EO: 990
BYE: 201819

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-1021

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151950). Claimant filed a timely request for hearing. On July 19, 2017 and August 3, 2017, ALJ R. Frank conducted a hearing, and on August 11, 2017 issued Hearing Decision 17-UI-90249, affirming the Department's decision. On August 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's argument when reaching this decision. However, claimant's written argument contained information that was not part of the hearing record. OAR 471-041-0090(2) (October 29, 2006) states that EAB may consider new information when the party offering the information establishes that the new information is relevant and material to EAB's determination, and factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. Here, claimant asserted that the ALJ prevented her from offering the information into evidence at the hearing. However, our review of the hearing record shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). EAB therefore did not consider claimant's new information when reaching this decision, and considered her written argument only to the extent it was relevant, material and based upon the hearing record before us for review.

FINDINGS OF FACT: (1) Enriching Lives employed claimant as a social work coordinator from July 11, 2016 to May 17, 2017.

(2) The employer had policies requiring claimant, among other things, to maintain integrity, be professional and use good judgment, and to avoid falsifying company documents. The employer required claimant to review its policies, and claimant understood or should have understood its expectations.

(3) The employer provided in-home client visits and used "Grab & Go" binders to keep track of important information in each client's home. The employer had an electronic clinician report claimant was required to update after home visits that included a checklist of tasks, about which claimant was required to answer "yes" or "no" and was provided space to make comments.[1] One of the tasks was "Binder," and the electronic system provided a "prompt" for employees prior to answering "yes" or "no" that stated,

> Is the Grab & Go Binder up to date? Are all items in the table of contents current in the binder? Are Emergency & Incident Reporting Procedures (front and back covers) the most current versions? If additional blank forms are needed, have they been provided? Document in full sentences any work completed, follow up needed or assistance provided. Where applicable, include specific dates and names.

(4) On January 24 and January 26, 2017, the employer updated the emergency incident reporting procedures and table of contents pages for the binders. On January 27, 2017, the employer's director emailed employees, including claimant, with an instruction to make sure they updated each client's "Grab & Go Binder" with the new materials by February 15, 2017. The email also instructed employees, including claimant, to remove any outdated copies by the same date.

(5) Claimant did not replace those pages in her clients' binders, but, on February 22, 2017, answered "yes" to performing the binder task, and wrote in the comment section, "The binder is current." On March 7, 2017, claimant again answered "yes" and wrote "Grab & Go is current." On March 23, 2017, claimant answered "yes" and wrote "This is current." On April 4, 2017, claimant answered "yes" and wrote "This is current." On April 20, 2017, claimant answered "No" and wrote "POLST missing. This coordinator will bring at next home visit" and did not write anything about the emergency or table of contents pages. On May 3, 2017, claimant answered "yes" and wrote "This is current." On May 15, 2017, claimant answered "yes" and left the comment field blank.

(6) In April and May 2017 the employer developed a variety of other concerns about claimant's job performance and professionalism. On May 11, 2017, a supervisor reviewed one of claimant's clients' Grab & Go Binders and saw that it was out of date; shortly thereafter she reviewed the clinician reports upon which claimant had certified that the binder was up to date. The employer subsequently confronted claimant about the out-of-date binder. Claimant told the employer that she had delegated the task of maintaining the binder to others. On May 17, 2017, the employer discharged claimant, primarily for failing to update binders, yet reporting that the binders were current.

CONCLUSIONS AND REASONS: We agree with 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)

[1] *See* Exhibit 1 for all quoted content in these findings.

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 her.

The employer had the right to expect claimant to maintain and update her clients' Grab & Go binders. Claimant understood the expectation, yet on many occasions not only did not maintain or update a client's binder, or ensure that they were current, but also falsely reported to the employer that she had. Claimant told the employer and argued at hearing that she had delegated the task of maintaining the binders to others; regardless who actually maintained the binder, however, it was claimant who certified to the employer that the binders were current, apparently without first taking any action to ensure that they were. Additionally, the record shows that a quick glance through the binder would have made it readily apparent that it was not current, suggesting that it was more likely than not that claimant had not reviewed the binder to ensure it was "up to date," "the table of contents [were] current," whether the front and back covers were "the most current version," or whether "additional blank forms are needed" as she was both required and prompted to check before completing the clinician report. Claimant's conscious decision to answer "yes" and write that her client's binder was current, without knowing whether or not it was, amounted to a wantonly negligent violation of the standards of behavior the employer had the right to expect of her.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). An instance of poor judgment is "isolated" if it is a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). Claimant regularly failed to check or properly answer questions about binders on at least six occasions between February and May 2017. As previously discussed, her conduct was wantonly negligent; her conduct was therefore a repeated act or pattern of wantonly negligent behavior, and therefore cannot be considered "isolated" or excused as such.

Nor did claimant sincerely believe or have a factual basis for believing that she was either complying with the employer's expectations, or that any non-compliance would be condoned. While claimant averred that she delegated the task to others, regardless who actually maintained the binders claimant was responsible for updating, it was claimant who was responsible for answering questions about the binder contents. The fact that she chose to answer those questions without having personal knowledge of whether the binder contents were up to date, and without taking the time to familiarize herself with the content of the binders or verify that the information she was reporting to the employer about the binders was true or accurate, means she had no basis upon which to sincerely believe either that the binders were up to date or that she was providing accurate information about the binders to the employer. Her repeated wantonly negligent acts were, therefore, not the result of a good faith error on her part.

For the foregoing reasons, we conclude that the employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-90249 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: <u>September 19, 2017</u>

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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