

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1349

Affirmed
Disqualified

PROCEDURAL HISTORY: On October 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81404). Claimant filed a timely request for hearing. On November 8, 2016, ALJ Triana conducted a hearing, and on November 16, 2016 issued Hearing Decision 16-UI-71199, affirming the Department's decision. On December 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) PeaceHealth employed claimant as a surgical technologist from December 27, 2005 until August 4, 2016.

(2) The employer expected claimant to refrain from entering work areas of the employer's hospital when she was not scheduled to work or was on leave from work. Claimant understood the employer's expectations.

(3) Sometime in approximately February 2016, claimant was photographed dressed in scrubs in a work area of the hospital at a time when she was supposed to be on a leave. Shortly thereafter, the floor manager and the employer's human resources partner discussed this incident with claimant. Claimant told the employer representatives she had been at the hospital to check her email. During this discussion, the employer representatives told claimant that she was prohibited from entering the employer's premises when she was on leave and at all other times when she was not working unless she had the employer's permission to be there. Transcript at 16, 17, 24, 26.

(4) After April 19, 2016, claimant was on a leave the employer authorized under the Family Medical Leave Act (FMLA). Claimant was expected to return to work on August 9, 2016. On August 3, 2016, while claimant was still on leave, claimant was observed leaving the hospital dressed in scrubs. On

August 4, 2016, also while still on leave, claimant was observed in work areas of the hospital, outside the operating room and while entering a restroom. Immediately after claimant left the restroom, used syringes and scrubs dirtied with blood were discovered discarded in the restroom and blood was found in the restroom sink. Employees of the cardiac surgery department observed claimant and asked her to provide her name and to show them her identification badge, which she did. The employees reported their observations of claimant on both days to their manager and the manager reported them to the employer's human resources partner.

(5) On August 4, 2016, the employer discharged claimant for being in work areas of the hospital that day because she was on leave and did not have the employer's permission.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified that, based on her discussion with the floor manager and the human resources representative about being in the hospital when she was on leave in approximately February 2016, she knew the employer prohibited her from entering work areas of the hospital when she was on leave and when she was not scheduled to work unless she had specific permission to be there. Transcript at 24, 26. Claimant also conceded that although she was on leave on April 4, 2016, she entered the hospital and did not dispute that she entered a work area of the hospital that was not open to the public. While claimant contended she had permission from the floor manager to enter the hospital that day, which was communicated to her by a front office receptionist, the floor manager denied he gave that permission, denied that the receptionist contacted him about giving that permission and further testified that he spoke with the receptionist and she denied that claimant communicated with her about obtaining permission from him or that she had told claimant that the floor manager had authorized her entry onto the hospital premises. Transcript at 24, 36. Claimant's testimony about why she contacted the receptionist to seek permission from the floor manager on her behalf rather than contacting the floor manager directly is not particularly plausible. It does not make a great deal of sense that claimant would think the floor manager would respond to the receptionist's request for permission on her behalf more promptly than if she called the floor manager directly, or that the receptionist could better provide the reasons she needed to enter the hospital premises than she could do herself. Transcript at 24. Claimant's testimony about her alleged contacts with the receptionist was also questionable since she initially stated she spoke with the receptionist in live time and then stated the communications were by text message, after which she reversed this testimony and contended that the communications were probably through a combination of voice communications and text messages. Transcript at 24, 40.

As well, claimant's overall testimony was subject to further doubt when she admitted that she was in the restroom immediately before the scrubs, needles and bloody sink were discovered but denied she observed them or unusual in the restroom other than some cranberry juice in the sink when the disarray

in the restroom should have been readily apparent to anyone who was in it. Transcript at 28, 29. Given the substantial reasons to question the accuracy of claimant's testimony, and the weight of the plausible evidence in the record, it appears more likely that claimant did not have the floor manager's permission to enter the hospital on August 4, 2016 than that she did. By entering a work area of the hospital when she was on leave and did not have the employer's permission, claimant violated the employer's explicitly stated standards with at least wanton negligence.

Claimant's wantonly negligent behavior on August 4, 2016 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An excusable "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). However, an employee observed claimant entering the hospital on August 3, 2016, one day before the final incident, when claimant was also on leave. While claimant flatly denied she entered the hospital that prior day, there was no reason to doubt that the accuracy of the employee's observations. In addition, as discussed above, there are significant reasons to doubt the credibility of claimant's entire testimony at hearing. Here, as above, the weight of the credible evidence is that claimant entered the hospital on August 3, 2016, when she was on leave and did not have the employer's permission. Since the employer notified claimant sometime around approximately February 2016, well before August 3, 2016 that she was prohibited from entering the hospital under those circumstances, claimant's action on that day was at least a wantonly negligent violation of the employer's standards. Consequently, claimant's wantonly negligent behavior on August 4, 2016 was a repetition of her wantonly negligent behavior on August 3, 2016 and because, as such, it was not a single or infrequent violation of the employer's standards, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Claimant's behavior on August 4, 2016 also may not be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she entered a non-public area of the hospital on August 4, 2016 because she failed to understand the scope of the employer's prohibition against such entry. Indeed, such a contention would have been implausible in light of the clarity with which the employer warned claimant sometime around February 2016. This record is insufficient to support that claimant's behavior on August 4, 2016 was excusable as a good faith error.

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

DECISION: Hearing Decision 16-UI-71199 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, 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.

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