

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0735

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision #74828). Claimant filed a timely request for hearing. On May 27, 2015, ALJ Murdock conducted a hearing, and on June 1, 2015, issued Hearing Decision 15-UI-39338, affirming the administrative decision. On June 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent that it was relevant and based on evidence in the record.

At the May 27, 2015 hearing, ALJ Murdock admitted documents submitted by claimant and the employer as Exhibits 1 through 4 respectively. On this record, however, it appears that the exhibits admitted were not accurately marked. Accordingly, we have marked Exhibits 1 through 4 based on the ALJ's descriptions. Exhibit 1 consists of a memorandum/warning the employer gave to claimant on February 17, 2015; Exhibit 2 consists of the employer's "Standards of Conduct"; Exhibit 3 consists of a summary of the employer's investigation into claimant's conduct on March 3, 2015; and Exhibit 4 consists of claimant's performance evaluation for the period January 1, 2013 through July 31, 2013.

FINDINGS OF FACT: (1) SAIF Corporation employed claimant as an underwriter at its Salem office from July 9, 2001 to March 12, 2015.

(2) The employer's "Standards of Conduct" required that employees refrain from fraudulent or dishonest conduct which included falsification, alteration or misrepresentation of SAIF records,

including attendance records. Claimant annually reviewed employer policies that included these “Standards of Conduct.” Exhibit 2.

(3) In 2014, claimant began suffering from depression. She sought and received treatment for her depression. As a result of her depression, claimant’s productivity at work declined and she was frequently absent.

(3) On February 17, 2015, the employer reprimanded claimant in writing for her frequent absences and failure to properly document these absences, and her “lack of communication with agents, coworkers and other business partners.” Exhibit 1.

(4) On March 2, 2015, claimant talked by telephone with an agent in Forest Grove, Oregon about a March 3, 2015 meeting the agent had scheduled with representatives of Metro West Ambulance. Claimant discussed issues and concerns she had about this account, and answered a number of the agent’s questions. Claimant was not invited to and did not plan to attend this meeting.

(5) On the morning of March 3, 2014, claimant was extremely depressed and unable to go to work. While at home, she accessed her Outlook work calendar and made an entry showing that she was spending the morning traveling to and meeting with the agent in Forest Grove. Claimant remained at home until approximately 2:30 p.m., when she went to her office. Claimant’s supervisor asked her where she had been and she told him she had traveled to Forest Grove and met and ate lunch with the agent and Metro West representatives. She then made entries in her Outlook work calendar to show that she had traveled from her home to Forest Grove, met with the agent and Metro West representatives, ate lunch with the agent and Metro West representatives, and traveled from Forest Grove to her office. Claimant also made notes concerning a meeting with the agent in a client file. The notes accurately reflected the subjects discussed with the agent during the March 2 telephone conversation, but inaccurately stated that this conversation occurred at a face-to-face meeting on March 3.

(6) On March 9, 2015, claimant’s supervisor talked to the agent in Forest Grove with whom claimant supposedly met on March 3. The agent told the supervisor that claimant had not met with the agent on that date.

(7) On March 11, 2015, claimant met with her supervisor, a representative from the employer’s human resources division, and the director of underwriting. At this meeting, she admitted that she made false entries in her Outlook calendar and in the client file regarding her activities on March 3, and had also lied to her supervisor about these activities.

(8) On March 12, 2015, the employer discharged claimant for violating its “Standards of Conduct” by falsifying employer records regarding her activities on March 3, 2015, and for lying to her supervisor.

CONCLUSION AND REASONS: We agree 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. 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) (August 3, 2011).

The employer discharged claimant because on March 3, 2015, she falsified entries in her Outlook work calendar and in a client file. Although claimant was at home until 2:30 p.m., she indicated on her Outlook calendar that she had traveled to Forest Grove and met with an agent; she also entered information about this meeting, which never occurred, in a client file. When questioned by her supervisor about her activities, she told him that she had traveled to Forest Grove and met with the agent and a client. The employer expected that claimant would comply with its "Standards of Conduct" by accurately recording her work activities in her Outlook calendar, and accurately recording information in client files. Claimant knew and understood these employer expectations as a matter of common sense and because she annually reviewed the employer's "Standards of Conduct." Because she was embarrassed about her depression, however, she testified that "I wanted to save face and made the wrong decision by pretending I was out in the field [meeting with the Forest Grove agent]." Transcript at 33. Claimant's conscious and deliberate decision to lie about her activities on March 3 was, at best, a wantonly negligent violation of the employer's policy.

We note, however, that the record shows that claimant's conduct on March 3, 2015 was the only occasion on which she violated the employer's "Standards of Conduct" policy. We therefore consider whether this incident was an isolated instance or poor judgment. An isolated instance of poor judgment is defined as "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior," which does not exceed mere poor judgment by being unlawful or tantamount to an unlawful act, causing an irreparable breach of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A) and (D). As discussed above, claimant's decision to lie about her activities resulted from poor judgment. Although claimant's dishonest behavior on that date involved more than one action on her part, these actions constituted a single incident; they were part of the same occurrence in the employment relationship, *i.e.*, all were precipitated by her misrepresentation about her activities during a few hours on a single day that violated one employer policy. *See Robin MacKillop*, EAB Decision 01-AB-1198 (2001), (citing *Perez v. Employment Dept.* 164 Or App 356, 992 P2d 460 (1999), EAB concluded that a claimant's conduct in repeatedly failing to secure a money bag was a single incident because the failures were part of the same occurrence in the employment relationship, violated a single employer policy, and occurred during a short period of time during a single day).

We agree with the ALJ's conclusion, however, that claimant's conduct exceeded poor judgment because it created "an irreparable breach of trust in the employment relationship" as defined by OAR 471-030-0038(1)(d)(D). This standard is an objective one. *Isayeva v. Employment Department*, 266 Or App 806, 811 (2014), citing *Callaway v. Employment Department*, 225 Or App 650, 654, 202 P3d (2009). As a result of claimant's dishonesty about her conduct on March 3, 2015, a reasonable employer would no longer be able to trust that she could provide accurate information about her work activities, or accurately record information in client files.

In her written argument, however, claimant contended that the circumstances of her situation are similar to those in Appeals Board Decision 2014-EAB-0924 (July 3, 2014) in which EAB concluded that a claimant's actions in changing the amount on a payroll advance request form, without obtaining authorization from her supervisor to do so, was an isolated instance of poor judgment. Claimant asserted that her actions in submitting false information about her work activities should be excused under the exculpatory provisions of OAR 471-030-0038(3)(b) for the same reasons we excused the claimant's behavior in Appeals Board Decision 2014-EAB-0924. We disagree.

In Appeals Board Decision 2014-EAB-0924, claimant initially obtained her supervisor's signature on a form requesting a payroll advance of \$1,600. After her supervisor signed the form, claimant decided she only needed a \$1,000 advance; she changed the amount requested on the form and submitted it to payroll department. Claimant then decided she needed an additional \$600, so she took the form containing her supervisor's signature she had previously submitted, changed the amount to \$600, and again submitted the form again to the payroll department, writing "Second Request" on the form. Claimant testified that she was not trying to be dishonest or to deceive anyone with her second request; she thought there would be no problem because the supervisor had already approved the additional \$600 on her first payroll request form. Based on these facts, we concluded that the record failed to show that claimant "intended to commit a dishonest act such that a continued employment relationship was impossible." Appeals Board Decision 2014-EAB-0924 at 3. In this case, however, there is no evidence that claimant sincerely believed the employer would excuse her falsification of her Outlook calendar and notes in a client file. Nor did claimant have any reasonable basis for concluding that her conduct did not violate the employer's policy. As a result of her reprimand on February 27, 2015, claimant knew that the employer expected her to accurately document her absences. In spite of this warning, claimant chose to conceal her absence on March 3, 2015 by falsifying employer records. Her decision to do so was an act of dishonesty that irreparably breached the employment relationship.

The employer discharged claimant for misconduct. She is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-39338 is affirmed.

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

DATE of Service: August 3, 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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