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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0020

Affirmed
Disqualification
Ineligible Weeks 45-14 through 50-14

PROCEDURAL HISTORY: On December 5, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions, once concluding the employer discharged claimant for misconduct (decision # 83707), and the other concluding that claimant was not available for work from November 2 through 29, 2014 (decision # 90258). Claimant filed timely requests for hearing. On January 2, 2015, ALJ Murdock conducted hearings, and on January 6, 2015 issued Hearing Decision 15-UI-31337, concluding that claimant quit working for the employer without good cause, and Hearing Decision 15-UI-31403, concluding that claimant was not available for work from November 2 through December 13, 2014. On January 9, 2015, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-31337 and 15-UI-31403. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0020 and 2015-EAB-0021). No party applied for review of that portion of Hearing Decision 15-UI-31403 concluding that claimant was available for work from December 14 through 27, 2014. EAB therefore limited its review to whether claimant was available for work from November 2 through December 13, 2014.

FINDINGS OF FACT: (1) Dove Lewis Emergency Animal Hospital employed claimant as a veterinary technician from April 28, 2006 to November 4, 2014.

(2) Prior to November 1, 2014, the employer required its veterinary technicians to work two consecutive days followed by two consecutive days off, and then five consecutive days followed by five consecutive days off. In fall 2014, claimant attended community college on Mondays from 1:00 p.m. to 3:00 p.m., and Wednesdays from 8:00 a.m. to 11:00 a.m., and 1:00 p.m. to 3:00 p.m. The employer therefore did not require claimant to work Mondays or Wednesdays.

(3) On October 24, 2014, the employer notified its veterinary technicians that in November and December 2014 they also would be required to be available for two on-call shifts per month. The employer instructed the veterinary technicians to select their on-call shifts by November 1, 2014. However, claimant selected only one on-call shift per month because she was concerned that being on-call for two shifts per month would not leave her enough time to study for school.

(4) On November 3, 2014, claimant's supervisor noticed that claimant had selected only one on-call shift per month. On three occasions on November 4, 2014, claimant's supervisor discussed claimant's failure to select two on-call shifts per month. Claimant repeatedly refused to do so. Claimant further stated that although she was unwilling to be available for two on-call shifts per month, she would not quit work, and the employer would have to fire her.

(5) Later that day, claimant and her supervisor met with the employer's human resources director. Claimant's supervisor reported to the human resources director that claimant was unwilling to be available for two on-call shifts per month. The human resources director asked claimant if November 4 was her last day of work. Claimant stated that it was her last day only if the employer was firing her. The human resources director terminated claimant's employment at that time.

(6) Claimant claimed benefits for the weeks from November 2 through December 13, 2014 (weeks 45-14 through 50-14). During those weeks, claimant sought work as a veterinary technician. The usual hours and days of the week customary for the work such work were 8:00 a.m. to 5:00 p.m. on weekdays.

(7) During weeks 45-14 through 50-14, claimant continued to attend community college on Mondays from 1:00 p.m. to 3:00 p.m., and Wednesdays from 8:00 a.m. to 11:00 a.m., and 1:00 p.m. to 3:00 p.m. Claimant was unwilling to work during those times.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, that the employer discharged claimant for misconduct. We agree with the ALJ that claimant was not available for work during weeks 45-14 through 50-14.

Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id*.

In Hearing Decision 15-UI-31337, the ALJ concluded that claimant quit work on November 4, 2014 because she could have continued working for the employer if she had chosen to comply with its new scheduling policy, and claimant did not object or change her mind about complying when the employment relationship clearly appeared to come to an end due to her unwillingness to do so, which evinced an unwillingness to continue working for the employer.[1] As found by the ALJ however, claimant told her supervisor that she would not quit work, and told the employer's human resources

[1] Hearing Decision 15-UI-31337 at 3.

director that November 4 was her last day of work only if the employer was firing her.[2] Those statements demonstrated that claimant was willing to continue working for the employer. The human resources director responded by severing the employment relationship. Because claimant was willing to continue working for the employer for an additional period of time but was not allowed to do so by the employer, the work separation is a discharge, and not a quit.

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) 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).

The employer had a right to expect claimant to be available for two on-call shifts per month in November and December 2014. In repeatedly refusing to do so, claimant consciously engaged in conduct she knew violated the employer's expectations, and therefore willfully violated those expectations.

Claimant's conduct cannot be excused as an isolated incident of poor judgment. For an act 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). In addition, 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 this case, claimant exercised poor judgment when she failed to select two on-call shifts per month by November 1, 2014, and in repeatedly refusing to be available for two on-call shifts per month in four separate meetings with her supervisor and the human resources director. Claimant's exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence. In addition, claimant's repeated refusals to work were acts of insubordination regarding a fundamental aspect of the employment relationship.[3] As such, they were sufficient to create an irreparable breach of trust in the employment relationship, and otherwise make a continued employment relationship impossible.

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[2] *Id*. at 2.

[3] *See, e.g., Michael A. Bruce* (Employment Appeals Board, 12-AB-3095, December 14, 2012)(taking unauthorized time off work was a willful act of insubordination that exceeded mere poor judgment); *Dennice L Grover* (Employment Appeal Board, 12-AB-0152, March 22, 2012) (employers may reasonably expect employees to work as scheduled; claimant's refusal, in no uncertain terms, to work Saturdays willfully violated that expectation and, because refusing to work as assigned is fundamental to the employment relationship, her refusal made a future employment relationship impossible); *Kimberly L. Hammond-Legree* (Employment Appeals Board, 11-AB-3412, January 6, 2012) (refusal to cancel vacation plans or attempting to find another employee to cover her shifts was a refusal to work that caused a breach of trust in the employment relationship); *Zachary P Branch* (Employment Appeals Board, 10-AB-0936, May 4, 2010) (refusal to cancel vacation plans was a refusal to work when scheduled, which was an act of insubordination sufficient to create an irreparable breach of trust in the employment relationship that makes 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).

Finally, claimant's conduct cannot be excused as a good faith error. Claimant understood the employer expected her to be available for two on-call shifts per month in November and December 2014, and consciously engaged in conduct she knew violated that expectation. Her conduct therefore was not the result of an error in her understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits based on her work separation from the employer.

Availability. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work during all of the usual hours and days of the week customary for the work being sought. *Id*.

Given claimant's refusal to be available for two on-call shifts per month because she was concerned that doing so would not leave her enough time to study for school, we find it likely that claimant was unwilling to work during the times she was attending school. Claimant therefore was unwilling to work during all of the usual hours and days of the week customary for the veterinary technician work she sought. She therefore was unavailable for work during weeks 45-14 through 50-14, and is ineligible for benefits for those weeks.

DECISION: Hearing Decisions 15-UI-31337 and 15-UI-31403 are affirmed.

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

DATE of Service: <u>February 23, 2015</u>

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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