

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1153

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On June 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100632). Claimant filed a timely request for hearing. On June 24, 2014, ALJ S. Lee conducted a hearing, and on July 2, 2014 issued Hearing Decision 14-UI-20808, affirming the Department's decision. On July 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Planned Parenthood employed claimant from July 12, 2010 to May 9, 2014 as a front office clinic assistant.

(2) The employer expected claimant to maintain accurate records of appointments, and did not permit clinic assistants to schedule false appointments. Setting false appointments prevented the health center from seeing patients, reduced income, and violated the employer's duty to maintain accurate records. If it was necessary to block time because a clinician was behind schedule, or clinic assistants needed time to complete other duties, the employer's procedure was to put an appointment in the schedule that said "do not fill" to show there was no patient scheduled at that time. Transcript at 8. The employer expected claimant to be honest during workplace investigations. Claimant understood the employer's expectations.

(3) One of claimant's job duties was to fill the time slots in the patient schedule template prepared by the manager.

(4) Claimant sometimes felt overwhelmed by her workload. On December 19, 2013, the other clinical assistant complained to the manager about the clinical assistants' workload. In response to the

complaint, the manager and the assistant manager began to work at claimant's health center two days per week to relieve the clinical assistants' duties assisting patients so they could complete their other duties. When the manager and assistant manager went to claimant's health center, claimant did not need assistance with her duties.

(5) Claimant and the other clinical assistant asked the manager to reduce the patient load. The manager refused because the employer expected the clinic to treat 15 to 16 patients per day, and could not schedule fewer appointments due to the center's high rate of patients who did not appear for their appointments ("no-shows"). The clinic historically had 16 to 18 patients per day. The clinicians at claimant's clinic did not complain to the manager about the number of patients other than to say it was "too light." Transcript at 49.

(6) Sometimes when claimant blocked a time slot on the schedule with "do not fill," the call center or a manager would override the "do not fill" and fill the time slot with an appointment. Transcript at 8. Claimant did not discuss this matter with the employer.

(7) Instead of blocking appointment times with "do not fill," claimant and the other clinic assistant began to set false appointments on the patient schedule using false names or names of patients who did not have appointments. Both clinic assistants knew the other was setting false appointments. They discussed the appointments and planned together when to set the false appointments. The employer expected claimant to schedule as many walk-in patients as possible. Claimant set the false appointments to limit the number of walk-in patients that got appointments, and to prevent the employer's call center or manager from setting appointments for those time slots. Some of the false appointments were made in advance, during the prior week.

(8) The employer's manager and assistant manager, and not clinical assistants, were charged with preparing the health center's template for the patient schedule, including the number of patients per day. The employer did not know claimant had been setting false appointments, did not instruct her to do so, or permit the practice. Neither claimant nor the other clinic assistant asked the employer for permission to put false appointments on the schedule. Claimant did not tell her manager she was creating false appointments.

(9) The employer compared the "no-show" rates for its health centers, and noticed that the health center where claimant worked had a higher rate of "no-shows" than the other health centers. Before 2013, the clinic had "no-show" rates of 15 to 20 percent. During October, November and December 2013, the "no-show" rate increased to 26 to 27 percent. In January 2014, it increased to 37 percent.

(10) In February 2014, the employer implemented a new electronic health record system. The new system caused delays during appointments and increased patients' waiting time. The manager reduced the number of appointments by 50 percent in February 2014 to compensate for the delays until the clinicians learned the new system. The manager increased the number of appointments gradually until it was back to 90 percent of its normal schedule in April 2014.

(11) On April 10, 2014, the manager saw an appointment from the January 2014 patient schedule that the other clinical assistant had copied and pasted into a time slot for April 9, 2014, leaving duplicate appointments on the calendar. The manager investigated the situation, and saw other appointments in

the patient schedule that appeared false, and an email from February 15, 2014, in which claimant and the other clinic assistant discussed “fake” appointments set for the next week. Transcript at 9.

(12) On May 1, 2014, claimant’s manager met with claimant, her union representative, and a representative from human resources to discuss workplace matters. Claimant told the employer representatives that she put false appointments on the patient schedule. Claimant stated that she was not aware of the other clinical assistant creating false appointments.

(13) The employer has a grievance process and an “open door” policy. Claimant did not complain to other managers, human resources, or her union about her workload or patient schedules.

(14) On May 9, 2014, the employer discharged claimant for falsifying patient schedules and dishonesty.

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. 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).

Claimant put false patient appointments on the employer’s schedule without the employer’s knowledge or permission, to reduce the flow of patients in the clinic. The employer had a right to expect claimant to refrain from doing so. At hearing, claimant testified that she “had to use the tools available to [her]” to maintain the flow of appointments so patients were seen in a timely manner. Transcript at 50. However, the record does not show the number of patients increased from past years, or that the employer failed to address the clinical assistants’ complaints about their workload and the impact of the new health record system on the patient schedule. Nor does the record show that claimant had the express or implied authority to modify the number of patient appointments using false appointments. Moreover, that claimant concealed the changes to the schedule by using false information shows she knew her conduct violated the employer’s expectations. Claimant’s conduct in falsifying the patient schedule, without the employer’s permission, was a willful violation of those expectations.

The employer had a right to expect claimant to be honest during workplace investigations. We infer claimant understood that expectation as a matter of common sense. On May 1, 2014, claimant told the manager and human resources representative that she was not aware of the other clinical assistant creating false appointments, rather than truthfully telling them that the other clinical assistant engaged in the same conduct. The preponderance of evidence shows claimant tried to conceal some of the conduct from the employer. In failing to be truthful to the employer, claimant willfully violated the standards of behavior that an employer has the right to expect of an employee.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant alleged at hearing that she had seen people in the employer's other clinics creating "no-show" appointments by filling appointment slots with false information, and that it was a "common practice," and that "no one talks about it, but it does happen." Transcript at 26, 50. Although claimant asserted that others engaged in the same practice, the record does not show that she sincerely believed, or had a factual basis for believing, that the employer would condone putting false information in the patient schedule because she never requested permission from the employer to put false appointments in the schedule, did not reveal she was scheduling fake appointments until asked about it on May 1, and attempted to conceal the other assistant's participation in creating the false appointments. Moreover, the assertion that "no one talks about it, but it does happen" shows that it was not a practice that claimant, in good faith, believed was known to the employer and approved by the employer. Transcript at 50. Thus, her conduct cannot be excused as a good faith error in her understanding of the employer's expectations. Nor does the record show claimant had a good faith basis to believe that being dishonest about the other assistant's behavior was acceptable to the employer.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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 disregarded the employer's reasonable expectations when she created the false appointments on more than one occasion, and again when she lied about the other assistant having created false appointments. 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). Viewed objectively, claimant's acts of falsifying the patient schedule and lying about the other assistant's participation were acts of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

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

DECISION: Hearing Decision 14-UI-20808 is affirmed.

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

DATE of Service: August 5, 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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