk drawer containing the performance review, and that going into the manager's desk was "probably questionable." Audio Record ~ 24:54 to 25:07. Claimant asserted, however, that she believed the employer did not prohibit employees from looking at and discussing

coworkers' performance reviews because she had, in the past, discussed her own performance reviews with coworkers, and because the employer's code of ethics explicitly stated it did not limit employees from discussing "the terms and conditions of their employment, including their wages and U.S. Bank employment-related policies and practices." Audio Record ~ 22:24 to 23:08, 25:08 to 25:38. Claimant admitted, however, that when she had discussed her performance reviews with her coworkers in the past, she had chosen to share her own performance review information, whereas, on January 27, claimant's coworker had not given her permission to read or discuss the performance review. Audio Record ~ 25:39 to 25:58. Moreover, contradicting her earlier testimony, claimant also testified that she knew the employer would probably discipline her if it knew she had reviewed another employee's performance review. Audio Record ~ 26:52 to 27:20. The preponderance of evidence shows that claimant's conduct in entering her manager's desk, reading a coworker's performance review, and sharing that information with another employee amounted to a willful violation of the employer's reasonable confidential information policy.

Claimant argued at hearing and in her written argument to EAB that her conduct on January 27 was 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). 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). OAR 471-030-0038(1)(d)(D). In Hearing Decision 14-UI-18617, the ALJ reasoned that claimant's conduct was a pattern of poor judgment, and not a single act, because she "both procured confidential information and shared that information with her co-workers."¹ We disagree, and conclude that claimant's sharing of confidential information with a coworker was a continuation of the same occurrence that began with claimant removing and reading the performance review. Thus, claimant's conduct was a single occurrence.

However, the ALJ concluded correctly that claimant's conduct could not be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d)(D) because it exceeded mere poor judgment, stating that, "given claimant's access to highly sensitive and confidential information, her conduct created an irreparable breach of trust in the employment relationship."² Viewed objectively, it was reasonable that an employer would no longer trust claimant in response to claimant's conduct, especially where claimant's position allowed her frequent access to confidential information. Claimant consciously disregarded the employer's policy to address her dissatisfaction with her recent performance review, despite knowing that her conduct would probably result in disciplinary action if the employer knew about it. Audio Record ~ 26:52 to 27:20. Claimant's lack of prior violations notwithstanding, her conduct created an irreparable breach of trust in the employment relationship, and thus 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). Claimant willfully violated the employer's expectation that she refrain from reviewing or disclosing confidential information gathered by the employer. Her conduct was not the result of an error in her understanding of the employer's expectations.

¹ Hearing Decision 14-UI-18617 at 3.

² *Id.*

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

DECISION: Hearing Decision 14-UI-18617 is affirmed.

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

DATE of Service: July 14, 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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