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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1112

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73406). On February 28, 2017, claimant filed a timely request for hearing. On March 23, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 28, 2017 at 9:30 a.m. OAH canceled that hearing, and on March 28, 2017 mailed notice of a hearing scheduled for April 10, 2017 at 9:30 a.m. On April 10, 2017, ALJ Sgroi conducted a hearing at which the employer and claimant appeared until claimant was disconnected, at which time the ALJ continued the hearing to another date to be determined later. On April 10, 2017, OAH mailed notice of another hearing scheduled for April 28, 2017 at 9:30 a.m. On April 11, 2017, OAH mailed an amended notice of a hearing scheduled for April 28, 2017 at 9:30 a.m. On April 28, 2017, ALJ Sgroi conducted a hearing at which claimant failed to appear, and on May 5, 2017 issued Hearing Decision 17-UI-82749, concluding the employer discharged claimant for misconduct. On May 16, 2017, claimant filed a timely request to reopen the April 28th hearing that included a written statement explaining why she had missed the hearing. On June 26, 2017, OAH mailed notice of a hearing scheduled for July 14, 2017 at 10:45 a.m. On July 14, 2017, ALJ Sgroi conducted a hearing, and on July 21, 2017 issued Hearing Decision 17-UI-88640, denying claimant's request to reopen. On July 26, 2017, claimant filed an application for review of Hearing Decision 17-UI-88640 with the Employment Appeals Board (EAB). On August 1, 2017, EAB issued Appeals Board Decision 2017-EAB-0900, concluding claimant had good cause to reopen the April 28th hearing, reversing the hearing decision, and remanding the case for a hearing on the merits of decision # 73406. On August 2, 2017, OAH mailed notice of a hearing scheduled for August 29, 2017 at 9:30 a.m. On August 29, 2017, ALJ convened a hearing at which claimant failed to appear, and issued Hearing Decision 17-UI-91431, adopting Hearing Decision 17-UI-82749, which affirmed the disqualification of benefits established in decision # 73406. On September 14, 2017, claimant filed an application for review of Hearing Decision 17-UI-91431 with EAB.

With her application for review, claimant asked EAB for the opportunity for another hearing since she failed to appear at the August 29th hearing. Claimant explained that although she was prepared and planned to participate in the August 29th hearing she failed to appear for it because, upon receiving

notice of the hearing, she had written on her calendar that the hearing would begin at 10:30 a.m. instead of its actual 9:30 a.m. start time. She further explained that she likely wrote the wrong time down because things were generally unsettled and she was living out of boxes after moving and undertaking renovation work at her new residence, did not realize until approximately 10:15 a.m. on August 29th that she had missed the hearing, and upon realizing what had happened felt physically ill. Claimant's request is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing.[1]

Claimant had adequate notice of the August 29th hearing, and given the import of the event and despite her personal circumstances, did not establish that it is more likely than not that keeping track of the scheduled time of the hearing, and double-checking that she recorded the correct time on her calendar, were factors that were outside her reasonable ability to control. Calendaring errors of the sort that resulted in claimant's failure to appear are generally considered to be within a party's reasonable control, as they do not, for example, raise a due process issue or result from inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply. Claimant's error was particularly unfortunate in this case given her significant efforts prior to August 29th to appear and present evidence about her work separation; however, claimant has not established that her failure to accurately read and calendar the August 29th event under the circumstances she described were beyond her reasonable control. Accordingly, under OAR 471-041-0090, claimant is not entitled to present additional evidence before EAB, and her request to do so is denied. EAB therefore reached its conclusion in this case based upon review of the hearing record.

FINDINGS OF FACT: (1) Portland Community College employed claimant as a part time faculty member, last from September 24, 2005 to December 21, 2016.

(2) The employer, pursuant to the Family Educational Rights and Privacy Act (FERPA), required claimant to protect students' names and information from disclosure. In March 2016, the employer sent an email to part time faculty, including claimant, that stated, pursuant to FERPA guidelines,

> No personal information about a student should be shared with other students, parents, friends, or family of students, or with individuals outside of the PCC system. This includes verification that the student is even attending classes at PCC.[2]

[1] We are not required to construe claimant's request as a request to reopen or refer it to OAH. *See* OAR 471-041-0060(4) ("EAB *will* treat an application for review by a party *whose request for hearing was dismissed* because that party failed to appear as a request to reopen the hearing…" (emphasis added)). Claimant's request for hearing was not dismissed; EAB's rules therefore do not compel EAB to consider claimant's application for review as a request to reopen. We note, however, that even if we had referred the matter to OAH the outcome of this decision would most likely remain the same because claimant's reason for missing the hearing did not amount to "good cause" under OAR 471-040-0040 for the same reasons she is not entitled to present additional evidence to EAB.

[2] Unless otherwise noted, Exhibit 1 is the source of all quotations in these findings.

(3) A student enrolled in claimant's 2016 Summer term writing class had behavioral problems inside and outside class. Within a week of the first class, claimant reported the student as "highly distracting, abrasive, and rude" to claimant and the other students. Claimant reported to the faculty department chair that she did not want the student to continue in her class.

(4) Throughout the term, claimant and the student continued to have a fractious relationship, claimant continued to find the student's presence in her class untenable and his behavior outside class unacceptable, but the employer did not permit claimant to exclude the student from class. Claimant continuously sought help dealing with the student and repeatedly requested that he be excluded from it, and considered the employer's responses to her requests inadequate. The student also sought assistance dealing with claimant and her class from the dean of instruction and others.

(5) On July 11, 2016, claimant sent an email to a substitute faculty member tasked with covering her July 13th class stating that the student "sometimes dominates class discussion too much and may also need to be reigned in." The substitute subsequently informed claimant that the July 13th class "went fine." On July 15, 2016, claimant sent another email to the substitute specifically asking if the student, to whom she referred as "the loud, intelligent one," had any behavioral problems during the July 13th class. The substitute responded that for the most part he was fine.

(6) Between July 19, 2016 and July 22, 2016, the student sent many emails to claimant, the volume and content of which caused claimant to feel harassed. Claimant discussed the student and his emails with her boyfriend; claimant and her boyfriend quickly realized that the student about whom claimant was speaking was the boyfriend's tenant. On July 22, 2016, claimant reported to the employer that the student had been harassing her by sending her "incessant emails, insulting you and your intelligence and making rude comments." Claimant reported that the tone of his emails was "hostile and aggressive."

(7) In a July 23, 2016 email to the student claimant said he was "blatantly rude and insulting" and referenced his "exaggerated sense of importance and arrogance," requested that he not come to the next class, and wished him "the best with your writing, your attitude and your missing chickens." The reference to the student's chickens came from claimant's discussion about the student with her boyfriend. On July 25, 2017, claimant was instructed that "unless immediate concern for safety is evident" that the student should be allowed to attend class. On July 30, 2016, the Division Dean notified claimant that the student had been removed from the class.

(8) The student subsequently lodged a complaint with the employer that claimant had discriminated against and harassed him. On September 22, 2016, the employer began an investigation into the student's complaint. The notice of investigation the employer sent to claimant by email at that time stated that claimant was prohibited from retaliation, and, with respect to confidentiality,

> We expect you to keep the investigation and content of our communications confidential. This means that you should not talk about the investigation, or the statements you make during the interview, with your coworkers, other college employees and/or students.

On September 23, 2016, claimant replied to that email.

(9) Later on September 23, 2016 claimant sent another email to the July 13th substitute, informed her that the student had filed a complaint against claimant for harassment and discrimination, and asked the substitute for feedback about the student. On September 24, 2016, claimant sent an email to six students from her summer writing class stating,

> As I'm sure you noticed, there was some contention in the classroom last term between myself and your fellow student named [Name]. In order that my boss might fully understand the situation, I'm asking if you would mind writing your observations regarding our interactions and his presence in the class? Your honest observations are what we are after here. Please let me know if you are comfortable with this request.

She described the student to one who was not sure who she was asking about as "louder; he has dark curly hair and wasn't in class the last week or so." Five students responded to claimant, disparaging the student. On September 26, 2017, claimant sent a second email to the sixth student stating that there was "a fairly big meeting about this issue happening tomorrow afternoon" and requesting the student send his or her letter prior to it.

(10) On September 27, 2016, claimant sent the substitute another email in which she wrote,

> Also, legally, no one is allowed to talk about his allegations, etc., other than if called upon to give testimony, so if you could avoid mentioning it to anyone else unless officially questioned about it, that would be great. :)[3]

(11) On October 3, 2016, the employer orally reiterated the confidentiality and non-retaliation expectations to claimant during a meeting. Sometime after the October 3, 2016 meeting, claimant discussed the student with her boyfriend and boyfriend's brother. They informed claimant at that time that the student had informed them that he had been convicted of a felony.

(12) On November 16, 2016, the employer had an investigatory meeting, during which claimant was advised again of the confidentiality requirement and advised that she was expected to cooperate and be truthful. At the meeting, claimant told the employer that she sent the September 24th email to the six students prior to seeing the September 22nd email notifying her about the investigation even though she had replied to the September 22nd email the day before she emailed the six students.

(13) On December 21, 2016, the employer discharged claimant for violating its FERPA-based policies, violating the confidentiality and non-retaliation directives, and being untruthful during the investigatory meeting.[4]

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)

[3] Emoticon as appears in the original.

[4] The employer alleged other misconduct, which we conclude were not substantiated on this record and have therefore omitted from further discussion.

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.

There is no meaningful dispute in this case that the student in claimant's summer 2016 writing class was obstreperous, that he and claimant failed to establish a cooperative educator-student relationship, that he and claimant had mutual difficulty dealing with each other, that both claimant and the student repeatedly engaged with the employer in an effort to get through the term, and that, by all appearances, claimant considered the employer's response to her concerns and complaints about the student wholly inadequate. Those circumstances, however, as difficult as they might have been, are beside the point for purposes of this unemployment insurance case because, even if true, they do not affect the outcome of this decision.

The employer alleged claimant violated its FERPA-based policies by discussing the student with individuals outside the PCC system. Based upon the employer's notes concerning claimant's statements during its investigation, claimant's exhibits, and her reference in an email to the student's chickens, it is more likely than not that claimant discussed the student with her boyfriend in July 2016 and discussed the student with her boyfriend and his brother in approximately October 2016. It is more likely than not that claimant's discussions did, in fact, violate the employer's policies. It is more likely than not that the violation was, at a minimum, done with conscious disregard of the employer's policies given that the employer had specifically informed her of those policies via email just a few months prior to her first violation. Claimant was, therefore, wantonly negligent in discussing her student with her boyfriend and his brother on two occasions.

The employer alleged that claimant violated its confidentiality and non-retaliation directives by sending emails to six students and a substitute faculty member after having been notified that the student had complained about her, and having been instructed to keep the investigation and contents thereof confidential. It is undisputed that claimant emailed six students on September 24th asking for their feedback about the student. Those emails, while likely inappropriate and possibly a violation of the employer's FERPA-based policies, did not reference the investigation or statements made during the investigation, and therefore do not appear to have violated the confidentiality and non-retaliation directives. Claimant's September 23rd email to the substitute differs, however, because claimant specifically wrote in the email to the substitute that the student had filed a complaint against her. Likewise, claimant's follow-up email on September 26th to the student who had not yet replied to her earlier email also referenced the fact that there was an "issue" with the student and a "fairly big meeting" about it the following day, which was clearly an indirect reference to the employer's investigation that she also knew or should have known would violate the employer's confidentiality directive. Claimant sent both emails after she had received, read and replied to the employer's September 22nd email notifying her of the investigation and directing her to keep that confidentiality, and therefore knew or should have known about the confidentiality directive and that she was violating it. That claimant likely knew she was doing so at the time she sent both of those emails is further substantiated by her subsequent email to the substitute on September 27th in which she referred to the

confidentiality directive. Claimant's decision to violate the confidentiality requirement by sending the September 23rd and September 27th emails amounted to willful violations of the employer's expectation.

The employer also alleged that claimant was untruthful during its investigation. The preponderance of the evidence supports the allegation. Specifically, claimant told the employer that she had not seen the September 22nd email directing her to keep the investigation confidential at the time she sent the September 24th emails to the six students, which was false because claimant replied to the September 22nd email prior to sending the September 23rd emails. The information claimant provided to the employer was not true, and it appears more likely than not that claimant knew or should have known at the time she provided that information to the employer that the information was untrue, and provided it under circumstances where she had been instructed that she was expected to be truthful with the employer. Claimant's conscious choice to provide untruthful information to the employer, at a minimum, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). It appears that claimant was under a lot of stress and pressure because of the student's behavior, his continued enrollment in her class, and her belief that the employer had not been responsive enough to her concerns, complaints and requests for help. It does not appear, however, that claimant believed in good faith that speaking with her boyfriend and his brother did not violate the employer's FERPA-based policies, that emailing a student and substitute about the investigation did not violate the employer's confidentiality directive, or that being untruthful about her knowledge of the investigation at the time she sent those emails would not violate the employer's advice that she be truthful during the investigation. Nor, on this record, does it appear that she had a reasonable basis for believing the employer would excuse or condone her policy violations or her untruthfulness during the investigation. She did not, therefore, act in good faith with regard to the matters at issue.

Claimant's conduct also cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered "isolated" it must be a single or infrequent occurrence or poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). In this case, claimant repeatedly exercised willful or wantonly negligent poor judgment on at least five occasions between July and November 2016 when she discussed the student with her boyfriend and his brother in July and October 2016, violated confidentiality by sending a student and the substitute emails about the investigation in September 2016, and then was untruthful with the employer during its investigation into the student's complaint. Claimant's conduct therefore cannot be considered "isolated" and is not excusable.

For the reasons explained, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until she requalifies for benefits under Employment Department law.

DECISION: Hearing Decision 17-UI-91431 is affirmed.

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

DATE of Service: <u>October 11, 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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