

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1460

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141807). Claimant filed a timely request for hearing. On November 9, 2015, ALJ Vincent conducted a hearing, and on November 13, 2015 issued Hearing Decision 15-UI-47642, affirming the Department's decision. On December 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McCrae Management & Investment employed claimant as a hearing aid center clinician from December 31, 2013 to September 8, 2015.

(2) The employer prohibited employees from creating conflicts of interest between themselves and the employer or a client. The employer notified claimant of the prohibition, and claimant understood it.

(3) Claimant had a friendship with one of the employer's clients that predated his employment by approximately eight years. Claimant's friend had offered to help claimant on a number of occasions. On August 15, 2015, claimant was visiting Salem, Oregon on a business trip and realized he had lost his wallet and was unable to pay for his lodging. Claimant contacted his friend and asked to borrow \$400 until August 20, 2015. Claimant's friend loaned him the money. On August 20, 2015, claimant repaid the loan to his friend.

(4) Claimant's friend's caregiver discovered that the friend had loaned money to claimant and complained to the employer. The caregiver and claimant were involved in a personal dispute at the time of the caregiver's report. On September 8, 2015, the employer discharged claimant after concluding that his solicitation of the loan from his friend had created a conflict of interest.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ, and conclude that claimant's discharge was not 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.

In Hearing Decision 15-UI-47642, the ALJ concluded that claimant's discharge was for wantonly negligent misconduct because he had created a conflict of interest by borrowing \$400 from a client. Hearing Decision 15-UI-47642 at 2. We disagree. Although the employer had the right to expect claimant to refrain from creating conflicts of interest with its clients, the record fails to show that claimant knew or should have known that taking a five-day personal loan from an individual with whom he had been friends with for ten years, eight years longer than claimant had been affiliated with the employer's business, would or was likely to constitute a conflict of interest.

Even if it had, claimant's conduct was no more than an isolated instance of poor judgment. The ALJ concluded that claimant's conduct, although isolated, had "sever[ed] the ability of an employer to trust the employee to refrain from future misconduct," therefore exceeding mere poor judgment. Hearing Decision 15-UI-47642 at 2. We disagree. Conduct only exceeds poor judgment if it is unlawful, tantamount to unlawful conduct, causes an irreparable breach of trust in the employment relationship, or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The employer did not allege or show that claimant's conduct was unlawful or should be considered tantamount to unlawful conduct. Nor did the employer explain why claimant's conduct caused an irreparable breach of trust in the employment relationship. Any severity of claimant's conduct is mitigated by several facts, including that the individual initially accusing claimant of wrongdoing had motive to falsely report claimant's conduct, or mischaracterize it as wrongdoing, due to her personal dispute with claimant. It is also mitigated by the fact that claimant solicited the loan in his capacity as a friend, and not in his capacity as an employee of the employer's business or his friend's capacity as a client. The ALJ wrote that claimant's friend was "a vulnerable client," from whom claimant should not solicit a loan, because she was elderly and "required assistance from a caregiver." Hearing Decision 15-UI-47642 at 2. However, the fact that claimant's friend was elderly is not dispositive of her ability to knowingly consent to loaning claimant money, especially where, as here, the record does not show what kind of caregiving assistance claimant's friend required, and fails to include any information about the vulnerability of claimant's friend, such as her mental acuity or the state of her general health. The record lacks any evidence to support a finding that claimant's friend was so vulnerable as to make her unable to knowingly consent to loaning claimant money. Claimant's conduct is also mitigated by the fact that he borrowed only what he needed under the circumstances, placed specific terms on the duration of the loan, and, in fact, had repaid the loan on schedule. Given those mitigating circumstances, the record fails to show that claimant's conduct was such that the employer could not trust him not to repeat the conduct if so instructed, or that his decision to borrow and repay money from a friend who was also one of the employer's clients made a continued employment relationship impossible.

We therefore conclude that the employer discharged claimant for conduct that was no more than an isolated instance of poor judgment. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). Thus, claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-47642 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 5, 2016

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.