

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1616

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 194330). Claimant filed a timely request for hearing. On September 15, 2014, ALJ Frank conducted a hearing, and on September 23, 2014 issued Hearing Decision 14-UI-25734, reversing the Department's decision. On October 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that was interspersed with new information that she did not present at the hearing. Claimant did not explain why she did not offer that new information during the hearing or otherwise show that factors or circumstances prevented her from doing so. Under ORS 657.275(2) and OAR 471-041-0090(2) (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Greater Albany Public Schools employed claimant as a teacher from August 4, 2008 until June 23, 2013.

(2) State law required that all teachers employed in the employer's public schools have valid teaching licenses issued by the Oregon Teacher Standards and Practices Commission (TSPC). The employer expected claimant to maintain a valid teaching license as a condition of employment. Claimant was aware of the employer's expectations.

(3) On November 22, 2009, claimant's teaching license was going to expire unless she successfully completed certain required graduate level courses and submitted an application for renewal to TSPC. Claimant did not take all the required steps to secure a timely renewal and TSPC allowed her a grace

period until June 30, 2010 to renew her teaching license. Because claimant still had not complied with all renewal requirements by the end of the grace period, the employer requested and TSPC granted an emergency teaching license to claimant that was valid until October 30, 2010. At some point, claimant renewed her teaching license. Claimant's renewed teaching license was valid until November 22, 2013.

(4) On October 31, 2013, claimant told the employer that she had forgotten that her teaching license was scheduled to expire in November 2013 and she had not completed the courses required for its renewal. Claimant asked the employer to request another emergency license to allow her to continue teaching. On November 6, 2013, the employer sent claimant a letter informing her that she still needed 1.5 quarter hours of graduate level college coursework to renew her teaching license. The employer advised claimant that if she submitted an application to TSPC for the renewal of her license before November 22, 2013, TSPC would probably allow her a grace period to complete the required course work. The employer's letter advised claimant that it understood TSPC no longer issued emergency teaching licenses to extend the deadline for completing license renewal requirements beyond the grace period. Exhibit 2 at 2. Ultimately, TSPC allowed claimant a grace period until May 10, 2014 to complete the required graduate courses to renew her teaching license.

(5) In December 2013, claimant did not register for the 1.5 quarter hours of graduate level courses she needed to renew her teaching license. To complete the required 1.5 quarter hours of credit would involve claimant spending approximately twenty total hours listening to lectures and completing course assignments. Claimant had the option to take the 1.5 credit hours online via the internet and at a time and place that was convenient for her. Claimant was able to enroll and begin taking the credit hours at any time during the school year.

(6) On January 9, 2014, claimant was injured at work. Claimant strained the muscles in her neck and her physician instructed to wear a neck brace to minimize neck movements. Claimant did not have any surgical procedures as a result of the injury. Claimant was off work to convalesce until approximately January 30, 2014. At that time, claimant's physician released her to light duty work for four hours per day and claimant returned to work. Claimant's physician approved her to work at an assignment where she did not teach, but did paperwork on a computer as well as problem solving. Claimant was able to perform that work. At some later point, possibly in early April 2014, claimant's condition had sufficiently improved for her physician to authorize her to increase her work to six hours per day. Claimant was able work six hours per day. However, claimant did not attempt to register for or take the 1.5 credit hours that she needed to complete to renew her teaching license either online or at a school's campus. Claimant did not ask the employer to relieve her of work responsibilities so that she could spend the time or engage in the physical efforts that she needed to complete the required course work .

(7) On May 4, 2014, claimant told the employer that she had not completed the coursework for the renewal of her teaching license. Claimant told the employer that her neck injury had not allowed her to perform the activities that taking the class required and asked the employer to support a request to TPSC for an emergency teaching license for her. On May 7, 2014, claimant's physician evaluated her condition and stated that she remained able to work six hours per day, that he expected to release her for work without restrictions by July 1, 2014 and that he did not expect any permanent limitations on her ability to work. Exhibit 2 at 11, 15. The physician stated that claimant had no restrictions on fine motor skills, manipulation with her hands, grasping and pulling and using a keyboard. Exhibit 2 at 15. The physician did not mention that claimant had any restrictions on sitting, on viewing a computer monitor

or on reading and writing. In a separate letter dated May 7, 2014, the physician stated that, in his opinion, claimant was not able to make up the work time she had lost due to her injury and that he did not think she had been medically able to perform any additional work assignments or training during the period she was subject to medical restrictions. Exhibit 2 at 13. He did not give any specific opinion on whether, during this period, claimant was able to perform the activities required of her to take graduate level courses for 20 hours online and at her own pace.

(8) On May 10, 2014, claimant's teaching license lapsed. On May 15, 2014, the employer notified claimant it intended to recommend her discharge because she had failed to maintain a valid teaching license. On June 23, 2014, the employer discharged claimant for this reason.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(c) (August 3, 2011), defines misconduct, in relevant part, as a willful or wantonly negligent failure to maintain a license, certification or other authority necessary to the performance of an occupation so long as the failure is reasonably attributable to the individual. In this context "wanton negligence" means 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 it would probably result in the individual's failure to maintain such license, certification or other authority. OAR 471-030-0038(1)(c).

No party disputed that claimant was aware that the employer to expected her to maintain a valid teaching license and that her failure to take the required course hours needed to renew her license was directly attributable to her or her physical condition. The issue is whether claimant's failure to enroll in and complete the courses, which directly led to her failure to maintain her teaching license, resulted from her willful or wantonly negligent behavior.

There is also no dispute that claimant was well aware after late November 2013 that she needed to take all required steps to renew her teaching license by May 10, 2014, including successfully completing the required graduate level courses. Claimant's explanation for failing to maintain her teaching license was that events beyond her control intervened, and that from the date of her workplace injury on January 9, 2014 through May 10, 2014, she physically unable to take or complete the classes that she needed to timely renew her teaching license. Transcript at 27, 29; Claimant's Written Argument at 2, 5. We accept that claimant's injury was not reasonably foreseeable to her, but that is not dispositive of the issue of whether, despite her injury, claimant's failure to take the required classes was wantonly negligent.

While claimant generally asserted at hearing that she was physically unable to take the classes online or otherwise, the doctor's evaluation that she submitted for purposes of a worker's compensation claim arguably suggested that she had the physical ability to engage in the activities required to do so online. The evaluation did not restrict claimant in any way from performing the activities expected if she took the classes online, *i.e.*, sitting, viewing a computer monitor, reading and keyboarding. Exhibit 2 at 15. Indeed, the type of light duty work that the physician authorized claimant to perform for four hours a day beginning on January 30, 2014, which he later increased to six hours per day, appears markedly similar to the activities required to take the classes online. Although claimant pointed out that her doctor's report from May 7, 2014 stated that the doctor did not think that it was medically reasonable to

require her to perform additional work for the employer to make up for the reduced hours she had been working nor that it was medically reasonable for her to have undertaken additional work duties or training during the time her work activities were medically restricted, this evaluation is, at best, ambiguous support for her apparent position that the doctor had medically restricted her from taking the classes online. Claimant's Written Argument at 5; Exhibit 2 at 13. It appears that the doctor's evaluation was prepared for a worker's compensation carrier and was intended to justify the physician's general restriction of claimant's work hours. *Id.* No specific reference was made to the coursework claimant was required to complete to renew her teaching license, and the doctor did not state that taking those required classes was beyond claimant's physical abilities. The May 7, 2014 letter did not state that it was medically unreasonable to have expected claimant to devote the approximately 20 hours of time at a computer, spread out over approximately three months, needed to complete the required 1.5 quarter hours of coursework online or clearly state that claimant was restricted from taking classes online during weekends or school breaks, such as Spring break. *Id.* In light of the doctor's indication of the types of work that he had restricted claimant from performing and the types of work that he authorized her to perform, it is far from certain that, in her doctor's opinion, claimant lacked the physical ability to complete the required credit hours between the date of her injury and May 10, 2014 or that claimant's doctor actually advised for medical reasons not to attempt to take the required credit hours. For this reason, claimant's reliance in her written argument on *Pacific Northwest Bell Telephone Company v. Employment Division*, 37 Or App 843, 588 P2d 654 (1978) is misplaced. Claimant's Written Argument at 5-6. While claimant cites this case for the proposition that medical opinion of a claimant's doctor is given substantially more evidentiary weight than an employer's opinion of a claimant's physical abilities, the issue in that case was actually whether it was misconduct for claimant not to have returned to work against the orders of her treating physician. *Pacific Northwest Bell*, 37 Or App at 851. In the case before us, it does not appear that claimant's doctor ever specifically instructed her not to take the required classes and the issue is not whether claimant was relying in good faith on a doctor's opinion but whether claimant was, in fact, physically unable to take the classes.

When a claimant raises a claim that certain activities that would otherwise constitute misconduct are not misconduct because claimant lacked the ability to comply with an employer's expectation, there must be sufficient evidence in the record to support that claim. In this case, claimant's asserted absolute inability to comply with the employer's expectation that she would complete the required credit hours by May 10, 2014 is undercut by her own doctor's evaluation of her condition and physical abilities. In addition, based on the fact that her doctor had increased her approved hours of work from four to six hours per day during the first approximately three months of light duty, and did not anticipate that her limitations were permanent, there was no objective reason for claimant to conclude that if she spread out over several weeks the hours of effort required to obtain the 1.5 credits, she would worsen her condition or jeopardize her recovery. Even if claimant subjectively believed that she did not have the physical strength to perform work resembling the light duty work that her doctor had approved for her in addition to her work for the employer (like the effort involved in taking the required credit hours), she did not persuasively explain why she was unable to take the credits during the employer's Spring vacation when she would not otherwise be working for the employer and therefore would not need to exceed at all the approved six hours of effort per day. Transcript at 29. Since claimant did not attempt to enroll in or take the required courses online at any time before May 10, 2014, the only objective evidence that existed about her physical limitations and her stamina was her doctor's evaluations. In light of the uncertainty of the doctor's evaluation and claimant's awareness of the fundamental importance of renewing her teaching license, it was at a minimum wantonly negligent for claimant either

not to have attempted to take the required credit hours to determine if that activity was, in fact, beyond her physical limitations during the regular school session or during Spring break, or not to have obtained a more definitive restriction from her doctor specifically addressing her inability to undertake the physical efforts required to complete the credit hours. On the facts in this record and absent evidence that, more likely than not, claimant was physically precluded from taking the required credit hours, claimant's failure to maintain her teaching license was wantonly negligent and directly attributable to her.

Claimant's wantonly negligent failure to maintain her teaching license cannot be excuse from constituting misconduct under OAR 471-030-0038(3)(b) as either an "isolated instance of poor judgment" or a "good faith error." Since 2004, the Department has consistently interpreted OAR 471-030-0038(3)(c) to define the loss of the legal authority to perform an occupation as a type of misconduct per se that is not subject to the general exculpatory provisions of OAR 471-030-0038(3)(b). See December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c). Since the exculpatory provisions cannot be applied to excuse claimant's behavior, it was misconduct¹.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-25734 is affirmed.

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

DATE of Service: December 1, 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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¹ See also *Matthew B. Freeman* (Employment Appeals Board, 05-AB-0049, January 4, 2005) (so stating and referring to Byerley letter); *Shannon M. Picklesimer* (Employment Appeals Board, 05-AB-0050, February 7, 2005 (same)); *Cassie D. Ardito* (Employment Appeals Board, 05-AB-0500, April 11, 2005); *Michael E. Heilbrun* (Employment Appeals Board, 07-AB-0405, March 8, 2007); *Dennis L. Orr* (Employment Appeals Board, 08-AB-0580, April 10, 2008); *Ronald D. Lapp* (Employment Appeals Board, 09-AB-2437, August 11, 2009); *Steven A. Simpson* (Employment Appeals Board, 11-AB-0602, March 10, 2011).