EO: 200
BYE: 201712

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

286
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0721

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113736). Claimant filed a timely request for hearing. On May 25, 2016, ALJ Triana conducted a hearing, and on June 6, 2016 issued Hearing Decision 16-UI-61110, affirming the Department's decision. On June 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Multnomah County School District #1 employed claimant from August 24, 1999 until March 22, 2016 as a secretary to a building principal.

(2) The employer expected claimant and all its employees to keep confidential information regarding reports to the Department of Human Services (DHS), including the names of the reporter and child, and the details of the investigation. Confidentiality was necessary to protect the safety of the reporter and the child, and to preserve the integrity of the DHS investigation. The employer expected claimant to report any DHS matter to the principal, but refrain from contacting parents or telling other staff about the matter unless it was necessary for the purposes of the DHS investigation. The employer also expected claimant to provide leadership, work direction and guidance to other office staff regarding school policies and procedures. The employer expected claimant to report violations of the employer's policies and procedures if she knew of or witnessed violations. Claimant understood the employer's expectations.

(3) On November 4, 2015, a staff member made a report to DHS regarding a student at the school where claimant worked. Later on November 5, a DHS worker called and spoke with claimant to request information about the reporter and the child who was the subject of the report. As the principal's secretary, claimant was the lead for the school secretary, who was also present in the office when claimant received the DHS call. When the DHS worker asked claimant about the reporter, claimant asked the school secretary who the person was, because claimant was not familiar with the name given by the DHS worker. After claimant hung up the telephone, the school secretary asked claimant about the nature of the call. Claimant told the school secretary the names of the reporter and child and that the call was from a DHS worker.

(4) The DHS worker who had spoken to claimant arrived at the school. He asked the school secretary about the person who made the DHS report. The school secretary went to get the reporter so the DHS worker could interview her. The reporter arrived at the office and met with the DHS worker.

(5) Claimant engaged in a conversation with the school secretary questioning why DHS was there regarding that particular child, and whether they believed that abuse or neglect had occurred. Claimant and the school secretary knew one of the child's parents, in part because the parent was a prior employee of the school. The school secretary asked claimant if it was "okay to call" the child's parent, and stated that "if it was [her] she would want someone to . . . call her." Transcript at 42, 43. The school secretary continued to speak about calling the parent. Claimant did not remind the school secretary about the school's policy to maintain the confidentiality of the child and the reporter and to refrain from hindering the DHS investigation.

(6) The school secretary told the child's parent about the DHS visit via text message. Claimant saw the parent come into the school office. Claimant told the parent that someone wanted to speak with her. The parent then removed the child from the school before the child spoke with the DHS worker.

(7) About one hour after the DHS worker called the school, one of the child's parents arrived at the school wanting to speak to the staff person who made the report to DHS.

(8) On November 5, 2016, the principal was not at the school where claimant worked. Other administrators were there that day. The principal was at the school on November 6, 2015. Claimant did not report anything about the DHS incident to the principal or other school administration, including the comments the school secretary had made about calling the parent. The employer learned about the November 5 DHS visit on November 9, 2015 when DHS began to look into the school's role in the November 5 investigation.

(9) On November 15, 2015, the employer put claimant on administrative leave with pay while it investigated claimant's conduct from November 2015.

(10) On March 22, 2016, the employer discharged claimant for her conduct on November 5, 2015 and for failing to inform the principal or other administrators about what occurred on that date.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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.

The employer discharged claimant because of her conduct regarding the DHS investigation on November 5, 2015. The employer asserted that claimant violated its expectations, in part, by disclosing to the school secretary the names of the person who made the report to DHS and the child, and by telling the school secretary about the nature of the call from the DHS worker. Transcript at 6, 8-9. Claimant argued at hearing that she did not violate the employer's expectations by discussing the DHS investigation with the school secretary because the school secretary was commonly involved in assisting DHS with its work at the school. Transcript at 35. We agree with the ALJ and find that, had claimant merely asked the school secretary for identification information about the staff person, that conduct alone would not have been a willful or wantonly negligent disregard of a known employer expectation because claimant's inquiry to the school secretary about the reporter was needed to identify the person to assist the DHS worker. However, for the purposes of the DHS investigation, there was no reason for claimant to tell the school secretary who was calling about the staff person. Once the DHS worker arrived, claimant has not shown she had any reason to discuss the DHS case with the school secretary other than to assist with arranging the interviews once the DHS worker arrived at the school. Claimant's conduct in discussing the DHS case with the school secretary was at least a wantonly negligent violation of the employer's reasonable expectations that claimant would maintain confidentiality regarding a DHS case.

The employer also discharged claimant, in part, for failing to provide leadership, work direction and guidance to the school secretary when she discussed the DHS case with claimant and questioned whether she should call the child's parent. Claimant argued that she did not counsel the other secretary that she was prohibited from calling the parent because claimant assumed the other secretary knew she was prohibited from calling the parent, and it was not claimant's role to provide "moral leadership." Transcript at 42-43, 56-57. Claimant's complicity in permitting the school secretary to allow her personal feelings about the parent of the child involved in the case to prompt her to interfere with the DHS investigation violated the employer's expectation that claimant would provide guidance to ensure protection of a child potentially in danger and was a willful violation of the employer's policy. Similarly, claimant's failure to inform her principal or other administrators that the school secretary had spoken about calling the parent, and that the parent appeared at the school and removed the child before the DHS worker spoke with the child was a willful disregard of the employer's policy that she report any such concerns to her superiors.

Claimant's willful or wantonly negligent behavior on November 5, 2015 and her failure to notify her principal or other superiors about the irregularities that occurred on November 5 may be excused from misconduct that disqualifies her from unemployment benefits if it was an isolated instance of poor

judgment. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is 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)(A). Behavior that exceeds "mere poor judgment" may not be excused. OAR 471-030-0038(1)(d)(D). An act exceeds mere poor judgment if it was unlawful, tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship possible. OAR 471-030-0038(1)(d)(D).

Claimant's November 5 conduct consisted of a single incident. She disclosed information unnecessarily to the school secretary, discussed the DHS investigation with the secretary, failed to counsel the secretary against calling the parent, and did not report the secretary's statements about calling the parent or the fact that the parent arrived at the school, disrupting the DHS investigation. *See accord Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (claimant's violation of the employer's disciplinary policy on two consecutive days was an isolated instance of poor judgment; it was a "single occurrence in the employment relationship" because the incident on the second day was a continuance of the incident on the previous day). The record fails to show that claimant engaged in any willful or wantonly negligent violation of the employer's policies prior to November 5, 2015. Thus, claimant's conduct on November, 2015 was an isolated instance of willful or wantonly negligent conduct.

Although claimant's conduct was isolated, OAR 471-030-0038(1)(d)(D) provides that acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible, exceed mere poor judgment and cannot be excused. The record does not contain sufficient information to determine if claimant's conduct violated the law or was tantamount to unlawful conduct. However, the employer's director testified persuasively that the employer could not continue to employ claimant because it could no longer trust her to properly handle confidential matters involving reports to DHS. The type of conduct in which claimant engaged – unnecessarily disclosing confidential information, discussing a DHS investigation with a coworker, and failing to counsel the coworker from contacting the parent who was the subject of a DHS report – impeded the DHS investigation and could have posed an increased safety risk to both the reporter and child. Viewed objectively, claimant's conduct on November 5 was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor was claimant's behavior on November 5 excusable as a good faith error under OAR 471-030-0038(3)(b). The record does not show that claimant had a reasonable basis to believe the employer would excuse her breach of confidentiality, improper discussions regarding the DHS matter, or failure to advise the school secretary on the proper course of action. Moreover, it is not plausible that claimant sincerely, but mistakenly believed that the employer would condone her conduct.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-61110 is affirmed.

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

DATE of Service: July 28, 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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