

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1901

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 104814). The employer filed a request for hearing. On November 7, 2014, ALJ Kangas issued Hearing Decision 14-UI-28345, dismissing the employer's request for hearing as untimely, subject to the employer's "right to renew" the request by submitting responses to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed. The Office of Administrative Hearings (OAH) received the employer's timely response, and on November 20, 2014, issued a letter entitled, "Cancellation of Hearing Decision" regarding Hearing Decision 14-UI-28345. On November 24, 2014, OAH served notice of a hearing scheduled for December 9, 2014. On December 9, 2014, ALJ Wyatt conducted a hearing at which claimant failed to appear, and on December 10, 2014, issued Hearing Decision 14-UI-30114, concluding the employer discharged claimant for misconduct. On December 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant requested that EAB reopen the December 9 hearing on the grounds that she was unable to attend and present evidence on that date. Her written argument included a narrative and other documents for EAB's review. Claimant's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of her request, claimant asserted that she was prevented from attending the hearing because of a conflict with job training she was required to attend for a new employer. However, claimant did not assert or show what, if any, attempt she made to participate in the hearing despite the conflict, nor did she show what, if any, attempt she made to secure a postponement of the hearing. Claimant's request to have EAB reopen the hearing or consider new information is, therefore, denied. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Westmont Living Inc. employed claimant as the executive director of an assisted living community from July 7, 2014 to September 25, 2014.

(2) The employer expected job applicants and employees to refrain from committing acts of dishonesty regarding work-related matters, including falsification of or making material omissions on job applications or resumes and providing false information during interviews.

(3) In July 2014, claimant applied for work with the employer as the executive director for an assisted living facility that claimant was told was encountering “regulatory turbulence” with the Oregon Department of Human Resources (DHS) over conditions at the facility. Audio Record ~ 19:15 to 19:30. The employer’s application form warned applicants that applicants could later be terminated for “omissions” made or “dishonest information” provided during the application process. Audio Record ~ 45:45 to 46:15. During claimant’s application process, she omitted from her resume her prior employment as a manager at two similar facilities which had received criticism from DHS, during her employment, for the way the facilities had been managed. When the employer’s regional director of operations (Judd) questioned claimant about gaps in her resume during her job interview, claimant responded that she had stopped working to attend nursing school and did not disclose the omitted prior employments. The employer hired claimant based on her apparent qualifications for the position.

(4) On or about September 17, 2014, Judd was notified by DHS that the facility claimant was managing would be restricted from admitting additional patients because of problems it attributed to claimant’s management of the facility and its lack of confidence in claimant’s ability to manage based on her prior work history. When Judd expressed surprise, The DHS representative advised her to check into claimant’s prior work history. On September 19, 2014, the employer placed claimant on administrative leave pending an investigation. During her interview with claimant on September 23, after disclosing her conversation with the DHS representative on September 17, Judd asked claimant if she had omitted any work history from her resume and job application. Claimant denied doing so, but the next day sent Judd text messages disclosing that she remembered two omitted employments DHS may have been referring to.

(5) On September 25, 2014, the employer terminated claimant’s employment for dishonesty.

(6) The Department mailed decision # 104814 to the parties on October 14, 2014. The employer received decision # 104814, disagreed with it and had twenty days, or until November 3, 2014, to timely file a request for hearing. The employer filed a request for hearing by fax Department records show was received by the Department on November 3, 2014 at 10:06 a.m.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer filed a timely request for hearing on decision # 104814. The employer discharged claimant for misconduct.

Request for Hearing. Under ORS 657.269, claimant had 20 days from the date decision # 104814 was mailed, or until November 3, 2014, to file a timely request for hearing. The Department’s witness testified that Department records show the employer filed a request for hearing by fax that was received by the Department on November 3, 2014 at 10:06 a.m. Audio Record ~ 10:45 to 14:00. Accordingly, the employer’s request for hearing was timely.

Discharge. 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).

The employer had the right to expect claimant to be honest when answering questions regarding her employment history when applying for its position and during its investigation on September 23 both as a matter of common sense and because the job application form warned her about the importance of being thorough and honest regarding her work history. Viewing the record objectively, we infer from the nature and timing of claimant's omissions and denials regarding her work history that those omissions and denials were made willfully to first obtain, and then maintain, her employment with the employer. Accordingly, we conclude claimant was willfully dishonest with the employer.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error. Claimant's dishonesty when answering questions regarding her work history was not isolated, having occurred in both July and September 2014. Moreover, claimant's conduct was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible, exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3). *See* OAR 471-030-0038(1)(d)(D). Claimant's conduct was willful, and therefore not the result of a good faith error in her understanding, as a matter of common sense, that the employer expected her to be honest regarding work related matters.

The employer discharged claimant for misconduct under ORS 657.176 (2). Claimant is disqualified from the receipt of unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-28345 is affirmed.

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

DATE of Service: February 2, 2015

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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