EO: 200
BYE: 201815

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0832

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80118). Claimant filed a timely request for hearing. On June 21, 2017, ALJ S. Lee conducted a hearing, and on June 23, 2017 issued Hearing Decision 17-UI-86509, affirming the Department's decision. On July 12, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Mid Valley Medical Group employed claimant as a prescription refill specialist from September 29, 2014 to April 14, 2017.

(2) The employer prohibited employees from monitoring, critiquing or instructing each other unless the employee was a designated trainer. The employer required employees to be courteous, respectful and kind to each other. The employer notified claimant of its expectations, and claimant understood them.

(3) The employer used an electronic prescription record system to handle prescription refill orders. The prescription orders resided in a queue and were marked by symbols indicating whether each order was available for processing. Refill specialists monitored the queue and would "take" available items from the queue; although the refill order remained in the queue until the order was completed and closed, the symbols that marked each item in the queue changed when the refill specialists took the item in order to indicate that the order was being processed. On rare occasions, such as when an individual accidentally ordered two refills of the same medication or requested that multiple medications be refilled, two or more refill orders for the same prescription record would appear in the queue. When that occurred, the symbol next to the first item in the queue changed to show that the record was in use, but the second and subsequent items continued to display the symbol indicating the order was available for processing. If one employee was using a prescription record while a second employee tried to enter the same record, the system alerted the second user to the fact that someone else was using the system and asked the

second user if she wanted to override the first user; if the second user answered in the affirmative, the system would then lock the first user out of the prescription record and prevent the first user from completing the refill work until the second user finished her work. The system notified the first user that he was locked out of the record. The notification included the name of the user who had locked the first user out of the record.

(4) On September 15, 2015, the employer issued claimant a written corrective action that, among other things, admonished her not to "monitor[] other refill center staff and their completed refills." Exhibit 1. On June 10, 2016, the employer issued claimant a performance expectations document that stated claimant "must cease critiquing or giving notes/directions to new employees or co-workers without being asked. Training new employees is the responsibility of the department supervisor or designated employees." *Id.* The document also said that claimant "needs to focus on her own work and not look at her co-workers [*sic*] in-baskets and review their work" and "focus solely on her workload." *Id.* On August 26, 2016, the employer met with human resources and a manager about her behavior. During the meeting, claimant was told to stop looking and critiquing other people's work, and that although claimant "believes she is assisting with the work flow . . . the perception of all other refill center is this monitoring is impeding their work flow." *Id.* Claimant was also told that she needed to "refrain from entering any patient record that she does not specifically have a refill to process" and "immediately exit the record" if she entered a record while another worker was using it. *Id.* The employer admonished claimant "each and every time . . . that if she continued . . . that if she couldn't make sustained improvement it could lead to further corrective action up to termination." Transcript at 7-8.

(5) On April 12, 2017, claimant engaged a coworker in conversation, mentioned something about the office being similar to the television show "Survivor" and made a comment about that show's practice of "voting" participants "off the island" in reference to the employer's staff. Claimant intended the comment to be affirming, and meant that she hoped a coworker did not get fired; the coworker felt "cornered." Exhibit 1; Transcript at 8. On April 13, 2017, claimant again referenced the show "Survivor" when she referred to a necklace in her workspace as an "immunity" necklace and offered it to a coworker. *Id.* Claimant again intended her comment to be supportive; the coworker felt that claimant had encroached upon her personal space while speaking with her and "was backing her up against the wall." *Id.* Both employees felt uncomfortable because of their interactions with claimant, but neither told claimant that she was making them feel uncomfortable or asked her to leave them alone.

(6) Around April 13, 2017, two of claimant's coworkers complained to the employer that claimant was "continually going into people's prescriptions looking at their work," which locked them out of the prescription records they were working on and prevented them from doing their work. Transcript at 5. The coworkers reported that claimant entered the same area of the same prescription record they were working in, overrode their use of the record, and locked them out. *See* Transcript at 12, 14, 16-17, 19.

(7) On April 13, 2017, the employer suspended claimant to investigate her behavior. Claimant admitted she had made "Survivor" references while speaking with two coworkers about the work environment and their coworkers, but stated that she had not intended her comments in a negative way. Claimant also denied that she went into prescription records to critique others' work or comment about their work practices; she claimed instead that she went into the records because she could not tell they were in use.

(8) The employer interviewed claimant's coworkers. The two coworkers with whom claimant spoke about "Survivor"-related things reported that they were uncomfortable with claimant's behavior. With respect to claimant entering prescription records others were using, the coworkers reported that after claimant entered the prescription records they were using they received messages stating, "You've been locked out by" claimant. Transcript at 25. One coworker reported that he had checked after one instance to see if there was any business reason for claimant to have entered the prescription record he was using, such as a duplicate or second prescription for the same individual, and found that there was none. In addition to the two coworkers who complained about claimant, two others confirmed that claimant had recently entered prescription records that were in their work queues. The consensus of all of claimant's coworkers was that claimant had entered the records "specifically to watch their work" and that "she would frequently make verbal comments about their work." Transcript at 32. The employer did not ask the coworkers to specify the dates and times of any particular instance, but all the coworkers indicated that instances had happened recently, including during the week of April 7th through April 13th, and that the behavior was ongoing.

(9) The employer concluded based upon its investigation that during the week of April 7, 2017 to April 13, 2017 claimant was discourteous to two coworkers and repeatedly entered prescription records her coworkers were using without having a business reason for doing so despite many warnings not to do so. On April 14, 2017, the employer discharged claimant for those reasons.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, in part, because of her interactions with two coworkers on April 12th and April 13th. The employer had the right to expect claimant to be courteous, respectful and professional when communicating with her coworkers. Although claimant's coworkers were apparently uncomfortable with claimant's behavior, and the employer considered claimant's conduct inappropriate and even threatening, the record fails to show that claimant's behavior amounted to misconduct. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer's evidence that claimant was inappropriate or threatening toward her coworkers is based on hearsay, without any firsthand evidence about what claimant said or what her demeanor was when she said it. Claimant testified, on the other hand, that regardless what the coworkers reported or the employer concluded about her conduct, claimant's intent during both interactions was to be supportive. Given the context

and circumstances claimant described, it is not more likely than not that claimant intentionally or consciously did or said anything objectively inappropriate when speaking with her two coworkers; in the absence of such evidence, we conclude that claimant did not engage in misconduct with respect to those two conversations.

The employer also discharged claimant for repeatedly entering prescription records in use by other employees during the last week of her employment without having a business reason for doing so. Although claimant denied doing so, and the employer's evidence of claimant's conduct in those instances is again based upon hearsay, we find it more likely than not that the employer's version of events is accurate. The employer's evidence consisted of consistent and corroborative reports from four separate employees, who reported that the employer's electronic system told them they were locked out by claimant. One employee reported that he checked to see if there was a business reason claimant had locked him out of a record he was working on; all the employees reported that claimant made comments indicating that she had reviewed and was monitoring their work, and the employees' reports about claimant's behavior during her final week of employment was consistent with behavior claimant had regularly been engaging in since at least September 2015. It is also notable that claimant's statement to the employer that she went into records that were in use by others because she could not tell that the records were in use, under the circumstances, was inconsistent with claimant's own testimony that the employer's work queue would have displayed a symbol showing that the records were in use by another refill specialist at the time she entered the records. Her claim was also inconsistent with the employer's evidence that the system identified claimant to other employees by name as the individual responsible for overriding them and locking them out of the records. Considering the totality of the evidence, we find it more likely than not that claimant repeatedly entered prescription records that were in use by others during her last week of employment, and, given that she did not have a business reason to access those records and made comments about her coworkers' work, it is also more likely than not that claimant entered the records to monitor or critique her coworkers' work, in violation of the employer's repeated admonitions not to do so. Claimant's conduct was, at a minimum, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error. The employer had issued claimant a series of warnings and specifically told her she was not a trainer and was not to be monitoring or critiquing her coworkers' work. She therefore had no basis upon which to believe that she was complying with the employer's expectations when she entered prescription records in use by others for those purposes, nor that the employer would condone her violation of its expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is defined to include a single or infrequent willful or wantonly negligent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). Claimant's conduct was not isolated. Four coworkers confirmed to the employer that claimant had entered records they were using during approximately the last week of claimant's employment, which constituted at least four instances of wantonly negligent behavior during that period. The employer had also issued claimant a second warning for that conduct on June 10, 2016, and a third warning on August 26, 2016. Given that claimant had previously been warned for the same type of behavior in September 2015, it is more likely than not that the conduct that resulted in the June and August warnings was also wantonly negligent. Claimant's exercises of poor judgment in the final week of her employment were therefore both repeated and part of a pattern of similar wantonly negligent exercises of poor judgment that cannot be considered "isolated" or excused as such.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation until she requalifies for benefits by earning sufficient wages from work in subject employment.

DECISION: Hearing Decision 17-UI-86509 is affirmed.

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

DATE of Service: August 7, 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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