

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1430

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct. On December 2, 2016, ALJ Shoemake conducted a hearing, and on December 9, 2016, issued Hearing Decision 16-UI-72666, concluding that the employer discharged claimant for misconduct. On December 21, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant 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) Crest Properties, an apartment management company, employed claimant as an office manager, receptionist and leasing agent from April 2010 until September 23, 2016.

(2) Prior to September 2016, claimant was convicted twice of Driving Under the Influence of Intoxicants (DUII). Claimant often spoke with the employer's president about her problems with alcohol, and the president told claimant that she should not drink while on the job or report for work if she had been drinking. Transcript at 49.

(3) On some occasions prior to September 2016, the employer's vice president and tenants noticed that claimant was intoxicated while at work. Transcript at 46, 51. The employer's president also smelled alcohol on claimant's breath on a few occasions, but believed the problem was slight because claimant appeared to be able to perform her job duties. Transcript at 49.

(4) When claimant reported for work on September 1, 2016, she smelled of alcohol and appeared to be intoxicated. She met with the employer's vice president and told him she was going to quit her job

because she was unhappy with her working conditions. The vice president had difficulty understanding her, however, because claimant's speech was slurred and "her ideas were kind of all over the place." Transcript at 45. Throughout the day, claimant was "mumbling nonsense," and stumbling when she walked. Transcript at 42, 54, and 56. A tenant who came to the office where claimant worked to sign a lease refused to do so because claimant's behavior made the tenant uncomfortable. Transcript at 42.

(5) After claimant left work for the day on September 1, the vice president found a cup containing a soft drink and alcoholic beverage on claimant's desk. At 5:28 p.m., the vice president sent claimant the following text message:

We can't have the liability of drinking on the job. I can see your side on everything we spoke about this morning and I know it must be really difficult to deal with but it isn't okay to be drunk/drinking at work. I hope to see you tomorrow for work and I'm always here if you need someone to talk to. Exhibit 1.

(6) On September 2, 2016, claimant did not report for work because she was worried that the vice president would be angry with her because of her behavior on the preceding day. She sent the vice president the following text message in response to his September 1 text message:

You are right, I'm really sorry and no excuses – just poor judgement [sic]. I'll be in on Monday and I won't do that again. Exhibit 1.

(7) On September 6, 2016, claimant met with the employer's president and gave him a letter in which she stated that she was quitting her job, although she had not set a "final date" yet and was willing to discuss it with the president. Claimant stated that although she had "a wonderful experience working here with you," she was leaving "due to her own mistakes." Claimant also apologized for not having "been as reliable as I would like to be or you need me to be." Exhibit 1. Claimant and the president discussed her situation, and agreed to that claimant would not resign.

(8) After his September 6 meeting with claimant, the president decided to investigate the "mistakes" and unreliable behavior to which claimant had referred in her letter. During this investigation, the president learned about her behavior on September 1 and prior occasions. On September 23, 2016, the president met with claimant and told her he was accepting her resignation. Claimant left the workplace and never returned to work for the employer.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant for misconduct.

Work separation: The first issue is the nature of claimant's work separation. The employer contended that claimant voluntarily left work because on September 23, 2016, he agreed to accept her previously submitted letter of recommendation. Claimant, however, asserted that the employer discharged her. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

Although claimant gave the employer's president a letter of resignation on September 6, he did not accept it and claimant continued to work for the employer for an additional period of time. The conduct of both claimant and the president indicated that they considered claimant's letter of resignation to have been rescinded and no longer effective. Claimant was willing to continue working for the employer, but the president would not permit her to do so after he met with her on September 23, 2016. Claimant's work separation was therefore a discharge.

Discharge: 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 discharged claimant because she was intoxicated while at work on September 1, 2016. Claimant and the employer's three witnesses disagreed about claimant's behavior on that date. According to the employer's witnesses, the signs of claimant's intoxication were clear: she smelled of alcohol, her speech was slurred, and her mobility was impaired. Claimant, however, asserted that she was not intoxicated on September 1 and that she did not behave inappropriately at work on that date. According to claimant, she and a coworker went out for lunch, and drank alcoholic beverages during their lunch. Claimant contended that the alcohol she consumed in no way affected her ability to perform her job duties. Claimant's testimony regarding the alcohol she consumed on September 1 was inconsistent. Although she initially testified that she had "a drink" at lunch¹, she subsequently testified she drank "two beers" with her lunch.² In addition, we find it highly unlikely that the vice president would feel a need to send claimant a text message telling her it "isn't okay to be drunk/drinking at work"³ if claimant's behavior at work was unaffected by the alcohol she had consumed. It is equally unlikely that if claimant believed her behavior on September 1 was appropriate, she would stay home from work on September 2 and apologize to the vice president for her poor judgment on September 1 if she believed her behavior that day was appropriate. Because claimant's testimony regarding her conduct on September 1 was inconsistent and implausible, we have based our findings on the testimony of the employer's three witnesses who observed claimant's behavior on that date. We find it more likely than not that claimant was intoxicated while at work on September 1, and that her ability to do her work was adversely affected. Claimant understood, as a result of previous conversations with the employer's president, that the employer expected her to refrain from drinking while on the job and not to report for work if she was intoxicated. Claimant's intoxication on September 1 constituted a conscious disregard of the employer's expectations and was at least wantonly negligent.

¹ Transcript at 24.

² Transcript at 26.

³ Exhibit 1.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act 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). The record shows that on some occasions prior to September 2016, claimant was intoxicated while at work. Because claimant's intoxication on September 1 was not a single or infrequent occurrence, it was not an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. Given her discussions with the employer's president about her alcohol problem and the requirement that she not work when intoxicated, claimant could not have sincerely believed that the employer would excuse her behavior on September 1.

We therefore conclude that the employer discharged claimant for misconduct. She is disqualified from the receipt of unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-72666 is affirmed.

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

DATE of Service: January 18, 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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