EO: 700
BYE: 201633

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0264

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant for misconduct (decision # 131230). Claimant filed a timely request for hearing. On January 28, 2016, ALJ K. Monroe conducted a hearing, continued on February 16, 2016, and on February 24, 2016, issued Hearing Decision 16-UI-53723, affirming the Department's decision. On March 3, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090 (October 29, 2006), we considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) On August 30, 2004, claimant began her employment with Administrative School District #1 Deschutes County and worked as a "certified employee." Transcript at 5.

(2) The employer had a "Fitness for Duty" policy that provided that if a principal or immediate supervisor brought to the attention of the superintendent any instance in which there was a question about an employee's ability to perform job requirements because of a physical or mental health problem, the employee might be required to submit to an examination by a physician or psychiatrist selected and paid for by the employer to determine the same. Exhibit E3. In the event such an examination was required, the employee had the right to submit a report from her (or his) physician on the same subject for consideration by the employer. The employer also expected its employees to obey the reasonable directives of supervisors or management employees. Claimant was aware of the employer's expectations.

(3) On June 9, 2011, claimant injured her left thumb at work. Her worker's compensation claim was accepted, and in October 2013 the Oregon Department of Consumer and Business Services awarded her a scheduled permanent disability award equal to 1% of the whole person. Exhibit C1.

(4) Between December 2013 and April 2014, claimant formed the belief that the employer had and was continuing to discriminate against her in various ways relating to her thumb injury and disability. On April 11, 2014, she filed a notice of claim with the employer notifying it of a potential lawsuit against the employer based on her injury, pain and disability. On or about May 28, 2014, claimant filed that lawsuit against the employer.

(5) At about the time the lawsuit was filed, based on information from the school principal, the assistant superintendent (Mathisen) obtained information from two of claimant's middle school coworkers describing odd behavior by her around them in the recent past. One coworker described claimant's work communications with her as "abrasive", "blunt", "frantic" and "obsessive", including one involving allegations that the coworker's middle school students had committed theft crimes against claimant and another that included a statement from claimant that "she hadn't slept in ten days because she was trying to determine who was spreading lies about her." Exhibit E4. The other coworker asserted that working with claimant in the past had been "awkward" and "horrible", that claimant "went off" when the coworker denied plaintiff the use an iPod over the summer, that the coworker believed "something isn't right" with claimant and that she could "snap", which caused the coworker to be "afraid." *Id.* She also reported that other coworkers of claimant found claimant's communications with them "awkward" and "intimidating." *Id.*

(6) Upon receiving the information, Mathisen was obligated to investigate in accordance with the governing collective bargaining agreement (CBA) and on June 4, 2014, directed claimant by email to meet with him in person on June 6, 2014. Claimant failed to show and a second meeting was scheduled for June 12, 2014 at 10:30 a.m., which was the last day of the school year before the summer recess. Claimant responded that she would not be available as it was during scheduled work hours. Mathisen then directed claimant to obtain a substitute and attend the meeting. Claimant failed to attend or even communicate with Mathisen before the summer recess period began. The employer became concerned about claimant's ability to perform her job functions – "i.e. following District directives and working effectively with staff and administration." Exhibit E4.

(7) On the first day of the fall term, August 26, 2014, Mathisen and an employer attorney met with claimant, provided her with a copy of the "Fitness for Duty" policy, notified claimant of coworker complaints and directed her to attend a fitness for duty examination on September 9, 2014 with a psychiatrist selected by the employer. The employer notified claimant it was placing her on paid administrative leave pending completion of its investigation and claimant's successful completion of the fitness for duty examination. The employer agreed to pay all expenses relating to the examination, including claimant's travel expenses. However, the following day claimant refused to attend the examination after concluding it was "retaliation for beginning a legal proceeding" against the employer. Transcript at 54.

(8) The employer continued to investigate reports of claimant's behaviors, spoke with six other employees and received reports of "berating/intimidating" communications from claimant and descriptions of her as "difficult", "unapproachable" and "awkward." Exhibit E4. It also met with claimant and her union attorney on October 1, 2014 to discuss her coworkers' complaints and to ask questions of claimant. The employer divulged the names of the coworkers interviewed and notes of their statements, most of which claimant disputed. Later that day, claimant filed complaints against each

coworker named, accused each of making false statements with malicious intent and sent each a "cease and desist" notice, threatening legal action. *Id.*

(9) The employer directed claimant to meet with Mathisen in person on October 30, 2015 as a follow-up to the October 1 meeting. Claimant refused. The employer then directed claimant to meet with Mathisen in person on November 3. Claimant refused to attend in person but appeared by phone. The employer then gave claimant formal reprimands for failing to attend the meetings on June 12, October 30 and November 3 as directed and warned her that she was required to attend future scheduled meetings in person. The employer then directed claimant to attend an in-person meeting with Mathisen on November 10, 2014. Claimant refused to attend the meeting in person stating she would do so only if her lawyer was present. Claimant was given another reprimand for failing to follow an employer directive. A union representative for claimant attended the meetings on October 30, November 3 and November 10.

(10) Claimant's refusal to follow employer directives unless she believed they were "lawful", as she reported on October 1, 2014, together with her coworker's reports of her behaviors heightened the employer's concern over claimant's ability to perform her job functions due to a mental impairment. The employer scheduled another fitness for duty exam for January 12, 2015. On January 9, claimant, through her union attorney, notified the employer she was refusing to attend because the employer had failed to provide a rationale that "[did] not involve unlawful retaliation or lies", had failed to respond to her offer to be examined by a local practitioner of her choosing, had failed to divulge how much the employer's chosen examiner would be paid, had failed accurately report to claimant its communications with its chosen examiner and because claimant believed the employer's chosen examiner was unreliable based on his reputation as she understood it. Claimant did not attend the examination on January 12.

(11) On February 11, 2015, the employer placed claimant on unpaid administrative leave based on her refusal to comply with the employer's directive to participate in a fitness for duty examination under its policy. It informed her that it would allow her to return to work if she successfully completed and passed the examination in accordance with the policy.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ. The employer suspended claimant for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended claimant for misconduct. OAR 471-030-0038(3)(a) (November 1, 2009) 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).

As a preliminary matter, we agree with the ALJ that the employer initially suspended claimant on August 26, 2014 and that the suspension with pay was imposed to accommodate its need to investigate the information it received from claimant's coworkers and claimant's fitness for duty based on her examination by its chosen mental health practitioner, scheduled for September 9, 2014. Hearing Decision 16-UI-53723 at 4. The purpose of the suspension was to accommodate the employer's investigative and administrative needs rather than to discipline claimant. Accordingly, that suspension

was not attributable to claimant as misconduct. However, those circumstances changed on February 11, 2015. On that day, the employer modified the nature of the suspension from paid to unpaid to discipline claimant for willfully refusing to attend the fitness for duty examination the employer had directed her to attend on January 12, 2015. In written argument, claimant did not dispute that she willfully refused the employer's directive to attend the examination in question. Rather she asserted the directive was unreasonable, and accordingly, her refusal to abide by it was not misconduct. Written Argument at 2-3.

According to OAR 471-030-0038(1)(d)(C), a claimant's conscious decision not to comply with an unreasonable employer policy is not misconduct. As the burden of persuasion is on the employer to prove misconduct, the employer must establish each and every element, including "the right to expect" a claimant to observe the "standard[] of behavior" in question. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The "standard of behavior" or expectation in question in this case was the expectation that claimant attend a fitness for duty examination the employer directed her to attend under its Fitness for Duty policy.

On its face, the employer's policy was reasonable. Its purpose was to ensure that employees retained the physical and mental ability to perform their jobs by giving the employer a procedure for having an individual's physical or mental capacities tested if circumstances reasonably suggested the employee's physical or mental abilities relating to job requirements had been compromised. At the same time, it provided some protection for the employees by giving them the right to submit a report from a physician of their choice on the same subject matter for consideration by the employer.

Claimant's objection to the employer's directive to attend the examination in question appeared to be based on her belief that the employer had no reasonable basis in fact for directing her to attend a fitness for duty mental health examination and that its directive was solely based on its desire to obtain a biased opinion, thereby unlawfully retaliating against her for filing a civil lawsuit. However, the evidence shows that at least eight coworkers were interviewed during the employer's investigation and described what the employer characterized as "paranoid and agitated behaviors" on claimant's part. Exhibit E4. The fact that later that day, after the employer divulged their names and notes of their statements, claimant filed complaints against each coworker named, accusing each of making false statements with malicious intent and sending each a "cease and desist" notice threatening legal action, arguably supports that characterization. Viewed objectively, it seems unlikely that eight separate employees would fabricate statements describing similar behaviors on the part of a part-time employee against whom they had no evident bias. Moreover, claimant did not dispute the employer's assertion that she indicated, on October 1, that she believed she could "pick and choose" which employer directives to follow based on whether, "in her sole estimation," the directive in question was "lawful." *Id.* Such a belief on the part of an employee that supervised students the employer had responsibility for during the school day would reasonably cause such an employer concern. Viewing the record as a whole, we cannot conclude that the employer failed to establish that it had legitimate concerns regarding whether claimant exhibited symptoms of a mental impairment to the extent that it could reasonably expect claimant to attend a fitness for duty examination with a mental health practitioner of its choosing under its policy, which also afforded claimant some protection. Consequently, claimant's refusal to attend the scheduled examination on January 12, 2015 constituted a willful violation of a reasonable employer expectation.

Claimant's failure to attend the January 12 examination cannot be excused as an isolated instance of poor judgment. To be isolated, an 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). Claimant also exercised poor judgment on November 10, 2014, when she failed to personally attend a meeting with Mathisen after being directed to do so, asserting she would attend only if her lawyer was present. Claimant's conduct in that instance constituted a willful violation of the employer's reasonable expectation that employees obey reasonable directives of supervisors or management employees, particularly in light of the fact that her union representative personally attended the meeting.

Claimant's January 12 conduct cannot be excused as the result of a good faith error in her understanding of the employer's expectation. Claimant did not assert or show that she reasonably believed the employer would excuse her failure to attend the examination after being directed to do so while represented by her union attorney.

The employer suspended claimant for misconduct under ORS 657.176(2)(b). Claimant is disqualified from receiving unemployment insurance benefits until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 16-UI-53723 is affirmed.

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

DATE of Service: <u>April 14, 2016</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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