

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0206

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 90553). Claimant filed a timely request for hearing. On January 31, 2017, ALJ Wyatt conducted a hearing, and on February 3, 2017, issued Hearing Decision 17-UI-76226, affirming the administrative decision. On February 16, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Thrive Lifestyle Services employed claimant as a concierge until November 23, 2016. Claimant worked in a financial building in Portland.

(2) The building in which claimant worked was not open to the public, and could only be accessed by using a key card during evening, night time and early morning hours. Certain areas of the building were also only accessible by a key card. Claimant understood that the employer expected her not to permit anyone other than herself to use the key card she had been issued. Audio recording at 36:34.

(3) Claimant lent her son her key card, and claimant's son and girlfriend used the key card to enter the building where claimant worked on October 4, 2016 at 1:18 p.m. and 8:13 p.m., on October 10, 2016 at 7:32 p.m., and on October 30, 2016 at 3:43 p.m. Audio recording 14:11 to 15:10. While in the building on October 4 and 10, claimant and his girlfriend used the key card to enter the men and women's locker rooms. Audio recording at 38:20.

(4) From October 14 through November 18, 2016, claimant was on a leave of absence from her job.

(5) After reviewing video surveillance footage, the employer discovered that claimant's son had used claimant's key card to enter the building in October. On November 21, 2016, the employer warned claimant in writing about her unauthorized loan of the key card to her son, and her son's use of the card. The employer deactivated the key card claimant had been using, and told claimant that she would have to "buzz" into the building when she reported for her shift in the morning. The employer also told

claimant that she would be permitted use of a key card only when she was working in the building and would no longer be authorized to take a key card home when she left work. Audio recording 20:10.

(6) On November 22, 2016, while at work, claimant used the employer's computer to delete all records regarding her son's unauthorized use of the key card to enter the building and the employer's facilities in October. Claimant also reactivated the key card the employer had deactivated the previous day, and made a duplicate copy of this key card. Audio recording at 21:06.

(7) On November 23, 2016, the employer discharged claimant for deleting employer records, reactivating a key card that had been taken away from her, and making a copy of this key card. Audio recording at 22:57.

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.

Claimant knew as a matter of common sense that the employer required that she not destroy its records, and that she comply with the directives of her supervisors. Claimant also understood that the employer did not permit her to lend the key card she had been issued to anyone. On November 21, 2016, after discovering that claimant had lent her key card to her son, and that her son had used the card to enter the employer's building and facilities, the employer deactivated claimant's personal key card, and told her she could only use a key card while at work. On November 22, 2016, claimant reactivated the key card the employer had taken away from her on the preceding day and copied the card; in addition, she deleted all records of her son's unauthorized use of the key card from the employer's computer system. Claimant's conduct constituted a deliberate refusal to comply with the employer's directive that she no longer possesses a personal key card, and an intentional destruction of the employer's records. Claimant willfully violated the employer's expectations.

Claimant, however, denied that she reactivated the key card the employer had taken away from her or deleted any records of her son's unauthorized use of the card, and also asserted that the employer's system did not permit her to make a duplicate copy of a key card. Claimant disputed the owner's charge that she was responsible for the November 22 computer entries by noting that she and other individuals who were on duty on that day share a single computer and use a common log in. Claimant presented no plausible reason why another employee would want to reactivate and then copy a key card for her, or delete records concerning her son, however. In addition, we find that claimant's account of why she lent her key card to her son and how he used it was contrary to the evidence in the record. Claimant testified

that on October 13, she loaned her son her key card when he arrived at her building and asked to use the restroom. According to claimant, she forgot to get the card back from him before she went on leave, and only learned about her son's use of the card when she returned from leave on November 18. Audio recording 28:34. The video surveillance which the employer reviewed and about which the employer's witness testified, however, showed that claimant's son and his girlfriend used the key card to enter the building and building locker rooms prior to the date on which claimant asserted that she gave her son the card – on October 4 and 10. Because claimant's testimony regarding the events that ultimately resulted in her discharge was not plausible or supported by evidence in the record, we have found facts in accordance with the employer's evidence, which was based on review of video surveillance footage and computer records.

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 claimant knowingly disregarded the employer's directives and expectations on more than one occasion – she lent her personal key card to her son, reactivated and duplicated the card after the employer took it away from her, and deleted records regarding her son's unauthorized use of the card. Claimant's actions were neither single nor infrequent, and cannot be excused as an isolated instance of poor judgment.

Nor can claimant's conduct be excused as a good faith error. The record does not show that claimant sincerely believed, or had a rational basis for believing, that the employer would excuse her deletion of employer records, or her refusal to comply with the employer's directive that she no longer possess a personal key card.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-76226 is affirmed.

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

DATE of Service: March 8, 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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