

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0485

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 105722). Claimant filed a timely request for hearing. On April 7, 2016, ALJ Allen conducted a hearing, and on April 11, 2016, issued Hearing Decision 16-UI-56963, affirming the administrative decision. On April 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Blue Harbor Senior Living, a company that managed senior living facilities, employed claimant from July 29, 2013 until February 23, 2016, last as building services manager. As building services manager, claimant was responsible for the general maintenance of apartments in the facility where he worked; his duties included preparing vacant apartments for rental by new tenants. Claimant oversaw the work of two maintenance assistants and a staff of housekeepers.

(2) Prior to December 2015, claimant used a checklist to certify to the employer's managers that a vacant apartment was "rent ready." Transcript at 12. The checklist required that claimant specify that the apartment was clean, that all appliances and fixtures in good working order, and that any necessary painting or repairs had been performed. Upon receiving the checklist, the managers would often discover problems that needed to be corrected before the apartment could be rented. The managers would then give claimant time to address these issues. Transcript at 17.

(3) In December 2015, the employer hired a new executive director for the facility where claimant worked. The executive director implemented a procedure that specified that after claimant completed a checklist specifying that an apartment was ready to rent, claimant was to submit the checklist to the employer's marketing director. The executive director or marketing director would then review the list and provide any necessary feedback. Transcript at 26-27.

(4) In February 2016, the executive director received complaints about two apartments for which claimant had submitted a checklist to indicate that they were "rent ready." One of these apartments had no functioning refrigerator or shower; the other apartment had broken blinds, a carpet that had not been

cleaned, and a shower that "was full of shower chairs." Transcript at 25. Tools had also been left in both of these apartments. Transcript at 25. As a result of these complaints, the executive director gave claimant a written warning on February 10, 2016. The warning specified that all tasks on the checklist must be completed before claimant submitted the list to the marketing director. The warning also stated that any failure to submit an accurate checklist, *i.e.*, one that indicated an apartment was ready to rent when it was not could result in further discipline. *Id.*

(5) On February 19, 2016, claimant submitted checklists certifying that six apartments were "rent ready." The employer's managers inspected these apartments and discovered significant maintenance and cleanliness problems in two of the six apartments. One of the six apartments had a strong odor of urine or feces, probably emanating from the carpet, as well as broken blinds and broken and peeling caulking around the bathroom sink. Another one of the six apartments had a three to four inch gash in the carpet, improperly installed blinds, and improperly applied touch up paint.

(6) On February 23, 2016, the employer discharged claimant for submitted checklists indicating that six apartments were "rent ready" when four of these apartments were not.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but 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.

As a result of the warning he received on February 10, 2016, claimant knew that the employer expected him to complete all repair and cleaning tasks on a checklist before he submitted the list to the employer's managers to indicate that a vacant apartment was ready to be rented. Claimant also understood that submitting a checklist that indicated an apartment was "rent ready" when the apartment was not could result in disciplinary action. In spite of this warning, claimant submitted checklists on February 19, 2016 that indicated that two apartments were "rent ready" when these apartments were not.¹ Claimant's failure on that occasion to submit checklists that accurately reflected the condition of two apartments he was responsible for preparing for rental demonstrated a conscious disregard of the employer's expectations. Claimant's conduct was at least wantonly negligent.

Although claimant's behavior on February 19 was wantonly negligent, it can be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment within the meaning

¹ The employer asserted that a four of the check lists submitted by claimant on February 19 inaccurately indicated that these apartments were "rent ready." At the hearing, however, the employer's executive director was only able to provide testimony regarding maintenance and cleaning problems in two apartments for which claimant submitted check lists on February 19.

of OAR471-030-0038(3)(b). An “isolated instance of poor judgment” is behavior that is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR471-030-0038(1)(d)(A). To qualify to be excused as an isolated instance of poor judgment the behavior at issue must not have exceeded “mere poor judgment” by, among other things, not causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Prior to February 10, 2016, claimant understood that he need not complete all cleaning or repair tasks prior to submitting a checklist for a vacant apartment to the employer, and that the employer would allow him time to correct any problems identified with his preparation of an apartment for rental. Only after he received the February 10 warning did claimant understand that the employer expected him to complete all the tasks specified on the vacant apartment checklist *before* submitting the list to the employer’s marketing director. Any incident occurring prior to that date, while still a violation of the employer's expectations, was not done willfully or with wanton negligence, so claimant’s conduct in submitting inaccurate checklists to the employer on February 19 was therefore a single willful or wantonly negligent violation of the employer’s expectations regarding the employer’s newly-implemented process for submitting these lists. Nor do we conclude that claimant’s failure to submit accurate checklists caused an irreparable breach of trust or otherwise make a continued employment relationship impossible. The record is devoid of any evidence demonstrating that claimant was unwilling or reluctant to accept direction from his managers to correct any cleaning or repair problems in the vacant apartments he was expected to prepare for new tenants. To the contrary, his actions prior to the February 10 warning indicated that he was apparently capable of accepting direction necessary to complete his assigned work: during that time, he prepared approximately 150 apartments for rental, and was never counseled about any performance issues or reprimanded for matters related to the condition of the apartments for which he was responsible. Transcript at 21. We therefore conclude that claimant’s submission of inaccurate checklists on February 19, 2016 was an isolated instance of poor judgment.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-56963 is set aside, as outlined above.

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

DATE of Service: May 25, 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.

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