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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
2018-EAB-0187

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92935). Claimant filed a timely request for hearing. On January 29, 2018, ALJ Clink conducted a hearing, and on January 31, 2018 issued Hearing Decision 18-UI-102133, affirming the Department's decision. On February 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that EAB received by fax on March 15, 2017, the final day on which it could have been transmitted and still considered timely filed if received during normal business hours. *See* OAR 471-041-0080(1) (October 29, 2006). While the argument included many documents that were not offered into evidence during the hearing, claimant did not explain why she was not able to present this information at the hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For his reason, EAB did not consider the new information that claimant sought to present by way of her written argument when reaching this decision.

Along with her written argument, claimant also submitted a memory card to EAB, but submitted it after the deadline expired. On March 16, 2017, EAB denied claimant's request for an extension of time to submit the memory card as a second part to her written argument; we therefore did not consider the contents of the memory card when reaching this decision. Even had EAB allowed claimant's request for an extension of time, though, EAB still would not have considered the contents of the memory card since, just like the written argument received on March 15, 2017, the memory card contained new information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the memory card or the items stored on it into evidence at the hearing.

FINDINGS OF FACT: (1) Hawthorn Farm Athletic Club employed claimant as a personal trainer from September 29, 2016 until November 12, 2017.

(2) Shortly before approximately November 8, 2017, claimant accepted a second job as a personal trainer with the employer's direct competitor. Also before November 8, 2017, the employer's manager told claimant that she was required to attend staff meetings that claimant thought were not mandatory for other trainers. Claimant became concerned that the employer was discriminating against her.

(3) On Wednesday, November 8, 2017, claimant's manager called claimant to her office. The manager told claimant that she should have informed the manager that she had accepted a second job as a trainer with a health club in direct competition with the employer. The manager also told claimant that some "billing irregularities" by claimant had come to the employer's attention, that the employer was going to investigate claimant's billings and that claimant should retrieve her belongings and leave the premises.

(4) As claimant was leaving the workplace on November 8, 2017, claimant saw the employer's general manager and met with the general manager and her manager. The general manager told claimant she was being investigated because one of the employer's clients had contacted the employer protesting certain charges that claimant had originated, and after reviewing the charges the employer had some questions about them. The general manager told claimant that the employer was going to commence an investigation. The general manager asked claimant not to come to work on Thursday, November 9, 2017 to give her time to investigate.

(5) Later on November 8, 2017, the general manager sent an email to claimant stating that, although claimant was being investigated, she was not being disciplined or discharged at that time. The email informed claimant, "Do remember an investigation is not employee discipline (or termination). Employee discipline would be the end result of an investigation if wrongdoing was found." Audio at ~29:52. The general manager attached to the email an outline of the employer's procedures for an investigation from the employer's employee handbook. Sometime on November 8, 2015, claimant learned that she was unable to access her work email.

(6) On Thursday, November 9, 2017, claimant did not work. That evening, claimant met with the general manager and the manager at the workplace. At the outset, the general manager again told claimant she was not being terminated simply because an investigation had been commenced. The general manager presented an agreement for the participants in the meeting to sign. That agreement stated they were "proceeding with a commitment to confidentiality, non-disparagement and acting in good faith" and they would all "make a reasonable and good faith effort to maintain confidentiality, protect the reputation of all parties [and] proceed on a need-to-know basis" as to what was brought up at the meeting and during the investigation and they were all "committed to ethical business practices and the [investigative] process in the employee handbook." Audio at ~30:40. The agreement further stated, "The employee [i.e., claimant] also agrees to act in good faith, including not soliciting clients or former members [of the employer's club] for outside work," "the employment with [the employer] is at will, which means that it may be terminated without cause," "all parties agree that violation of the confidentiality agreement we are signing here will lead to an end of the employment relationship" and all participants were "committed to the spirit of the agreement even if there is no longer an employee relationship." Audio at ~31:00. The general manager explained to claimant why she thought such an agreement was necessary. Both managers and claimant signed the agreement. The meeting lasted approximately two hours, during which claimant set out her concerns about her manager's prior treatment of her and having her integrity questioned, as well as her belief that she was being

discriminated against at work. The meeting participants also discussed in detail claimant and the employer's scheduling and billing practices that had given rise to the employer's investigation. At the conclusion of the meeting, the general manager told claimant that she could return to work on Friday, November 10, 2017. Sometime after this meeting, claimant's access to the employer's email was restored.

(7) On November 10, 2017, claimant reported for work. That day, the general manager sent an email to claimant reiterating some aspects of the agreement claimant had signed on November 9, 2017. In that email, the general manager stated, "Again, I remind us all that there should be no negative communications with members, former members, people in the community or industry or other employees. As we agreed, matters should not be discussed with outside parties at all except on a need-to-know basis. Maintaining a commitment to what we signed is essential. I want to be clear in saying that violating the letter or spirit of the agreement we signed last night will be grounds for employee discipline up to and including termination." Audio at ~34:22.

(8) On November 10, 2017, after the general manager sent the email to claimant, claimant sent a series of emails to the general manager to which she attached copies of or forwarded communications she had with others that the general manager concluded were communications in violation of the November 9, 2017 agreement. These communications included a text message between claimant and a former member of the employer in which claimant stated she was in "an unlawful termination/discrimination lawsuit with the employer." Audio at ~35:15. They also included a text message exchange between claimant and a coworker in which claimant asked for information about a staff meeting because there were "things going on that could not be openly discussed." Audio at ~35:25. They further included a copy of a "secret recording" that claimant had covertly made of a conversation that day with a coworker in which claimant "detailed" certain complaints she had against the employer "at length." Audio at ~35:32.

(9) On November 10, 2017 at 8:49 p.m., the general manager sent an email to claimant stating, "This [these communications] are in violation of our agreement. Please cease immediately. Please don't come back to the club [i.e., to work] until we meet on Monday [November 13, 2017]." Audio at ~35:55. In reply, claimant sent an email to the general manager stating, "Thank you for all you've done for me. I wish you all the best." Audio at ~36:40. Shortly past midnight, on Saturday, November 11, 2017, claimant forwarded an email that she had just sent to a coworker to the general manager. That email stated, "Termination has been granted." Audio at ~36:55.

(10) On Sunday, November 12, 2017, the general manager drafted a letter to claimant, which she sent to claimant by email and through the US mail. That letter stated, "This email serves to accept your resignation from [the employer]. I will arrange for your final paycheck and a copy of this email to be sent in the US mail." Audio at ~37:17.

CONCLUSIONS AND REASONS: The employer discharged claimant for misconduct.

The Work Separation. Claimant contended that she was discharged on November 10, 2017 by the email in which the general manager accused her that day of having violated the confidentiality and non-disparagement agreement she had entered into with the employer, instructed her to "cease immediately" and further instructed her not to enter return to work, but to meet with the general manager on

November 13, 2017. Audio at ~25:18. In contrast, the employer contended that claimant voluntary left work on November 10, 2017, when claimant responded to the general manager's email by "wishing her the best" and subsequently telling a coworker that "termination had been granted." Audio at ~38:50. As such, the first issue this case presents is the nature of the work separation. If claimant could have continued to work for the same employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). However, if claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

It is undisputed that claimant did not explicitly state to the employer that she was leaving work and also that the employer did not explicitly state to claimant that she was discharged. However, it is undisputed that in the days immediately preceding November 10, 2017, claimant had entered into the confidentiality and non-disparagement agreement at the employer's behest and the general manager had strongly reiterated to claimant when the agreement was signed it and after that discharge would result if the employer considered her to have violated the agreement. While the general manager might have reassured claimant that commencement of the employer's investigation did not mean she was discharged, the general manager had never similarly reassured claimant that she would not be summarily discharged if the employer believed that she had violated the confidentiality and non-disparagement agreement but, instead, had emphasized otherwise.

The general manager, who was the employer's witness at hearing, did not testify that she communicated anything to claimant after she notified claimant of her belief that claimant had violated the confidentiality agreement on November 10, 2017 that would have caused claimant to believe that the employer was going to allow her to continue working despite its determination that she had violated the agreement. That claimant responded to the general manager's email notifying her that she had violated the agreement as she did by expressing her farewell thoughts to the employer suggests that she thought the employer was not willing to allow her to continue working and had discharged her by the email pointing out her violations, and her email to a coworker, in which she referred to her "termination," further suggests her belief that she had been or would imminently be involuntarily discharged, rather than that she had intended to and was quitting work of her own volition. Although the general manager saw claimant's emails indicating what claimant thought the employer had done or intended to do, she chose not to correct claimant's belief, but rather to respond with a letter and email which purported to "accept" claimant's resignation and to send claimant her final check. Viewed in its context, that the general manager's final communication referring to the work separation as a "resignation," implying that claimant and not the employer might have initiated it, was insufficient to dispel claimant's reasonable belief that the employer had discharged her based on the employer's past communications and, most likely, confirmed that belief by enclosing her final paycheck.

In light of the general manager's repeated emphases that violations of the confidentiality, non-disparagement agreement would result in claimant's discharge, the preponderance of the evidence in this record would not permit a reasonable person to conclude that the employer would allow claimant to continue working for it despite its belief that she had violated the agreement. It is also insufficient to support the conclusion that if claimant had responded to the general manager's final communication to her by stating that she had not intended to resign, the employer would have allowed her to continue working. *See Roadhouse v. Employment Department*, 283 Or App 859, 867, 391 P3d 887 (2017); *Van*

Rijn v. Employment Department, 237 Or App 39, 43-44, 238 P3d 419 (2010). On this record, because the employer likely was unwilling to allow claimant to continue working after the general manager notified her that the employer considered her to have violated the confidentiality, non-disparagement agreement, claimant's work separation was a discharge as of November 10, 2017.

The Discharge. 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) 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 claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The general manager clearly notified claimant of the employer's expectations about confidentiality with respect to the topics that were brought up and discussed between claimant and the employer as well as non-disparagement of the employer in the agreement that claimant signed on November 9, 2017, in the discussion of that agreement during the meeting on November 9, 2017 and in the follow-up email that the general manager sent to claimant on November 10, 2017 further explaining the types of communications that the signed agreement prohibited. The employer's expectations of claimant reasonable, and were neither vague nor ambiguous. Despite the clarity of those expectations, claimant proceeded to engage in a text message exchange with a former club member that disparaged the employer by falsely stating she was involved in "an unlawful termination/discrimination lawsuit," engage in a second text message exchange with a coworker which violated both the confidentiality expectation and likely, by innuendo, the non-disparagement expectation when it referred to matters that "could not be openly discussed," and engaged in a conversation with a coworker setting out the complaints she had raised with the general manager, which violated at least the confidentiality expectation and likely the non-disparagement expectation. Audio at ~35:15, ~35:25, ~35:32. Given the clarity with which the employer had communicated its expectations to claimant, and the conspicuous manner in which claimant's communications on November 10, 2017 violated those expectations, claimant could only have known when she engaged in those communications that she was violating the employer's expectations. Claimant willfully violated the employer's standards on November 10, 2017 by her communications with a former member and with coworkers.

Claimant's willful violation of the employer's standards on November 10, 2017 may not be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The behavior of claimant at issue may be considered an "isolated instance of poor judgment" if, among other things, it was 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). However, behavior may not be excused as an isolated instance of poor judgment if it "exceeds mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant engaged in three separate and discrete willful acts in violation of the employer's standards on November 10, 2017. As such, claimant's behavior at issue was neither a single nor an infrequent act and therefore does not meet the first prong of the test for it to be considered an isolated instance of poor judgment. As well, the manner in which claimant violated the employer's standards on November 10, 2017 was unconcealed, willful and blatant. The violations were of an agreement entered into only the day before and to which the general manager had emphasized the

importance of all parties' compliance. Based on the manner in which claimant defied the terms of the confidentiality and non-disparagement agreement, which encapsulated the employer's expectations, a reasonable employer would objectively conclude that it could not trust claimant to conform her behavior to its standards in the future and that she had caused an irreparable breach of trust in the employment relationship. As such, claimant's behavior at issue also does not meet the second prong of the test for it to be considered an isolated instance of poor judgment.

Nor may claimant's willful behavior on November 10, 2017 be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). There is no evidence supporting that claimant was not subjectively aware that the communications she engaged in on that day would violate the employer's expectations and, given the clarity with which the employer set out its expectations, it is implausible that claimant mistakenly thought that the employer would permit her to engage in them despite its stated expectations. Claimant's behavior on November 10, 2017 was not the result of a good faith error.

On this record, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-102133 is affirmed.

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

DATE of Service: <u>March 23, 2018</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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