

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0761

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 90318). The employer filed a timely request for hearing. On June 8, 2016, ALJ Holmes-Swanson conducted a hearing and issued Hearing Decision 16-UI-61313, concluding claimant's discharge was for misconduct. On June 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Providence Health employed claimant as a retail services supervisor from August 19, 1996 to March 9, 2016.

(2) Claimant's work involved supervising a café. The employer required her to maintain a valid food safety certification as a condition of maintaining her employment, and prohibited her from working without a valid certification. Claimant understood the employer's expectation. Claimant's certification had to be renewed every five years, and claimant had renewed it at least two times during her employment.

(3) Between November 4, 2015 and the end of January 2016, the employer's human resources department sent four emails to claimant reminding her that her food safety certification was going to expire and that she needed to renew it. Claimant received the emails, but did not read them, and did not do anything to renew her certification. Claimant did not ask the employer's certification and licensing department to help her renew her certification.

(4) On February 28, 2016, claimant's food safety certification expired. Claimant continued to work for the employer with an expired certification. On March 3, 2016, the employer suspended claimant from duty. On March 9, 2016, the employer discharged claimant for failing to maintain the food safety certification that was a condition of her employment.

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. As a preliminary matter, we disagree with the ALJ's application of OAR 471-030-0038(3)(c) (August 3, 2011) to this matter. That rule provides that the willful or wantonly negligent failure to maintain a certification "necessary to the performance of the *occupation*" is misconduct, so long as it is attributable to the individual. Here, however, the record fails to show that a food safety certification was "necessary to the performance of" a retail services supervisor "occupation," just that this particular employer required it as a condition of holding that particular job. Therefore, the license provision does not apply to this case, and claimant's work separation should be analyzed using the general definitions of "misconduct" and "wanton negligence" found in OAR 471-030-0038(1)(c) and (3)(a).

OAR 471-030-0038(3)(a) 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). Isolated instances of poor judgment are not misconduct, unless the conduct involved exceeded mere poor judgment by making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D) and (3)(b).

The employer had the right to expect claimant to maintain her food safety certification. Claimant understood that holding that certification was a condition of retaining her employment. As the certification holder, claimant knew or should have known when it was going to expire, and taken reasonable steps to renew it. In the event that she did not, the employer sent her four notifications that her certification was about to expire. Claimant did not specify any reason or set of reasons preventing her from renewing her certification, and her lack of effort to ensure she retained a valid certification that she knew was a condition of her employment, when she knew should have known and was specifically informed that it was about to expire, demonstrated that she was consciously indifferent to the consequences of her conduct, and, therefore, wantonly negligent.

Claimant's conduct may not be excused as a good faith error, as it appears on this record that claimant did not reasonably believe she held a valid certification, or that the employer would excuse or condone her failure to maintain a valid certification. Claimant's conduct may not be excused as an isolated instance of poor judgment because, although it involved only a single incident, failing to maintain a certification that is a requirement of one's job is the type of conduct that, reasonably considered, makes a continued employment relationship impossible. In this case, holding a food safety certification was a requirement of claimant's job because she supervised food workers, monitored their activities, held them accountable, supervised how food was handled and stored, and made sure that the food served in the café she supervised was handled safely so the employer was serving safe food to customers. Audio recording at ~16:35. Because claimant let her certification lapse, she was no longer qualified by reason

of the certification to do the work the employer hired her to perform. Her conduct therefore made it impossible for the employer to continue to employ her, exceeded mere poor judgment, and cannot be excused.

Claimant's discharge was for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-61313 is affirmed.

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

DATE of Service: July 29, 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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