

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0615

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111217). Claimant filed a timely request for hearing. On May 4, 2015, ALJ Clink conducted a hearing, and on May 13, 2015, issued Hearing Decision 15-UI-38387, affirming the Department's decision. On May 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Claimant admitted that she failed to present at least some of the information because she "did not want to disclose too much information" to the employer due to ongoing investigations by other agencies into the facts concerning her termination. Claimant's Written Argument at 6. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Tongue Point Job Corps Center employed claimant as a career training instructor from April 10, 2014 to March 6, 2015. The employer was a residential jobs training program for "at-promise" youth that was operated by the Management & Training Corporation (MTC) of the U.S. Department of Labor.

(2) The employer had a written policy that prohibited "fraternization" between instructors and students unless specifically authorized by the employer's director. Exhibit 2 at 13, 15, 16. The policy listed specific examples of prohibited fraternization including taking a student to dinner, gifting personal items

to a student and allowing a student access to the instructor's home. Exhibit 2 at 15, 16. Claimant received a copy of and training on the employer's policy, after which claimant acknowledged in writing that she understood each of the employer's rules of conduct. During her employment term, claimant also requested and received authorization from the employer's director to take students out to dinner. Claimant was aware of the employer's expectations. Exhibit 2 at 8-9.

(3) In August 2014, claimant gave a student a key to her home to enable him to water her plants while she was on vacation. While claimant was on vacation, the student gave the key to another student who held a party in claimant's home that resulted in a neighbor's complaint and \$2000 in damage to claimant's home. Claimant did not request or receive prior authorization from the director to allow the student access to her home.

(4) In early 2015, claimant was on medical leave following a knee replacement. While on leave, claimant encountered a student in a grocery store parking lot. The student saw an oar claimant had received from a fellow instructor in the back of her truck, mentioned he liked the oar and it had just been his birthday. Claimant gave the oar to the student as a birthday present without requesting or receiving prior authorization from the director to allow her to present the student with a gift.

(5) In early February 2015, claimant returned to work from her leave. She clashed with the instructor who had given her the oar over work issues and he criticized her for giving the student the oar. On or about February 12, claimant met with the employer's human resources manager (Zillinger) about her conflict with the instructor, mentioned the gifting of the oar to the student as one source of her conflict and also mentioned she provided another student access to her home to water her plants in August 2014, both of which Zillinger considered violations of the employer's fraternization policy.

(6) On or about February 18, 2015, Zillinger discussed claimant's gifting and provision of home access to separate students with other managers. The decided to recommend to the employer's board that claimant be discharged. On February 19, 2015, the employer placed claimant on paid administrative leave and recommended to its corporate directors that claimant be terminated for twice violating its fraternization policy. Exhibit 2. On March 6, 2015, the employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to comply with its fraternization policy because she both received training on the policy and acknowledged in writing that she was aware of it. The employer discharged claimant for twice violating that policy, first by providing a student with unauthorized access to her home and second by gifting a student with a personal item without authorization. Claimant did not dispute those actions but asserted she did not consider the policy when she gifted the oar and believed the student she gave home access to would only come over to water rather than pass the key off to another student who would hold a party. Transcript at 46-50. She also asserted at hearing that the extent of her understanding of the policy was “you couldn't be out and about with 'em...but that's pretty much it,” but that assertion was disingenuous, based on her admission that she had sought and received the director’s approval in the past to reward students for accomplishments in the past. Transcript at 44. However, both actions were conscious acts that, given her knowledge of policy, she knew or should have known would probably violate the employer’s fraternization policy. By failing to even consider the policy or request prior authorization from the director before taking the actions in question, claimant demonstrated her indifference to their potential consequences for the employer and was at least wantonly negligent.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. An act of poor judgment is isolated only if the exercise of poor judgment is 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). Claimant’s violations of the employer’s fraternization policy were not isolated but repeated wantonly negligent acts that were not infrequent, having been engaged in over approximately a six-month period of time. Nor can claimant’s conduct be excused as a good faith error in her understanding of the employer’s expectations. By requesting and obtaining authorization from the director to reward students in the past, claimant demonstrated that she was aware of and understood the employer’s policy.

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

DECISION: Hearing Decision 15-UI-38387 is affirmed.

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

DATE of Service: July 17, 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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