

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0429**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On February 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84025). Claimant filed a timely request for hearing. On March 28, 2017, ALJ S. Lee conducted a hearing, and on March 30, 2017 issued Hearing Decision 17-UI-80006, affirming the Department's decision. On March 31, 2017, the ALJ issued Hearing Decision 17-UI-80042, amending Hearing Decision 17-UI-80006 to admit Exhibit 2 into evidence subject to objection by the parties. On April 6, 2017, claimant filed objections to the admission of Exhibit 2. On April 12, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On May 1, 2017, the ALJ issued a letter ruling purporting to overrule claimant's objection to "Exhibit 1."

**EVIDENTIARY MATTER:** While claimant filed an objection to the post-hearing admission of Exhibit 2 into evidence, the ALJ erroneously referred to the exhibit at issue as Exhibit 1 in her May 1, 2017 letter order overruling the objection. Because of claimant's objection, EAB has reviewed the propriety of the ALJ's apparent intention to overrule that objection. It appears from the record that the employer sent a copy of Exhibit 2 to claimant in advance of the hearing and when the ALJ gave claimant an opportunity at the hearing to object to the holding open of the record to receive Exhibit 2, claimant stated that she had no objection. Transcript at 4, 42. The documents in Exhibit 2 that claimant later found objectionable were copies of the January 31, 2017 letter by which the employer discharged her and the employer's policies that claimant allegedly violated. Claimant's stated objections to the admission of Exhibit 2 were based only the fact that she had submitted her documents, comprising Exhibit 1, in advance of the hearing and, for that reason, it was unfair for the ALJ to have allowed the employer additional time to submit documents on its behalf. Claimant's objections were not based on due process concerns, or that she was somehow deprived of a meaning opportunity to respond to the documents during the hearing, and not on evidentiary principles, or that the documents were not authentic or, for some reason, were irrelevant to the issues considered during the hearing. In addition, the contents of the documents that ultimately became Exhibit 2 were discussed at length during the hearing and the precise language in them was relevant and necessary to an accurate and full

understanding of issues raised during the hearing. Transcript at 7-9, 17, 21, 26. For these reasons, and because claimant did not contend that she sustained any cognizable legal prejudice by the admission into evidence of the documents comprising Exhibit 2, claimant's objection to Exhibit 2 is overruled. Exhibit 2 will remain in the record.

Claimant submitted to EAB a written argument that, in part, contained information that was not offered into evidence during the hearing. Claimant did not explain why she was unable to present this new information at the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. As a result, EAB did not consider the new information that claimant sought to present by way of her written argument. EAB considered only information received into evidence during the hearing when reaching this decision. Even if we had considered claimant's additional information, however, the outcome of this decision would remain the same for the reasons explained below.

**FINDINGS OF FACT:** (1) Multnomah County employed claimant as a clinical services specialist in its health department from July 1, 2012 until January 31, 2017. The position that claimant held required her to have and maintain a valid social worker license issued the Oregon Board of Licensed Social Workers (OBSW). Claimant first obtained her social worker license from OBSW in 2004.

(2) The employer expected that claimant would not in the course of her employment have an unprofessional relationship with any client, would not violate any federal, state or local laws or engage in any behavior that would bring discredit on the employer. The employer also expected that claimant would inform the employer of any significant events that occurred during the course of her employment as a social worker and would not withhold information of an official interest from the employer. The employer further expected that claimant would not distribute drugs, including cannabis, in the course of her employment as a social worker unless lawfully required to do so as a part of her job, even if done off the workplace premises. Claimant understood the employer's expectations as a matter of common sense

(3) The employer also expected claimant to comply with the OBSW code of ethics setting out her responsibilities as a licensed social worker. The code of ethics required that claimant not violate the position of trust, power and dependence that she had with any client as a social worker, would not enter into a relationship with a client that, by its nature, might conflict with the client's ability to benefit from the social worker's practice, might impair her professional judgment, might increase the risk of client exploitation, or might create the potential for her, as a social worker, to exercise undue influence on the client. OAR 877-030-0070(a), (b), (c), (f) (January 1, 2011). The code of ethics also prohibited claimant from providing, in the course of her social worker practice, any services to a client that were outside her area of competence, training or her qualifications as a social worker. OAR 877-030-0070(6). Claimant reasonably understood her responsibilities as a social work under the OBSW code of ethics.

(4) Beginning in approximately October 2015, claimant began working with a male client in the course of her practice as a social worker for the employer. As their professional relationship continued, claimant became aware that the client was abusing alcohol to the extent that he was regularly consuming a fifth of hard liquor each day. The client told claimant that he was consuming this amount of alcohol because he had chronic pain, and his physicians would not prescribe opiates for his pain due to the alcohol he was regularly consuming. The client told claimant that, although marijuana would relieve his pain, he was not able to obtain marijuana because he did not have a valid Oregon medical marijuana

card. The client told claimant he had valid medical marijuana cards in two other states but did not have the resources to obtain one in Oregon. He also told claimant that if he had marijuana he would be better able to abstain from alcohol. Claimant tried to locate a marijuana dispensary in Oregon that would provide marijuana to the client absent a medical marijuana card and on a no-cost or reduced-cost basis. Claimant was unsuccessful. For some time, claimant had operated a licensed medical marijuana growing site at her home. Beginning in April or May 2016, claimant began supplying some of the marijuana she grew to the client. Claimant did so because recreational marijuana had been legal in Oregon since July 2015, she thought that the client had a medical need for the marijuana, and she thought the client would obtain a medical marijuana card in the near future.

(5) After April or May 2016, the client did not obtain an Oregon medical marijuana card. When the client used up the marijuana claimant had initially supplied to him, he demanded more marijuana. At that time, claimant expressed that she was reluctant to give him additional marijuana. The client responded by telling claimant that if she did not give him that marijuana he wanted, he would inform the employer of her actions in providing marijuana to him, intending to create problems for her by jeopardizing her employment if she did not give him the marijuana. Subsequently, claimant supplied marijuana to the client approximately two times each month between May and August 2016. During these months, the client continued to threaten claimant with disclosure if she did not give him the marijuana he sought. The client usually demanded more marijuana by calling claimant or sending text messages to her on her work cell phone.

(6) Sometime around or before the period of May to August 2016, claimant assisted the client in obtaining a motel room when he did not have the identification necessary to rent one by showing her county identification to the motel desk clerk and vouching for the client. Afterward, claimant told her lead worker at a supervision meeting what she had done and the lead told claimant, “You might get fired for [doing] that.” Transcript at 20-21.

(7) Sometime between May and August 2016, the client began telling claimant that he “loved” her and that he and claimant were “soul-mates.” Transcript at 22. During this time, claimant also thought the client was becoming suicidal and his behavior was becoming increasingly unpredictable. In approximately June 2016, claimant told the lead about the client’s growing expressions of affection for her and her concerns about the client’s emotional state. The lead advised claimant to “close out” the client, meaning that she should end her work with the client, and refer him to community mental health organizations or crisis centers and to give him their phone numbers. Transcript at 22. The client rejected claimant’s efforts to end the relationship and to seek assistance elsewhere. The client continued to successfully extort marijuana from claimant and left her angry voicemail and text messages in which he demanded more marijuana. In those messages, the client began to threaten claimant with physical harm if she did not give him marijuana. Claimant never told her lead or any other employer representatives that she was providing, or had provided, marijuana to the client or that the client was threatening her with reprisals if she did not. Claimant continued to act as the client’s social worker.

(8) After August 2016, claimant did not give any more marijuana to the client. In October 2016, claimant ended her professional relationship with the client and no longer acted as his social worker. The client reacted to the termination of their relationship by leaving several angry phone and text messages for claimant calling her names and threatening her and her family with physical harm. On November 30, 2016, claimant obtained a temporary stalking protective order against the client. On

December 13, 2016, the client came to claimant's house and brandished a machete at claimant's husband. Claimant or her husband called the police. On December 21, 2016, claimant obtained a permanent stalking protective order against the client. Around this time, claimant was called as witness in a grand jury proceeding initiated against the client for his behavior on December 13, 2016. In preparation for her testimony, claimant consulted with a union steward who was also one of her coworkers. That coworker informed the employer of claimant's relationship with the client and disclosed that claimant had supplied marijuana to the client.

(9) On January 5, 2017, the employer suspended claimant from employment. On June 6, 2017, the employer met with claimant in an investigatory meeting about her behavior toward the client.

(10) On January 31, 2017, the employer discharged claimant, citing that her relationship with the client had not been appropriate, that it had violated several of the employer's policies and that she had not disclosed information about it to the employer.

(11) Prior to claimant's involvement with the client, the employer did not consider that she had violated any of its standards.

**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 by preponderance of the evidence that claimant engaged in misconduct for which it discharged her. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Much of claimant's defense to being discharged was that she provided cannabis to the client for what she thought was a beneficial purpose and she was ultimately victimized by the client when she refused to continue providing marijuana to him. However, the employer did not discharge claimant because of the client's actions toward her but because of the unprofessional nature of the relationship she created and allowed to persist over a period of several months with the client despite its obviously adverse impacts on therapeutic goals for the client. While claimant may not have known verbatim the employer's policies, as social worker with at least fifteen years of experience, she had to know, if only as a matter of common sense, that her judgment as a clinical social worker in connection with the client was significantly impaired by supplying marijuana to the client as a "medicine" when licensed physicians were unwilling to do so, by his successfully extorting more and more marijuana from her, by his repeated professions of love for her and his threats of physical harm against her and her family. Whatever her initial motivation in supplying marijuana to the client, claimant could only have known that given the manner in which her relationship with the client had progressed, her judgment as a social worker with respect to the client was profoundly damaged and skewed. As the client's behavior toward claimant escalated far beyond the realm of a professional or therapeutic relationship, claimant also could only have known as a matter of common sense that she had a duty to report a situation that extreme to the employer. By continuing to work with the client when the nature and full extent of the damage and dysfunction in their social worker-client relationship was known to her, and failing to disclose that

marked deviation to the employer, claimant willfully violated the employer's standards and those of the OBLSW, which were incorporated into the employer's standards.

Claimant's behavior may not be excused from constituting misconduct as an isolated instance of poor judgment. OAR 471-030-0038(3)(b). Behavior is only excusable as an "isolated instance of poor judgment" if it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent exercises of poor judgment, and, regardless of the frequency of the behavior, it must not have exceeded "mere poor judgment" by, among other things causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d). Claimant's relationship with the client that willfully violated the employer's standards lasted over six months, between approximately April 2016 and October 2016, during four months of which claimant gave to the client marijuana that he successfully extorted from her, and during six months in which the in which claimant did not disclose to the employer the aberrant nature of her relationship with the client. As such, claimant's behavior in willful violation of the employer's standards was prolonged and comprised of many, many occasions upon which claimant exercised poor judgment in continuing the relationship and choosing not to disclose it to the employer. Claimant's behavior was not isolated. In addition, that claimant accepted and continued her social worker relationship with the client for several months after the relationship had become aberrant and was not principally serving legitimate therapeutic goals would cause a reasonable employer to conclude that it could not in the future trust claimant to engage in a social worker practice that reasonably would not harm clients who, by definition, were vulnerable and not reliably able to gauge their own best interests or control their impulses. On this record, any reasonable employer would conclude that claimant's behavior toward the client caused an irreparable breach of trust in the employment relationship. Because claimant's behavior in willful violation of the employer's standards was not isolated and it exceeded "mere poor judgment," it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor is claimant's willful violation of the employer's standards excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that she behaved as she did because she believed her behavior was in compliance with the employer's standards and expectations, nor because she mistakenly thought the employer would approve of that behavior. Claimant's choice not to disclose her behavior to the employer after the client's behavior had escalated is strong evidence that claimant did not think the employer would approve of the actions she had taken. Claimant's behavior toward the client was not the result of a good faith error.

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

**DECISION:** Hearing Decision 17-UI-80042 is affirmed.

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

**DATE of Service:** May 24, 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](http://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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