

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1272

*Reversed
Disqualification*

PROCEDURAL HISTORY: On June 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 141503). Claimant filed a timely request for hearing. On July 14, 2014, ALJ Kirkwood conducted a hearing, and on July 17, 2014 issued Hearing Decision 14-UI-21689, reversing the Department's decision. On July 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

Because no written objections were filed to Exhibit 2 within the time period that the ALJ allowed in Hearing Decision 14-UI-21689, Exhibit 2 will remain in the hearing record.

FINDINGS OF FACT: (1) Oregon Employment Department employed claimant from May 1, 1991 until May 31, 2014. Claimant was first employed as a data entry operator and then promoted to the position of job service representative. Claimant was last employed as a business employment specialist.

(2) Sometime before April 4, 2014, claimant's primary care physician diagnosed claimant with arthritis in the cervical and lumbar areas of her back. The physician also diagnosed claimant with high blood pressure and intermittent chest pain and referred claimant to a cardiologist for further medical evaluation. The physician issued a prescription for Flexeril to claimant for back pain. Claimant did not experience any side effects from taking Flexeril.

(3) Sometime before April 4, 2014, claimant obtained paperwork from the employer to excuse work absences caused by her health conditions under the Family and Medical Leave Act (FMLA). Around that same time, claimant gave to her physician a form titled "Certification of Health Care Provider" to complete as part of her application for FMLA protections.

(4) On April 8, 2014, claimant kept an appointment with her primary care physician. During that visit, claimant inquired about the FMLA certification form that she had given the physician. Claimant was told that the physician had completed the form and she should shortly receive it. At the end of that appointment, claimant was given a printed document that summarized the visit and the physician's treatment recommendations.

(5) On April 8, 2014, after her physician's appointment, claimant received an email from her physician's office that included, as an attachment, the FMLA certification form that the physician had completed and electronically signed on April 4, 2014. The form had three sections, the first two of which were to be completed by the employer and claimant, as the covered employee. The third section on the form was captioned in bold-faced font, "**SECTION III. For completion by the HEALTH PROVIDER.**" Exhibit 2 at 2. Section III stated in its introduction "**INSTRUCTIONS to the HEALTH PROVIDER**" and set out various recommendations to the health care provider when completing and signing that section of the form. Exhibit 2 at 2. Claimant changed some of the information that the physician had typed on the form and added new handwritten information. Claimant added to the physician's answer Question 1 that the "patient" was referred to a physical therapist; added to the physician's answer to Question 3 that the "employee" was able to perform only "modified work from 4/8/14 to 4/22/14;" whited out the physician's response of "no" to Question 7 about whether periodic flare-ups would prevent the "employee" from working and cause the employee to be absent, and changed it to "yes;" added to Question 7 the explanation that the absences from work during flare ups were medically necessary because of "server [sic] chest pain, high blood pressure and osteoarthritis[.] Will require medication, rest and time off to recover;" and as "additional information" to Section III, which the physician had left blank, added "unknow [sic] of estimated time of flare ups, this is ongoing. [P]atient is on modified work and been refer [sic] to physical therapy on 4/18/14." Exhibit 2 at 2, 3. Claimant also changed the date that the physician had signed the form from "4/4/2014" to read "4/8/2014." Exhibit 2 at 4. Claimant did not include any note anywhere on the altered FMLA certification form that indicated or suggested that she had changed or added any information to that which the physician had intended to appear on the form above the physician's signature. At the time that claimant changed the physician's FMLA certification, claimant was taking the Flexeril as prescribed by her physician. On April 11, 2014, claimant faxed the altered physician's FMLA certification to the employer's human resources department.

(6) After it received the physician's FMLA certification, the employer suspected that claimant had altered it. On April 14, 2014, the employer asked the physician to verify that the FMLA certification was authentic, especially the handwritten information appearing in the response to Question 7. The physician responded that the answer to Question 7 and the other alterations on the form were not authentic. Exhibit 1 at 4.

(7) On April 16, 2014, the employer met with claimant in a fact-finding meeting about the altered medical certification. Claimant admitted that she had altered the physician's FMLA medical certification before she had submitted it to the employer, and she had not obtained the physician's approval for the changes she had made. Claimant told the employer that she had altered the certification form to provide up-to-date information about her medical condition and that she did not think that it was wrong to change or add information to the certification without the physician's consent. On approximately April 18, 2014, claimant submitted to the employer a new, unaltered FMLA certification from her physician. The April 18, 2014 certification included new information from the

physician and stated that an intermittent FMLA leave was medically necessary when claimant experienced flare-ups in her health condition. Exhibit 2 at 9. This new certification contained information that was consistent with the information claimant had altered the original FMLA certification to include. Exhibit 2 at 7-10.

(8) On May 8, 2014, the employer held a pre-dismissal meeting and informed claimant that it intended to reach a decision on her continued employment in approximately ten days. On May 12, 2014, claimant's union steward spoke with the employer's human resources manager about claimant's continued employment. After this conversation, the union steward told claimant that the employer intended to discharge her if she did not resign by the end of the week, which was May 16, 2014. The steward told claimant that the employer was not giving her a "second chance." Transcript at 10.

(9) On May 14, 2014, claimant submitted a resignation to the employer stating that she was leaving work on May 31, 2014. Claimant resigned to avoid the employer's discharge of her. On May 31, 2014, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). Leaving work without good cause includes resigning to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The standard for determining whether claimant had good cause is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Based on claimant's hearing testimony, claimant had arthritis in her back and dyslexia, both of which appear to be permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for her employer for an additional period of time.

To evaluate whether a claimant resigned to avoid a discharge for misconduct, it must first be determined whether the behavior for which the employer intended to discharge claimant was misconduct. OAR 471-030-0038(3)(a) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-21689, the ALJ concluded that the discharge which claimant sought to avoid by her resignation was not a discharge for misconduct and that claimant therefore was not disqualified from benefits under OAR 471-030-0038(5)(b)(F). Hearing Decision 14-UI-21689 at 4-5. The ALJ largely based this conclusion on her inference that "claimant's demeanor during the hearing was unsophisticated and guileless suggesting a slight intellectual deficit" and that claimant's "cognition seemed mildly impaired possibly by the Flexeril she had taken [before the hearing] – the same medication she was taking at the time she altered the [physician's FMLA certification]." Hearing Decision 14-UI-21869 at 4-5. The ALJ also based her conclusion on her determination that, in light of claimant's supposedly impaired mental state and cognitive limitations, claimant's testimony that she had not altered the certification with any intent to deceive the employer was credible, as was her testimony that she had not understood the "importance of the document as an instrument of certification" but had thought of it only as a "means to relay information to the employer about her medical condition and ongoing care." Hearing Decision 14-UI-21869 at 5. The ALJ ultimately reasoned that, while an ordinary person would not have reasonably thought that altering a physician's certification was acceptable behavior, claimant's behavior was excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b) due to claimant's "lack of sophistication," "possible cognitive limitations and the "sincerity" of claimant's testimony that she had not thought it was wrong to alter the certification. Hearing Decision 14-UI-21689 at 5. Because the ALJ concluded that the behavior for which the employer intended to discharge claimant was not misconduct, she also concluded that OAR 471-030-0038(5)(b)(F) did not bar claimant from showing that her resignation was for good cause. Hearing Decision 14-UI-021689 at 6. We disagree.

An important issue in this case is whether claimant should be held to the standard of a reasonable person in assessing whether her unauthorized alteration of the physician's FMLA certification, and submitting that certification to the employer without informing it of her alterations, was misconduct. We have reviewed both the hearing transcript and the audio of the hearing to determine basis for the ALJ's conclusion that claimant appeared at the hearing both intellectually limited and impaired by the same medication she was taking when she altered the health care provider's certification. Claimant's testimony at hearing was not faltering, but very clear, cogent, specific and with a very good recall for events, dates, conversations and the participants involved. Substantively, it did not suggest impairments, limitations or a lack of sophistication. On the audio, despite the ALJ's characterization of claimant's speech and speech patterns at the hearing, the tempo of claimant's speech did not appear "labored" and claimant did not appear to struggle noticeably to form her thoughts into words. See Hearing Decision 14-UI-21689 at 5, note 1. Claimant's voice was somewhat child-like and, rather than being "slurred," it appeared that in her speech she had a slight articulation irregularity or lisp in which she converted the sound for the letter "r" in words into the sound "w." *Id.* Other than this very minor irregularity, there was no discernible difference in claimant's speech from that of the usual person and certainly nothing that tended to suggest impairments or cognitive limitations. Moreover, claimant did not testify that she was impaired from the medication Flexeril that she had been taking at the time she altered the physician's certification or at the hearing, and specifically denied that she experienced "any side effects" from the Flexeril. Transcript at 21. We have made a limited review of the resources available to us about the side effects of Flexeril and note that cognitive impairment is not one of them. See <http://www.drugs.com/flexeril.html>; <http://www.rxlist.com/flexeril-drug.html>. In addition, that claimant performed adequately for the employer in a number of responsible positions for twenty-three years also strongly supports a conclusion that she was not impaired, cognitively limited or unsophisticated. In sum, there is no reliable evidence in the record from which to infer that it is

inappropriate to evaluate claimant's behavior according to the awareness and understanding of an objectively reasonable person.

Claimant understood reasonably, as a matter of common sense, that the employer expected her to refrain from altering documents signed or certified by another person and submitting those documents to the employer without indicating that they had been altered. Moreover, the title of the form that claimant altered, "**Certification of Health Care Provider**" and the instructions to section III and its bold-faced and capitalized introduction referring to the "**PROVIDER**" conspicuously alerted claimant that the certification was intended to include only information that provided by the provider above the provider's signature. Exhibit 2 at 2. If claimant thought that the employer did not prohibit her altering that document in a way that made it appear that the changed and added information came from the certifying physician, her belief was utterly unreasonable. Transcript at 13. Whatever claimant's reason for altering the certification, whether it was to provide updated information that her physician had not included or to defraud the employer, she made the alterations knowingly and with the conscious intent to change the information being certified about her medical problems and her need for a leave and presented to the employer as if it were from the health care provider. Transcript at 13. Although claimant argued at hearing that the alterations she made to the initial certification were later confirmed as accurate by the second certification that the physician completed, and should therefore be excused, such an approach focusing only on the ultimate accuracy of the alterations, pushes aside the fact that the employer reasonably expected that the information contained on the certification would have come from the physician in the first instance. Transcript at 14, 22. By consciously altering the physician's certification without the permission of the physician, when the certification plainly and conspicuously indicated that it was intended to include only information from the physician and presenting it to the employer without any notification that it had been altered, claimant violated the employer's expectations with at least wanton negligence.

Claimant's behavior in altering the health care provider's certification was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment means, among other things, an act that does not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, claimant altered and submitted a document plainly intended to be completed and certified by a health care provider and to include only information from that provider. Whatever claimant's reasons for doing so, her behavior was contrary to the very purpose of requiring a certification from an independent third-party expert authorizing her to receive FMLA protections. Based on the very fundamental level of claimant's transgression, a reasonable employer could objectively conclude that it could no longer trust the soundness of claimant's judgments in the workplace, either in performing her work or in complying with the most basic of the employer's expectations.

Nor was claimant's behavior in altering the health care provider's certification excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). The purpose of the certification, and its language and instructions, were so clear that it is implausible that a person with normal perceptive abilities would have believed that the employer would condone her actions in substantively changing and adding information to the certification without the provider's permission. Since there was no evidence supporting that claimant had significant impairments in appreciating the significance of such a

certification, there is insufficient evidence to support that her behavior was excused as an isolated instance of poor judgment.

Because claimant's behavior in altering the certification was misconduct that was not excused under any exculpatory exceptions the behavior for which the employer intended to discharge claimant was misconduct. Because claimant resigned to avoid such a discharge, OAR 471-030-0038(5)(b)(f) establishes that she did not have good cause for resigning when she did.

Claimant voluntarily left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-21689 is set aside, as outlined above.

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

DATE of Service: September 16, 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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