

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0362**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 165222). The employer filed a timely request for hearing. On March 7, 2016, ALJ Ainsworth conducted a hearing, and on March 14, 2016 issued Hearing Decision 16-UI-54983, concluding the employer discharged claimant for misconduct. On March 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The Center for Human Development, Inc. employed claimant, last as a mental health therapist, from November 13, 2013 to September 30, 2015. Claimant worked for the employer in La Grande, Oregon, a small rural community.

(2) The employer had an ethics policy that prohibited its therapists from “exploit[ing] relationships with current or former clients for personal gain, including social or business relationships.” Exhibit 3 at 3. It also had a policy that required an employee to seek consultation whenever the employee had any doubt about how to act in the best interests of a client. At hire, claimant acknowledged receiving, reviewing and understanding the employer’s policies.

(3) In 2015, claimant treated a client, and in late summer that year, after the treatment was complete, developed a friendship with her. Claimant discussed her friendship with the former client with her college ethics professor who did not believe it was ethically improper. Claimant went on a trip with her three children and the former client to visit the former client’s family in Nevada. Claimant’s mother, with whom claimant lived, offered the former client a “place to stay” in her residence and the former client asked her probation officer for permission to do so. The probation officer denied the former client such permission, and on or about September 9, 2015, he received a letter from the former client’s prior significant other that accused the former client and claimant of engaging in a “sexual and personal relationship.” Transcript at 7. On September 15, 2015, the probation officer reported that information to the employer.

(4) On September 16, 2015, the employer placed claimant on administrative leave and conducted an investigation. Claimant acknowledged the Nevada trip with her children and the former client and having only a “friendship” with the former client. Transcript at 12-13. The employer did not interview the former client or the former client’s significant other, who had also been a client of the employer, about the information it had received from the probation officer.

(5) On September 30, 2015, the employer discharged claimant for having “a relationship with a former client” in violation of its ethics policy. Transcript at 6.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment and not misconduct.

As a preliminary matter, claimant’s first-hand denial differed from the testimony of the employer’s witnesses, which was based on hearsay, that claimant engaged in a “sexual and personal relationship” with her former client. Transcript at 7, 46. However, the ALJ did not explicitly find that claimant was not credible,<sup>1</sup> and in the absence of evidence demonstrating that claimant was not credible, her first-hand testimony that her relationship with the former client was no more than a “friendship” was at least as credible as the employer’s hearsay. Transcript at 45. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on that issue, we based our findings on claimant’s evidence.

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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

In its initial determination, the Department concluded claimant was discharged, not for misconduct, finding as fact that claimant was discharged “for allegedly having a relationship with a former client” but “did not have a relationship with her former client.” Decision # 165222. The ALJ disagreed, accepted the employer’s hearsay evidence over claimant’s first-hand denial that she had engaged in a “romantic” relationship with the former client, and concluded that claimant had engaged in disqualifying misconduct because she “commenced” a personal relationship with a former client in violation of the employer’s ethics policy, which created an “irreparable breach of trust in the employment relationship.” Hearing Decision 16-UI-54983 at 2-5. However, assuming, without deciding, that claimant’s friendship with the former client was at least a wantonly negligent violation of the employer’s ethics policy, we

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<sup>1</sup> See ORS 657.275 (2) (EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to an ALJ’s implied credibility findings).

disagree with the ALJ that claimant's conduct was not excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(D) further provides that some conduct, even if isolated, such as acts that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceeds mere poor judgment and cannot be excused. In Hearing Decision 16-UI-54983, the ALJ concluded claimant's relationship with her former client could not be excused as an isolated instance of poor judgment, reasoning,

There is substantial evidence in the record that claimant's relationship with the former client was anything but casual and apparently disrupted an existing relationship between two clients or former clients. . . . Due to the importance of therapists maintaining a professional distance from clients and former clients, and claimant's surreptitious relationship with the former client, claimant's conduct reasonably created an irreparable breach of trust in the employment relationship. . . .

Hearing Decision 16-UI-54983 at 5. However, the evidence in the record that claimant's relationship with the former client was "anything but casual and apparently disrupted an existing relationship" was based solely on hearsay and the Oregon Court of Appeals has stated that hearsay evidence may not constitute "substantial evidence" where the facts sought to be proved through the hearsay are central to the case, there is opposing evidence to the hearsay and where the ability to cross-examine the author of the hearsay statement about his or her observations, recollection, truthfulness or potential bias is important.<sup>2</sup> Here, the nature of claimant's relationship to the former client was important to both the employer's decision to terminate and the ALJ's analysis, and claimant denied that the relationship was "romantic" and was left without the critical opportunity to cross-examine the author of the hearsay about her apparent statement to the contrary, truthfulness or potential bias. Moreover, claimant's intent was not to disregard ethical concerns regarding relationships with former clients, as the record shows claimant discussed the issue of maintaining friendships with clients after treatment in general with both the employer, who did not provide her with any clear guidelines, and her ethics professor, who apparently dismissed any ethical concerns, particularly when serving people in a small community such as La Grande. Transcript at 47, 57-58, 60-61. Accordingly, on this record, viewed objectively, claimant's decision to engage in a non-sexual friendship with the former client, after her treatment ended, was not so egregious that it constituted a breach of trust that made a continued employment relationship impossible.

The employer discharged claimant because of an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

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<sup>2</sup> See, *Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

**DECISION:** Hearing Decision 16-UI-54983 is set aside, as outlined above.<sup>3</sup>

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

**DATE of Service:** May 6, 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](http://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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<sup>3</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.