

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1350

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 155339). Claimant filed a timely request for hearing. On November 16, 2016, ALJ Frank conducted a hearing, and on November 18, 2016 issued Hearing Decision 16-UI-71454, reversing the Department's decision. On December 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that offered some information not presented during the hearing and some photographs of items that claimant asserted he purchased from coworkers, apparently to support his argument that since others engaged in the same type of behavior for which he was discharged, he was discharged for reasons other than violating the employer's alleged policy against solicitations in the workplace for personal gain. Claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering this new information during the hearing as required by OAR 4711-041-0090 (October 29, 2006). As well, while the photographs claimant submitted to EAB appear to depict some items of clothing, there is nothing in the photographs that shows that coworkers solicited claimant in the workplace to purchase those items. For both of these reasons, EAB did not consider the new information that claimant sought to present by way of his written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) ColumbiaCare Services, Inc. employed claimant as a part time residential assistant at a residential care facility for mentally ill clients from October 2, 2015 until February 28, 2016.

(2) The employer expected claimant to refrain from soliciting or receiving anything of value from coworkers or the facility's residents in exchange for influencing claimant's actions or granting or

accepting favors from them for personal gain. Exhibit 1 at 2-3. The employer also expected claimant to follow the instructions of the employer's administrator, who was one of his supervisors. Claimant understood the employer's expectations.

(3) On February 5, 2016, claimant met with the employer's administrator for the residential program to follow up on prior meetings. At the meeting, claimant told the administrator that he was engaged in a business venture separate from his work for the employer that involved selling insurance. Claimant was very excited about the insurance venture, and told the administrator it was a lucrative business. Exhibit 1 at 4; Audio at ~26:40. Claimant suggested that the facility's residents might benefit from purchasing insurance products and offered to give the administrator information on obtaining licenses that would allow her or other staff members to sell insurance to the residents. Audio at ~24:00. In response, the administrator told claimant that it was not appropriate for him to promote his insurance business at work, either with her, his coworkers or residents. Audio at ~16:14. As the meeting proceeded, claimant continued to return to the topic of his insurance venture. To deter claimant, the administrator instructed claimant not to discuss his insurance business in the workplace and to focus on his work duties instead. Audio at ~16:47; Exhibit 1 at 4, 10.

(4) On February 12, 2016, the assistant administrator reported to the administrator that she had overheard claimant at work urging a coworker to become involved in his insurance business. Exhibit 1 at 8. Later than day, another of claimant's coworkers reported to the assistant administrator that claimant had encouraged her and her boyfriend to seek work in the insurance industry. Exhibit 1 at 8. That coworker reported that claimant had told her "I'm not supposed to talk about this at work" before he gave his advice to her. Exhibit 1 at 8. On February 15, 2016 another staff member reported to the administrator that claimant had tried to persuade her to purchase an interest in the insurance company he was working for. Exhibit 1 at 7. On February 16, 2016, still another staff member reported to the assistant administrator that claimant had tried to sell an insurance policy to her. Exhibit 1 at 6.

(5) On February 18, 2016, the administrator met with claimant to discuss the reports she had received about him promoting his insurance business with coworkers in the workplace. The administrator told claimant he was discharged for not following her instruction to cease discussing his insurance venture with his coworkers in the workplace. Claimant did not defend his actions by contending that his coworkers had sold products in the workplace from businesses they operated, or that the employer was actually discharging him in retaliation for his having missed a recent workplace meeting.

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. 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 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).

While the employer's written policies did not clearly prohibit claimant from promoting his insurance business in the workplace, the administrator eliminated any ambiguity in the scope of the policy when, after he attempted to elicit her participation in his insurance business on February 5, 2016, she unequivocally told claimant that she was prohibiting him from discussing his insurance business at all in the workplace with his coworkers. Claimant agreed that she issued this explicit across-the-board instruction to him. Audio at ~24:26. Claimant also agreed that he discussed the insurance business with which he was involved with his coworkers "on occasions" after February 5, 2016, despite the explicit instructions of the administrator that he not do so, and did not deny that he had such discussions on February 12, 15 and 16, 2016 as the employer contended. Audio at ~24:44, ~25:10, ~26:46.

Claimant did not provide a logical explanation about why he continued to discuss or promote his insurance business with his coworkers after the administrator clearly forbade him from doing so. While claimant contended that other employees were also selling products in the workplace from businesses that they operated, he did not suggest that he did not follow the administrator's instruction to him because of the behavior of his coworkers or that he misunderstood the administrator's prohibition issued to him. Audio at ~27:40. Moreover, even if claimant's testimony about actions of the coworkers in generating side sales in the workplace is accepted, that evidence would be insufficient to support that the coworkers' actual practices in selling their products were analogous to claimant's workplace behaviors in promoting his business. In addition, the coworkers' alleged behaviors actions did not serve to undercut the clarity with which the employer prohibited claimant from any discussion of his business in the workplace or excuse claimant from complying with the employer's directive. Claimant also contended that the employer's discharge of him for discussing or promoting his side insurance business in the workplace was a pretext and that the employer actually discharged him for missing a meeting. Audio at ~27:48. However, claimant did not explain how a missed meeting would be of such importance that it would lead to his discharge and why, assuming he missed this meeting, the employer would need to concoct a reason for discharging him rather than basing his discharge on his failure to attend that meeting. The preponderance of the evidence in the record does not show that claimant was discharged for reasons other than discussing his side insurance business in the workplace. Based on this record, by contravening the clear instructions that were given to him by the administrator on February 5, 2016, claimant knowingly and willfully violated the employer's standards on February 12, 15 and 16, 2016.

Claimant's willful violations of the employer's standards may be excused from constituting misconduct if they were an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is considered an "isolated instance of poor judgment" only if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior by claimant. OAR 471-030-0038(1)(d)(A). Here, claimant's violations of the employer's standards were deliberate and willful and took place on four separate occasions in the two weeks following the administrators explicit instruction to him to cease discussing or promoting his side insurance business in the workplace. Claimant's willful violations were not isolated or infrequent, but part of pattern of non-compliance with the employer's standards. As such, claimant's behavior on February 12, 15 and 16, 2016 falls outside that which is excusable as an isolated instance of poor judgment. Nor was claimant's behavior excusable from constituting misconduct as a good faith error

under OAR 471-030-0038(3)(b). Claimant testified at hearing that he understood what the employer had prohibited him from doing February 5, 2016, and he did not suggest that, somehow, he misinterpreted that explicit prohibition. On these facts, it is implausible that claimant believed in good faith that, despite the clarity of the employer's prohibition, he was permitted to continue to discuss or promote his insurance business. This record does not support that claimant's behaviors in contravention of the employer's standards on February 12, 15 and 16, 2016 were excused as a good faith error. Since claimant's behaviors willfully violated the employer's standards and were not excused under OAR 471-030-0038(3)(b), they constituted disqualifying misconduct.

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

DECISION: Hearing Decision 16-UI-71454 is affirmed.

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

DATE of Service: January 4, 2017

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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