

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0927

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160248). Claimant filed a timely request for hearing. On July 15, 2015, ALJ R. Davis conducted a hearing, and on July 22, 2015 issued Hearing Decision 15-UI-41856, 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) Portland Metro employed claimant from October 23, 2013 to April 28, 2015 as a community support specialist in a group home for developmentally disabled adults.

(2) The employer expected claimant to report to work for her scheduled shifts. Claimant worked Thursday through Monday each week.

(3) On April 14, 2015, the employer met with claimant to discuss performance issues. Claimant became upset because the employer reprimanded her for allegedly failing to report suspected abuse of clients in a timely manner, and for administering medication improperly. Claimant was also upset because the employer told her to refrain from discussing her past gang affiliations unless a manager approved her to present the topic as a "success story." Audio Record at 16:49 to 17:08. Claimant's coworkers knew about claimant's gang history before the April 14 meeting because claimant had posted information about her past gang affiliations on Facebook.

(4) After the April 14, 2015 meeting, claimant filed a grievance in which she requested a transfer to work in a different group home asserting she was concerned the staff in the home where she worked would behave in a hostile manner toward her due to her past gang affiliations, and due to back strain. The director told claimant to call in before each shift if she was refusing to report to work, and that any absences while her grievance was pending would be considered unexcused. Exhibit 1. Claimant failed to report to work for her scheduled shifts from April 16 to 20, 2015 because the employer had not yet reviewed her grievance.

(5) On April 21, 2015, claimant told the employer she would not return to work until the employer addressed her grievance asking that the employer accommodate her back strain and remove her from a “hostile environment” by transferring her to another group home. Audio Record at 26:13 to 26:33. The employer had already accommodated claimant’s back strain with light duty work, however, and claimant believed the accommodation for her back strain had been “working perfectly.” Audio Record at 27:12 to 27:23.

(6) On April 23, 2015, the employer informed claimant in a letter and orally that the employer expected her to return to work for her shift on April 23, and that any further unexcused absences would result in termination. The employer told claimant that its board of directors would review her grievance, including her request for a transfer, at its next board meeting on May 5, 2015. Claimant did not report to work for her five scheduled shifts from April 23 to 27, 2015.

(7) On April 28, 2015, the employer discharged claimant because she refused to return to work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to report to work for her scheduled shifts. Claimant maintained that she understood it was sufficient to call the employer and notify it that she was going to be absent from work. Audio Record at 30:23 to 31:07. Claimant’s testimony on that issue was not credible. The employer’s executive director told claimant on April 14 and 23, 2015, verbally and in writing, that she was required to report to work, that absences while claimant’s grievance was pending would be considered unexcused, and that additional unexcused absences would result in termination. It is not plausible under those circumstances that claimant misunderstood the employer’s expectations, or believed the employer would condone her failure to report to work due to the pending grievance.

The employer discharged claimant because she repeatedly failed to report to work. Claimant implicitly asserted that the employer’s expectation that she return to work while her grievance was pending was unreasonable due to her back condition and the allegedly “hostile environment” in the home where she worked. However, the employer had already accommodated her request for light duty work, and claimant admitted at hearing that the accommodation adequately addressed her back condition. Nor did claimant show her coworkers’ knowledge of claimant’s past gang affiliations created a “hostile” work environment. Moreover, the employer told claimant it would review her grievance within two weeks, on May 5, 2015. In repeatedly refusing to return to work, claimant consciously engaged in conduct she knew violated the employer’s expectations, and therefore willfully violated the employer’s reasonable expectations that she return to work.

Claimant's conduct cannot be excused as an isolated incident of poor judgment. For an act to be isolated, 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). In addition, acts that create and irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant exercised poor judgment each day she failed to report to work from April 23 to 27, 2015. Claimant's exercise of poor judgment was therefore a repeated act, and not a single or infrequent occurrence.

Nor can claimant's conduct be excused as a good faith error under OAR 471-030-0038(3)(b), because she did not sincerely believe, or have any factual basis for believing, the employer would excuse or condone her failure to report to work. The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-41856 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 14, 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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