

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1201

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant's benefit rights based on wages earned prior to discharge were cancelled (decision # 110807). Claimant filed a timely request for hearing. On September 29, 2015, ALJ Vincent conducted a hearing, and on September 30, 2015 issued Hearing Decision 15-UI-45160, modifying the Department's decision and concluding that claimant was discharged for misconduct but claimant's benefit rights were not cancelled. On October 8, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision. While claimant contended that she was denied her due process rights to a fair hearing, in part because the ALJ did not "clarify" the testimony of unspecified witnesses at hearing, allegedly did not allow claimant to cross-examine the employer's witness on a particular issue, and ultimately ruled against claimant's position, EAB has reviewed the entire audio record of the hearing and does not find this to have been the case. Claimant's Written Argument at 1, 2. The audio record shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). With respect to claimant's objection that the ALJ improperly relied on hearsay evidence when reaching his conclusions, EAB does not find that reliance to have been a denial of claimant's due process rights, as discussed below.

Because no adversely affected party sought review of that part of Hearing Decision 15-UI-45160 that concluded claimant's benefit rights based on wages earned prior to the discharge were not cancelled, EAB confined its review to the issue of claimant's work separation.

FINDINGS OF FACT: (1) G & R, Inc. employed claimant as a pharmacy technician at Malheur Drug Store from September 1, 2007 until August 4, 2015. Claimant had a license issued by the Oregon Board of Pharmacy authorizing her to work as a pharmacy technician.

(2) The employer expected claimant not to remove quantities of controlled drugs from the employer's inventory without authorization. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime before August 4, 2015, the pharmacy owner discovered that some hydromorphone, a Schedule II controlled drug, was missing from inventory. The owner was concerned that someone had stolen this controlled drug from the pharmacy.

(4) On August 4, 2015, claimant, another pharmacy technician and the owner were working in the pharmacy. Between 9:30 a.m. and 10:00 a.m., a third pharmacy technician reported late for her scheduled shift. The owner wanted to send the third technician home to penalize her, but she protested this action and became emotional. The owner and the second technician spoke to the third technician outside the pharmacy in an effort to calm her until approximately 11:00 a.m., at which time the third technician went home and the second technician and the owner returned to the pharmacy. During the time they were absent, claimant was alone in the pharmacy.

(5) On August 4, 2015 at sometime between approximately 12:15 p.m. and 12:30 p.m., the second pharmacy technician left for lunch and was expected to return at between 1:15 p.m. and 1:30 p.m. Shortly thereafter, the pharmacy owner left the pharmacy for lunch and to pick up some apples. After the owner left, claimant was alone in the pharmacy until the owner returned. The second pharmacy technician returned to the pharmacy from her lunch after the owner, and at that time, claimant left for her lunch.

(6) After he returned from his lunch, the pharmacy owner printed out reports for the pharmacy's recent operations. Upon reviewing the reports, the owner observed that someone had made a manual entry at 1:09 p.m. that day editing the inventory for 1 mg. alprazolam, a controlled drug, to remove 50 tablets from the inventory. At 1:09 p.m., claimant had been alone in the pharmacy. The owner also observed that someone had made three manual entries on August 4, 2015 editing the inventory of hydrocodone APAP to remove 13, 20 and 10 tablets, respectively, for a total removal of 43 tablets from the inventory. The owner also observed that the manual adjustments to the hydrocodone inventory were made when claimant was alone in the pharmacy that day. The owner then counted the existing inventory of alprazolam and hydrocodone and determined that the inventory of those drugs was short by the amount of the adjustments made to the inventory. Based on the fact that claimant had made the adjustments to both drug inventories when she was alone in the pharmacy, the owner concluded that she had taken the drugs without authorization.

(7) On August 4, 2015, when claimant returned to the pharmacy after her lunch, the pharmacy owner discharged her for taking alprazolam and hydrocodone from the inventory.

(8) Sometime after August 4, 2015, the pharmacy owner reported to the Board of Pharmacy that some alprazolam and hydrocodone were missing from the pharmacy that was not accounted for by authorized distributions. He sent to the Board of Pharmacy the reports on which he based his conclusion that claimant had taken the missing drugs without authorization.

(9) Sometime after August 19, 2015, claimant submitted a written response to a Department questionnaire seeking information about the reasons for her discharge. When asked why she had been discharged, claimant stated it was “for taking drugs illegally. Addiction issues from the past still dealing with.” Audio at ~16:10. In a separate section asking for claimant’s additional comments, she stated, “[W]ill seek treatment and willing to work at G& R, Inc. if able.” Audio at ~ 16:16.

(10) Sometime after approximately August 19, 2015, a representative from the Board of Pharmacy contacted claimant and explained what the owner had reported to the Board. The representative told claimant that there was “compelling evidence” showing that she had removed controlled drugs from the employer’s inventory with authorization. Audio at ~41:05.

CONCLUSIONS AND REASONS: 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The evidence the employer presented to show that claimant took the prescription drugs without permission from the pharmacy was circumstantial, and rested on manual entries made on August 4, 2015 to the employer’s drug inventory records showing that drugs were missing from the employer's inventory, the inventory records had been modified to make it appear that no drugs were missing, and that both of those events had occurred at a time when claimant was alone in the pharmacy. The employer’s witness, the second pharmacy technician, provided first-hand evidence that she and the pharmacy owner were off the pharmacy premises, and claimant was alone in the pharmacy, between approximately 9:30 a.m. and 11:00 a.m. The technician further provided first-hand evidence that she was off the pharmacy premises from approximately 12:15 p.m. or 12:30 p.m. until approximately 1:15 p.m. or 1:30 p.m. and hearsay evidence, presumably from the owner, he was also off the premises for a period of time that included 1:09 p.m., at which time claimant was alone in the pharmacy and had the opportunity to alter the employer’s inventory records for alprazolam. Although claimant did not dispute the existence of the altered inventory records, she contended she did not make those alterations and that was never alone in the pharmacy that day because either the owner or the second technician was always on the premises with her on August 4, 2015. Audio at ~33:30, ~33:57, ~34:08. In her written argument, claimant asserted that the evidence the employer presented was insufficient to support the conclusion that claimant engaged in misconduct on August 4, 2015 because it was principally based

hearsay, and hearsay is insufficient “to support a finding unless it would be admissible over objection in civil actions.” Claimant’s Written Argument at 1.

In *Reguero v. Teacher Standards and Practices Commission*, 312 Or 402, 417, 822 P2d 1171 (1991), the Supreme Court rejected claimant’s assertion and held that hearsay evidence, alone, is sufficient to constitute “substantial evidence” and support an administrative decision “even if it would be inadmissible in a civil or criminal trial.” *Reguero* sets forth several factors to be considered in determining whether hearsay evidence is sufficient, in and of itself, to support an administrative conclusion. *Reguero* at 417-422.

Here, the only disputed issue that is supported exclusively by hearsay is whether claimant was alone in the pharmacy at 1:09 p.m. on August 4, 2015, when the alprazolam records were altered, and possibly when the hydrocodone records were altered. Applying the *Reguero* factors to this issue, we conclude that the employer's hearsay evidence was reliable, and sufficient to constitute substantial evidence of disputed facts. In particular, with respect to the substantiality of the hearsay evidence, claimant’s rebuttal evidence was a generalized denial without supporting detail, and a generalized contention that she was never alone in the pharmacy on August 4, 2015. However, claimant did not specifically dispute that the other pharmacy technician and the owner went to lunch that day, did not dispute that the other technician was away from the pharmacy premises between approximately 12:15 and 1:30 p.m. and did not provide specific information about when she contended either of them had gone to lunch. Other evidence also supports the reliability of the employer’s hearsay evidence on this issue, including the responses that claimant submitted to a Department questionnaire sometime after August 19, 2015 in which she appeared to admit that she had taken drugs from the employer without permission on August 4, 2015. Audio at ~12:55 ~18:20. While claimant contended at hearing that she thought the Department’s question was asking to specify the reason that the employer had given her for the discharge, and not to give her own account, this explanation is seriously undercut by the fact that claimant volunteered in her response that she was still dealing with addiction issues and in the “additional comments” section to the questionnaire where she stated that she was going to seek drug abuse treatment. Audio at ~16:06, ~37:21. If claimant merely misunderstood the purpose of the question, it is unlikely she would so extensively describe the contributions of her past addiction to the events on August 4, 2015. It appears, most likely, that claimant was trying to explain in her response why she had taken the drugs on August 4, 2015 and how her past addiction might have influenced her behavior that day. Furthermore, claimant appeared at some points in her testimony to suggest that the pharmacy owner had removed the drugs from the pharmacy’s inventory, which would mean that he was trying to blame claimant for what he had done. Audio at ~33:57. It is illogical that the owner would fraudulently alter the pharmacy records, and then make a report to the Board of Pharmacy about the missing drugs, which would implicate the his own pharmacy license, if he was the one who had taken them. With respect to whether claimant was alone in the pharmacy at 1:09 p.m. and when the hydrocodone records were altered, claimant’s lack of specificity in her rebuttal testimony, the strength of the other evidence supporting the reliability of the employer’s hearsay evidence and the improbability that the owner would fraudulently concoct evidence implicating claimant in the removal of drugs from the pharmacy to hide his own drug theft, weigh in favor of allowing this finding to rest principally on the employer’s hearsay evidence based on the factors set out in *Reguero*.

The preponderance of the evidence shows that the employer’s drug inventory records were edited on August 4, 2015 to remove quantities of the controlled drugs alprazolam and hydrocodone when claimant

was alone in the pharmacy and no one other else had the access to the records. It is more likely than not that claimant made those alterations. Since the quantity of drugs removed from the altered inventory records was identical to the quantity missing from the physical inventory, the logical conclusion is that the person who altered the records - claimant - removed them from the physical inventory. By doing so, claimant willfully violated the employer's expectations.

Claimant's behavior on August 4, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is behavior that it is a single of infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To be considered an isolated instance of poor judgment, claimant's behavior also must not have been the type that caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant made at least two separate decisions on August 4, 2015 to willfully violate the employer's expectations, when she altered records and removed alprazolam and when she altered records and removed hydrocodone from the employer's inventory without authorization. Because her behavior included repeated willful acts of poor judgment, it was not isolated, and it is not excusable as an isolated instance of poor judgment. As well, an employer operating a pharmacy has an overriding interest in controlling its inventories of controlled drugs to ensure that those drugs are dispensed only under the authority of prescription from a licensed medical provider. By removing controlled drugs from its inventory without authorization, claimant's behavior on August 4, 2015 also caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible, thereby exceeding mere poor judgment. For both reasons, whether considered individually or together, claimant's actions on August 4, 2015 are not excusable as an isolated instance of poor judgment.

Nor was claimant's behavior on August 4, 2015 excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that she removed controlled drugs from the employer's inventory without authorization on that day because she was under a sincere, but mistaken, impression that the employer would allow her to do so. There is no evidence in the record to support a finding that claimant's behavior was based a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-45160 is affirmed.

Susan Rossiter and J. S. Cromwell, participating

DATE of Service: November 16, 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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