

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0590

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 122029). The employer filed a timely request for hearing. On May 4, 2016, May 11, 2016 and May 13, 2016, ALJ Seideman conducted a hearing, and on May 13, 2016 issued Hearing Decision 16-UI-59556, concluding claimant's discharge was for misconduct. On May 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Hiron, Inc. employed claimant as a licensed pharmacy technician from January 27, 2014 to March 17, 2016.

(2) In order to become a licensed pharmacy technician claimant had to undergo a 14-month college program. Part of the curriculum for pharmacy technicians included education about state controlled substances laws which prohibit sharing prescribed medications with other individuals. The employer prohibited employees from violating state law with regard to prescriptions while at work.

(3) At all relevant times, claimant had valid prescriptions for the prescription narcotics Percocet and Oxycodone. In October 2015, claimant had a panic attack at work. Claimant asked a coworker she knew had a prescription for the same medication she took, if she could borrow a pill. The coworker refused, but explained that claimant could, instead, take a pill from the employer's stock and replace the pill later from her prescribed supply. A couple of months later, claimant asked the coworker for another pill. The coworker refused again, and told claimant to quit forgetting her medication.

(4) Between October 2015 and February 2016, at least one employee told claimant after claimant asked to borrow a pill from the employee that it was illegal to borrow prescription controlled substances from another person. The employee told claimant to speak with her doctor if she needed more pills than were prescribed, and claimant replied that her doctor as "not helping her." Exhibit 1, statement of C.W.

(5) On February 12, 2016, the pharmacist orally warned claimant that asking coworkers for their prescription medication was prohibited. She told claimant "it is never okay to take medication that is not yours. It doesn't matter what it is – it could be for blood pressure – I [the pharmacist] warned her it was very serious, that she could be written up or fired and to not ever do it again. She [claimant] said okay." Exhibit 1, statement of K.K.

(6) Shortly after giving claimant the February warning, the pharmacist learned that claimant asked a coworker for a Lorazepam. On two occasions between February 12, 2016 and March 11, 2016 claimant requested an Oxycodone and a Xanax from the same coworker. Around March 9, 2016, claimant again asked a coworker for a Lorazepam. The employee refused, and another employee reported the incident to the employer. On March 11, 2016, the employer suspended claimant from work to investigate.

(7) On March 16, 2016, the employer contacted the Oregon Board of Pharmacy about claimant's conduct. On March 17, 2016, the employer discharged claimant for repeatedly asking other employees to allow her to borrow prescription controlled substances.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for asking coworkers to loan her their prescription medications after specifically being warned that it was "never okay" to do so. Claimant argued at the hearing that she did not understand her conduct was not acceptable. Claimant's argument is, however, implausible. At the time of the final incident, claimant had been told by a coworker that borrowing medication is illegal. She had been told by the pharmacist that it was "never okay." She had undergone a 14-month college training program during which laws related to prescription medication were on the curriculum. Claimant argued that she thought it was acceptable because she had prescriptions for the same medications she was asking to borrow. That argument is not persuasive, either. The medications claimant asked to borrow were available only by prescription, and in prescribed quantities. In other words, when claimant collected her prescribed medication from the pharmacy, and was dispensed a certain number of pills, those pills in that quantity constituted the prescribed controlled substances claimant was allowed to possess. It did not, as a matter of common sense and given claimant's specialized knowledge as a trained and licensed pharmacy technician, authorize claimant to access an unlimited quantity of that prescription from others' prescribed supplies of the same medication. Nor does the fact that the pharmacy claimant worked for, through which claimant obtained her prescription, had once loaned her one pill from its supply of medication reasonably form a basis for claimant to

believe she could "borrow" medication from others who were prescribed the same type of medication. The circumstances under which claimant borrowed one pill from a business charged with regulating and dispensing controlled substances for patients the pharmacy had documented proof held valid prescriptions for those medications are far different from claimant's attempts to informally borrow medication from her coworkers who did not have the same knowledge and were not authorized to dispense controlled substances.

Given the specific warnings she received from her coworker and the pharmacist that her conduct was unlawful, could get herself and her coworkers in trouble, and could result in her discharge, the record shows that claimant understood borrowing medication from her coworkers was also a violation of the employer's expectations of her, and, nevertheless, she repeatedly and willfully violated it. Claimant repeatedly and willfully exercised poor judgment by attempting to borrow prescription medication from at least two coworkers on at least six occasions, including at least four occasions that occurred after she had been told that borrowing medication was unlawful and specifically prohibited by the employer. Because claimant's conduct involved a pattern of distinct willful exercises of poor judgment, it cannot be excused as an isolated instance of poor judgment. Nor does the record show that claimant's conduct was excusable as a good faith error. Given that the pharmacist and a coworker had specifically advised claimant before the final four incidents that her conduct was illegal and could result in her discharge from work, claimant could not have sincerely believed the employer would excuse or condone her attempts to solicit prescription medication from her coworkers.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-59556 is affirmed.

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

DATE of Service: June 20, 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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