

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0805

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 84116). Claimant filed a timely request for hearing. On June 17, 2015, ALJ Seideman conducted a hearing, and on June 23, 2015, issued Hearing Decision 15-UI-40476, affirming the administrative decision. On July 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) The Multnomah County District Attorney's (DA) office employed claimant as a victim advocate from April 24, 1995 to April 13, 2015. Claimant's job duties included helping crime victims understand the legal system and Oregon court process, and offering support to and resources for crime victims. At all times relevant to this decision, claimant was a member of a bargaining unit and covered by the terms of a collective bargaining agreement.

(2) The employer expected that claimant would be truthful in her interactions with supervisors, coworkers, and the victims she assisted. Claimant knew and understood the employer's expectations as a matter of common sense.

(3) On September 16, 2014, claimant was assigned to meet with and counsel a husband and wife prior to the trial of their son-in-law, who was charged with harassing the couple. Claimant did not meet with the couple on that date. The trial of the son-in-law was postponed to September 24, 2014.

(4) On September 24, 2014, claimant was again assigned to meet with and advise the husband and wife prior to the trial of their son-in-law. Claimant did not meet with the couple on that date.

(5) On October 10, 2014, the employer reprimanded claimant in writing for “failing to provide victim services” to the husband and wife on September 24, 2014. Exhibit 1 at 4-5.

(6) On October 24, 2014, claimant filed a written grievance under the applicable collective bargaining agreement regarding the reprimand concerning her actions on September 24, 2014. In her grievance, claimant stated that on September 16, 2014, she spent two and one-half hours with the couple, “talking about trial processes, answering questions and addressing their concerns.” Exhibit 1 at 6. In regard to her actions on September 24, claimant stated that on that date, she called a receptionist to explain that she would be late to work. Claimant also stated that when she finally arrived at work, a little before 9 a.m., she immediately checked the waiting room and did not find the couple there. *Id.*

(7) On November 3, 2014, claimant and her union representative met with employer representatives for a Step 1 grievance meeting. At that meeting, claimant affirmed that the description of her actions on September 16 and 24 in her written grievance was accurate. Exhibit 1 at 8.

(8) On November 20, 2014, employer representatives met with claimant to investigate the truthfulness of her description of her actions on September 16 and 24. Claimant again asserted that the description of these events in her written grievance was accurate, except for her statement that she spent two and one-half hours talking with the couple on September 16. Claimant stated that she probably spent only 40 minutes talking with the couple on that date. Exhibit 1 at 6.

(7) As part of the investigation into claimant’s grievance, an investigator talked to the husband and wife with whom claimant said she had spoken on September 16 and showed them a picture of claimant; they told the investigator that they did not recognize claimant and never met with her. The investigator checked office phone records for September 24, records of claimant’s use of her badge to enter the employer’s building, and video recordings of the waiting room during relevant periods on September 16 and 24. Based on information obtained from these records, the investigator concluded that claimant did not talk with the husband and wife on September 16, did not call the receptionist to advise the receptionist of her late arrival on September 24, and did not check the waiting room soon after she arrived at work on September 24.

(8) By letter dated April 13, 2015, the employer discharged claimant for “dishonesty at work, in the course of the investigatory process and in the course of the grievance process.” Exhibit 1 at 4.

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. 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.

The employer had the right to expect that claimant would be truthful in her dealings with supervisors, coworkers and the victims she was assigned to assist. Claimant understood this expectation as a matter of common sense. Claimant knowingly violated this expectation when, during an investigation of her conduct, she provided the employer with false information. Claimant falsely asserted that on September 16, 2014, she spoke with a couple she was assigned to assist and falsely asserted that on September 24, 2014, she called a receptionist to advise the employer of her late arrival, and checked the waiting room soon after her arrival at approximately 9:00 a.m. to see if the couple was present.

Claimant contended that she was not dishonest about her actions on September 16 and 24. In regard to September 16, claimant testified that she spoke with the couple for perhaps 30 to 35 minutes on that date, explaining “I don’t sit there the whole time. I go – I got out and make calls to victims who were waiting on my line. Come back. Go do other things and come back.” Transcript at 36. The employer’s investigator, however, testified that the couple insisted they never spoke to claimant. When asked at the hearing about the September 24 phone call to the receptionist, claimant at first testified that she told the investigator she did not remember the call because her “phone throws off blocked numbers sometimes.” Transcript at 41. When questioned about phone records that showed she had not made the call, however, claimant testified that “I guess it is true.” *Id.* At the hearing, the employer asked claimant about her check of the waiting room on September 24, pointing out that the video recording showed she entered the waiting room at 10:43 a.m. and not shortly her arrival at approximately 9:00 a.m. Claimant responded:

“I – I could tell you I was at work and I can tell you I was working. I can’t tell you how many days – how many times and days I go through that door. And so while this is very convoluted about the times that – between 9:00 and 10:30, it does not show that I was not doing my work.” Transcript at 42.

Claimant thus admitted that she did not call the receptionist on September 24 to advise the employer of her late arrival. In regard to the other incidents upon which her discharge was based, we conclude that the results of the employer’s thorough investigation have greater probative value than claimant’s vague and non-specific account of her supposed meeting with the couple on September 16 and alleged check of the waiting room soon after her arrival at work on September 24.¹ We therefore find facts in accordance with the employer’s account of these events.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). She did not assert or show that he sincerely believed or had any factual basis for believing the employer would condone his falsification of records or dishonesty.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent

¹ In her written argument, claimant asserted that she “was engaging in protected union activity when she made statements that the [employer] claims to be misconduct.” Written Argument at 2. Claimant apparently claims that the employer unlawfully discharged her for her exercise of activity protected under the Oregon Public Employee Collective Bargaining Act (PECBA), ORS 243.650 *et seq.* The record is devoid of any evidence that that employer has been found to have violated PECBA, however. The Employment Relations Board, not EAB, has the authority to make such a determination.

conduct that does not exceed mere poor judgment by, among other reasons, causing a breach of trust in the employment relationship. OAR 471-030-0038(1)(d). Claimant's conduct was not isolated because she engaged in at least three instances of poor judgment by making false assertions about her activities in her October 24 written grievance, and at the November 3 grievance meeting and the November 20 investigatory meeting. Claimant's conduct also exceeded poor judgment by causing a breach of trust because, after her intentional dishonesty about her activities on September 16 and 24, no reasonable employer could trust claimant to be honest about her interactions with coworkers and the victims she was assigned to assist.

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

DECISION: Hearing Decision 15-UI-40476 is affirmed.

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

DATE of Service: August 13, 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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