

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1317

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 104518). Claimant filed a timely request for hearing. On November 7, 2016, ALJ Buckley conducted a hearing, and on November 14, 2016, issued Hearing Decision 16-UI-71082, affirming the administrative decision. On November 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) From July 4, 2014 through August 5, 2016, Community Vision, Inc. employed claimant as a supported living companion. Claimant's job duties were to provide personal assistance to a person with disabilities as a live-in companion.

(2) On October 26, 2014, claimant signed a "Live-in Companion Contract" in which he agreed, among other things, to work cooperatively with other staff members and the supported individual "to create and implement excellent supports for the Supported Individual," and to not interfere with other staff members' work during his off-duty hours. Exhibit 1.

(3) Sometime in early February 2015, one of the employer's managers visited the supported individual's residence where claimant lived and worked, and saw that claimant had placed numerous personal items on the supported individual's dining room table. On February 17, 2015, the manager gave claimant a written "Training Documentation" in which he directed claimant to keep his personal items off the supported individual's dining room table. Exhibit 1.

(4) On January 24, 2016, one of the employer's managers gave claimant a written "Training Documentation" in which he reminded claimant of the employer's policy which required that employees treat one another with courtesy and respect. In this document, the manager also instructed claimant to not use the living room of the supported individual's residence, to minimize interactions with on-duty staff when claimant was off-duty, to use the kitchen only to prepare and eat meals, and if possible, to use the kitchen at times when on-duty staff were not preparing meals for the supported individual. Exhibit 1.

(5) On March 2, 2016, claimant sent an email to the employer's Director of Human Resources and Director of Support Programs in which he discussed a conflict he was having with a coworker, and mentioned discussions he had had with another staff member about care of the individual for whom claimant provided support. On March 29, 2016, one of the employer's managers gave claimant a written "Training Documentation" in which he directed claimant to talk to his supervisor about any problems regarding care of the supported individual, to respect the supported individual's priorities while living in her home, and to treat other employees with professionalism and respect.

(6) On April 11, 14, 16 and 18, 2016, while off-duty, claimant used the kitchen table in the supported individual's home for personal work and projects. His use of the kitchen table interfered with the work of on-duty staff members. On April 26, 2016, one of the employer's managers gave claimant a written "Training Documentation" in which he reminded claimant of the January 24 directive that he use the kitchen only to prepare and eat meals, that he not use the living room, that he keep the dining room table free of personal items, and that he not interfere with the work of other staff members. The "Training Documentation" stated that "[t]his notice will serve as a final warning," and warned claimant that failure to immediately comply with the employer's policies would result in discipline up to and including discharge. Exhibit 1.

(7) On June 26, 2016, while off-duty, claimant left his bedroom and went into the living room to read. A coworker, who was on-duty, was in the living room working. Claimant and the coworker got into an argument over whether the living room blinds should be opened or closed. Transcript at 16, 51.

(8) On June 29, 2016, claimant met with the employer's human resource coordinator to complain about a staff member. The employer began an investigation into the complaint.

(9) By letter dated August 5, 2016, the employer discharged claimant for failing to comply with the terms of the "Live-in Companion Contract" and for violating the employer's policies and procedures. The employer cited "several concerning issues" that were discovered during the investigation of claimant's June 29 complaint. These issues were: claimant's engagement "in multiple power struggles" by closing the garage door when on-duty staff members were going in and out of the garage and by raising the blinds in the living room after staff members had lowered them; claimant's personal use of the kitchen at times when on-duty staff members were working there; and claimant's use of the living room when an on-duty staff member was attempting to sleep in the room. The letter also cited a number of other instances of claimant's conduct that staff members reported as "concerning." The instances listed were: "taking [the supported individual's medical residential books into your bedroom," "[i]nvading staff's personal space and unwanted contact," "an increased pattern of [the supported individual] refusing supports during your shifts," "[c]oming into common spaces without being fully dressed," "moving your belongings into areas that support staff on-duty are using," "leaving completed

laundry in the machines, “leaving dirty dishes in the sink,” and “storing personal belongings behind [the supported individual’s] chair” Exhibit 1.

CONCLUSION AND REASONS: We agree with the ALJ and conclude 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 connected with work. 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant for conduct that violated the employer’s policies and procedures, and also violated the terms of the “Live-in Companion Contract” claimant signed after he began working for the employer. Claimant knew and understood that the terms of the “Live-in Companion Contract” required that he work cooperatively with other staff members and the individual he was assigned to support, and that he not interfere with the work of on-duty staff members when claimant was not working. The employer clearly informed claimant of its expectations regarding the use of the residence where claimant lived with the supported individual in the “Training Documentations” it gave him January 24 and April 26, 2016. In these documents, the employer directed claimant to not use the living room, to use the kitchen only when preparing and eating meals, and to not interfere with the work of on-duty staff when claimant was not working. In spite of these directives, claimant entered the living room on June 29, 2016 and engaged in an argument with an on-duty staff member who was working there, and continued to make personal use of the kitchen in a manner that interfered with the work of on-duty staff. Claimant knew, or should have known, the employer’s expectations in regard to his personal use of the supported individual’s residence. His conduct in violating these expectations constituted a willful or wantonly negligent disregard of the employer’s interests.

At the hearing, claimant did not deny his personal use of the kitchen or living room. He testified, however, that he “interpreted” the employer’s directive about the living room as a warning “that I shouldn’t use the living room when it will interfere with job performance.” Transcript at 52. He also testified that he found the rules about use of the kitchen to be “rather oppressive,” that agreeing to these rules would mean he would need to “forgo eating and sustaining myself,” and that “there was room in the kitchen for multiple people to cook or function simultaneously.” Transcript at 58. Contrary to claimant’s assertions, however, the employer’s directives regarding his personal use of the supported individual’s residence were clear, direct and reasonable. The employer ordered claimant to stay out of the living room, regardless of any effect his presence might have on on-duty staff. The employer’s directive regarding the kitchen allowed claimant to prepare and eat his meals there, so that he was not required to “forgo eating and sustaining himself.” We therefore reject claimant’s contention that he was

unaware that his June 29 use of the living room violated the employer's policy, or that he was justified in disregarding the rule concerning his use of the kitchen because it was unreasonable.¹

Claimant's actions cannot be excused as an isolated instance of poor judgment under the provisions of OAR 471-030-0038(3)(b). To be isolated, the exercise of poor judgment must be 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). In addition, under OAR 471-030-0038(1)(d)(D), acts that created irreparable breaches of trust in the employment relationship "exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3)." Here, claimant willfully, or with wanton negligence, violated the employer's expectations multiple times from April 11 through June 26, 2016. His exercise of poor judgment therefore was a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence. In addition, claimant's conduct demonstrated that he was unwilling to comply with the employer's directive regarding kitchen use, and willing to "interpret" the employer's clear directive to stay out of the living room in a manner that justified his behavior. A reasonable employer in the same industry as this employer – providing in-home care to people with disabilities – would no longer be able to trust that claimant would continue performing his duties in compliance with the employer's expectations. Claimant's conduct therefore created an irreparable breach of trust in the employment relationship, and exceeded mere poor judgment.

Nor can claimant's conduct be excused as a good faith error. Given the employer's repeated directives – regarding claimant's use of the living room and kitchen -- on February 17, 2015, and January 24 and March 26, 2016—claimant could not have reasonably believed the employer would have excused his personal use of these rooms.

The employer discharged claimant for misconduct. He is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-71082 is affirmed.

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

DATE of Service: December 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.

¹ In addition to claimant's use of the kitchen and living room, the employer described numerous other examples of claimant's inappropriate behavior in the August 5 letter discharging claimant. These examples were based on reports provided by claimant's coworkers. Claimant denied that he engaged in any of these behaviors, however. We find that claimant's first hand testimony outweighs the hearsay evidence of his coworkers, and conclude that the employer failed to meet its burden to demonstrate that any conduct of claimant's – other than his use of the living room and kitchen – violated its policies and procedures or the "Live-in Companion" contract that claimant signed.

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