

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0480

Reversed
Disqualification

PROCEDURAL HISTORY: On March 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 82715). Claimant filed a timely request for hearing. On March 30, 2015, ALJ Murdock conducted a hearing, and on April 3, 2015, issued Hearing Decision 15-UI-36319, concluding that the employer discharged claimant, but not for misconduct. On April 21, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its 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) The Power House Residential Drug Treatment Center employed claimant from January 6 to December 30, 2014, last as house coordinator. Claimant's duties included shopping for and cooking food for the clients and counselors at the employer's residential facility. The employer maintained two bank accounts: one was accessible only by claimant and was used to purchase food and other household items, and the other was accessible only by the director and used for various business expenses.

(2) On October 15, 2014, the employer's director talked with claimant and instructed her to prepare menus and grocery lists for all meals, and not to purchase items that were not necessary for the menus or included on the grocery lists. The director also told claimant that she could not spend her own money to purchase food or other items for clients and request reimbursement from the employer for these purchases. Claimant understood these directives. (Transcript at 23-24).

(3) On October 20, 2014, the director reviewed a receipt claimant submitted for lunch groceries claimant had purchased. The director questioned claimant about the purchase of gum, ice cream and ice

cream cones; claimant responded that she had “always” bought these items. The director told claimant she must not buy any items that were not on the menu. (Exhibit 3).

(4) Sometime in October, 2014, claimant purchased food at Burger King for a client and items at a convenience store. On October 24, 2015, the director spoke to claimant, showed her the receipts for the convenience store and Burger King, and told claimant she must not purchase items that were not required for a meal.

(5) Approximately one week before Christmas 2014, claimant used her own money to purchase personal items for clients. She requested reimbursement from the employer for these purchases. Transcript at 17.

(6) On December 23, 2014, the employer gave claimant \$300 to purchase food for Christmas meals for approximately 15 clients and two counselors who would be spending Christmas at the employer’s facility. Claimant used part of this money to purchase food for breakfast, lunch and dinner on December 23, and for breakfast and lunch on December 24. After making these purchases, claimant realized she had approximately \$150 of the employer’s money remaining to spend on dinner for December 24, and all meals for December 25 and 26. Claimant believed this amount was insufficient to buy food needed for these meals. Claimant unsuccessfully tried to contact the employer’s owner and the director to request that more money be deposited in the bank account designated for food expenses. Claimant did not leave a message for the director when she called because she understood the director was ill. The director was accessible during the time claimant called her and would have responded to claimant, had she known claimant wanted to speak to her. Although the director could not make a deposit into the bank account designated for food, she could and would have given claimant money from the employer’s business account to purchase food.

(7) After attempting to contact the director and owner, claimant concluded she needed to purchase food before the stores closed on December 25. On December 24, 2014, at approximately 6 p.m., claimant spent \$376.24 to buy food. Because there were insufficient funds in the employer’s account, the store accepted the employer’s debit card for only \$150 of the total cost of the food. As a result, claimant used her personal check in the amount of \$226.24 to complete the purchase. (Exhibit 2).

(8) On December 26, 2014, the director called claimant and learned that she had spent her own money to purchase food for clients and staff. The director also visited the employer’s facility and was disturbed to see that there was little food in the house, despite claimant’s December 24 purchases.

(9) On December 28, 2014, the director discharged claimant, effective December 30, 2014, for spending her own money to purchase food for clients and staff.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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. 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer expected that claimant would refrain from using her own money to purchase food and other items for the clients and staff at the employer's residential facility. Claimant knew and understood the employer's expectation. Despite her understanding of the employer's directive, claimant spent \$226.24 of her own money to purchase food for clients and staff on December 24, 2014. Based on the directive the employer gave her, claimant knew or should have known that her conduct violated the employer's standards of behavior. As a result, claimant's actions were wantonly negligent.

The ALJ, however, concluded that claimant's conduct in using her own money to purchase groceries was excused as a good faith error under OAR 471-030-0038(3)(b). According to the ALJ, claimant "was in a difficult situation on December 24, 2015 when needing to ensure residents were fed over the holidays and she was the only one in charge of the business and had minimal funds with which to work." The ALJ concluded that claimant believed in good faith "that the employer would condone her using her money to cover the residents' meal expenses over the holiday and until more money was deposited into the account." Hearing Decision 15-UI-36319 at 5. We disagree. Claimant knew that the employer had expressly prohibited her from spending her own money to purchase food and other items for clients and staff, and also knew that the employer expected her to control food expenses by creating menus, maintaining grocery lists, and purchasing only items that were included on these lists. In view of these clear and unambiguous instructions, it is implausible that claimant was sincere in believing that the employer would approve of her large personal payment for food on December 24. Based on this record, we also find it implausible that claimant believed in good faith that she was in charge of the facility because the owner was unavailable and the director was ill. The director testified that she was accessible at all relevant times and could have immediately provided claimant with additional money for food had claimant reached her. Claimant, however, never left a message when she called the director. We also note that the director called claimant on December 26, and visited the facility on that date, additional evidence that the director was not inaccessible.

Claimant's wantonly negligent violation of the employer's standards on December 24, 2014 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An incident is isolated if, among other things, it is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d(A)). Claimant knew that the employer expected her to restrict her food purchases to items necessary for the menus she created, and to refrain from spending her own money on food for clients. On two occasions in October 2014, claimant knowingly violated these expectations by purchasing items that were not listed on her menus. A week before Christmas 2014, claimant again knowingly violated the employer's expectations by purchasing personal items for clients. Claimant's behavior on these occasions demonstrated at the least, a conscious indifference to the standards of behavior the employer expected of her and was therefore wantonly negligent. Because claimant

exhibited prior wantonly negligent behavior, her conduct on December 24, 2014 was not a single or infrequent willful or wantonly negligent act.

The employer discharged claimant for misconduct, and claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-36319 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 16, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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