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

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0926

Modified
Disqualification
Eligible Weeks 16-15 and 17-15

PROCEDURAL HISTORY: On June 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 91952). Claimant filed a timely request for hearing. On July 21, 2015, ALJ R. Davis conducted a hearing, and on July 29, 2015 issued Hearing Decision 15-UI-42218, affirming the Department's decision. On August 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sky Lakes Medical Center Inc. employed claimant as a nurse's aide from October 3, 1994 to April 23, 2015.

(2) In or about 2005, claimant developed an allergy to lilies, which patients sometimes had in their rooms. Claimant's allergy symptoms included itchiness and pain in her eyes, sinus headaches, lethargy and forgetfulness. Claimant treated herself with two nonprescription medications. However, the medications became less effective over time.

(3) As of August 1, 2010, the employer had a written policy regarding flowers and flower arrangement in patient care areas. As of June 1, 2013 the policy stated that if a patient's flowers were causing allergic or asthmatic reactions in the patient, a roommate, the staff assigned to care for them, or visitors, options should be discussed with the appropriate charge nurse, hospital supervisor or department manager/director to determine the best options for each individual case. The policy further stated that options included placing cellophane covers over flowers, changing a staff member's assignments if the staff member was experiencing allergic reactions to patient flowers, moving a patient if the patient was experiencing allergic reactions to a roommate's flowers, allowing staff members experiencing allergic reactions to patient flowers to wear masks to minimize pollen inhalation, and removing flowers if necessary.

(4) Claimant was aware of the employer's flower policy, and understood she was expected to discuss options with the appropriate charge nurse, hospital supervisor or department manager/director to

determine the best options for each individual case. However, claimant believed the employer did not follow and enforce its policy to the extent necessary to protect her health, and that of other employees and patients allergic to lilies.

(5) The employer had a written smoking and tobacco policy. As of September 1, 2014, the policy prohibited employees from smoking tobacco on the employer's property. Claimant was aware of the policy and understood the employer's expectations. On October 10, 2014, claimant smoked tobacco on the employer's property. Claimant knew her conduct violated the employer's expectations. The employer gave claimant a written warning for violating its smoking and tobacco policy.

(6) On April 20, 2015, claimant experienced allergy symptoms at work, although cellophane covers had been place over all lilies on her floor, and claimant was wearing a mask to minimize pollen inhalation. Claimant went to the floor below, found lilies in a patient's room, told the patient and a relative that the employer had a policy regarding flowers in patient care areas, and that she could have a cellophane cover placed over the patient's lilies. The patient stated that she was going home that day, and her relative offered to remove the lilies. Claimant told them she could cover the lilies for now, and they could remove them at their leisure. Claimant knew her failure to discuss options with the charge nurse; hospital supervisor or department manager/director violated the employer's expectations.

(7) On April 22, 2015, the employer decided that it was going to discharge claimant for her behavior on April 20, 2015. A human resources employee telephoned claimant and asked claimant to meet with her and another human resources employee on April 23, 2015. Claimant decided to she was going to quit work because she believed the employer failed to follow and enforce its flower policy to the extent necessary to protect her health, and that of patients allergic to lilies.

(8) On April 23, 2015, claimant notified the employer at the meeting that she was quitting work in two weeks. The employer's human resources employees initially stated that the employer did not accept her resignation, and that she was being discharged for her behavior on April 20, 2015. The employer's human resources employees then stated that the employer accepted claimant's resignation, effective immediately.

CONCLUSIONS AND REASONS: We disagree with the ALJ's conclusion that claimant quit work without good cause to avoid a discharge for misconduct. The employer discharged claimant, not for misconduct, within 15 days of claimant's planned quit without good cause. Claimant therefore is disqualified from the receipt of benefits, except that she is eligible for benefits for the weeks from April 19 through May 2, 2015 (weeks 16-15 and 17-15).

In Hearing Decision 15-UI-42218, the ALJ concluded that claimant quit work without good cause to avoid a discharge for misconduct.[1] We first address the ALJ's conclusion that claimant quit work. OAR 471-030-0038(2)(a) (August 3, 2011) states that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a quit. 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

[1] Hearing Decision 15-UI-42218 at 3.

continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

In Hearing Decision 15-UI-42218, the ALJ concluded that the work separation is a quit because claimant tendered her resignation before the employer advised her she was being discharged and, because their decisions to sever the employment were virtually concurrent, it appeared they mutually agreed to do so.[2] However, claimant notified the employer on April 23, 2015, that she was quitting work in two weeks. The employer did not allow claimant to continue working for the employer after April 23, 2015. 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 quit.

ORS 657.176(2)(a) provides that an individual shall be disqualified from the receipt of benefits if she has been discharged 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 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 are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if 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). Isolated acts exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3) only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In Hearing Decision 15-UI-42218, the ALJ concluded that claimant's failure to follow the employer's flower policy on April 20, 2015 and smoking on the employer's property on October 10, 2014, were knowing violations of the employer's expectations, and therefore misconduct.[3] We agree that claimant's conduct on October 10, 2014 and April 20, 2015 were, at best, wantonly negligent violations of the employer's reasonable expectations. However, they occurred over six months apart during claimant's decades' long tenure with the employer. The record therefore fails to show that claimant's exercise of poor judgment on April 20, 2015, for which she was discharged, was a part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence. Claimant's conduct on April 20, 2015 did not violate the law, was not tantamount to unlawful conduct and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship. Nor did the employer assert, or does the record show, that claimant's conduct otherwise made a continued employment relationship impossible. We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct.

[2] Hearing Decision 15-UI-42218 at 2.
[3] Hearing Decision 15-UI-42218 at 3.

However, ORS 657.176(8) provides that for purposes of ORS 657.176(2), when an individual has, without good cause, notified an employer that she will quit work on a specific date, and the employer discharged her, not for misconduct, no more than 15 days prior to the date of the planned quit, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned quit had occurred, except that the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned quit date. In this case, claimant notified the employer on April 23, 2015 that she was quitting work in two weeks, and therefore on May 7, 2015. The employer discharged claimant, not for misconduct, on April 23, 2015, fourteen days prior to the date of the planned quit. It therefore is necessary to determine whether claimant's planned quit would have been without good cause in order to determine whether she is disqualified from receiving benefits.

In Hearing Decision 15-UI-42218, the ALJ found that claimant quit to avoid being discharged for her behavior on April 20, 2015. However, the record shows that claimant planned to quit work because she believed the employer failed to follow and enforce its flower policy to the necessary to protect her health, and that of other employees and patients allergic to lilies, and not to avoid being discharged. Transcript at 5, 12, 29; Exhibit 1 at 5. A claimant who quits work is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for quitting when she did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to quit work. OAR 471-030-0038(4) (August 3, 2011). For an individual with a permanent or long-term "physical or mental impairment" (as defined at 29 CFR §1630.2(h)) good cause for quitting work is such that a reasonable and prudent person with the characteristics and qualities of such individual, would quit. Both standards are objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In the present case, claimant failed to show the employer failed to follow or enforce its flower policy, let alone to such an extent that it jeopardized the health of its patients. Claimant also failed to show that her allergy symptoms were so severe that no reasonable and prudent person would have continued to work for her employer for an additional period of time. Absent such showings, claimant failed to establish that her planned quit would have been for good cause. Thus, under ORS 657.176(8), claimant is disqualified from receiving benefits, except that she is eligible for benefits for the period including the week in which her actual discharge occurred through the week prior to the week of her planned quit date. Claimant therefore is eligible for benefits for weeks 16-15 and 17-15.

DECISION: Hearing Decision 15-UI-42218 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>September 15, 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 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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