EO: 200
BYE: 201917

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-0655

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75005). Claimant filed a timely request for hearing. On June 12, 2018 and June 15, 2018, ALJ Seideman conducted a hearing, and on June 19, 2018 issued Order No. 18-UI-111602, affirming the Department's decision. On June 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer certified that they provided a copy of their argument to claimant; however the employer's argument contained information that was not part of the hearing record and failed to show that factors or circumstances beyond their reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We therefore did not consider the parties' arguments when reaching this decision.

FINDINGS OF FACT: (1) Claimant began working for Colonial Travel Agency in 1987. On May 2, 2016, Davis World Travel, Inc. bought the business and continued to employ claimant as a travel agent and office manager until April 27, 2018.

(2) In April 2018, the employer presented claimant with some policies, which they asked her to agree to and sign. One of the policies stated, "Clients of Colonial Travel Agency are not your personal clients. All business with these clients is owned by Colonial Travel and will remain with Colonial Travel." Exhibit 6. The policy required claimant "agree and understand these new policies." *Id.*

(3) Another policy was a "Confidentiality Agreement" that stated, "any and all client information as well as personal issues that you are exposed to . . . are to be held in the highest confidence and not to be used or disclosed for any personal reasons nor to any person or persons within our outside of Colonial Travel Agency except in the case of carrying out the normal ongoing duties of your job . . . This is an all-inclusive agreement and is enforce [*sic*] for the duration of employment or until a modified version of this confidentiality statement . . . is signed and in place in your employee file. In the event of termination

of employment for any reason, confidentiality of all information and issues must be maintained beyond employment termination [].” Exhibit 7. The policy required claimant to “certify that I have read and understand the confidentiality agreement . . . and shall be bound by its contents.” *Id.*

(4) The employer implemented another policy requiring employees to provide the employer with “all passwords you have for all programs,” and to keep the employer informed if the employee changed a password. Exhibit 8. The policy stated that it was “a standing policy for any employee,” and required claimant to “sign that you agree and have read and understand this new policy.” *Id.*

(5) Claimant refused to sign the policies. She did not consider her clients’ information as owned by herself or anyone, did not want to provide it to the employer, and considered the policies a “non-compete” agreement. On April 27, 2018, the employer discharged claimant for refusing to agree to and sign its policies.

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) (January 11, 2018) 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(1)(d); OAR 471-030-0038(3)(b).

The employer required claimant to sign its policies and claimant refused to do so. Claimant argued that her refusal to sign the employer’s policies was not misconduct because the employer’s requirement was unreasonable. Claimant asserted that the policies amounted to a noncompetition agreement, which she was not legally obligated to sign. Under many circumstances, including circumstances similar to those present in this case, Oregon law deems noncompetition agreements voidable and unenforceable. *See* ORS 653.295(1) and (2). However, Oregon law defines “noncompetition agreement” as “an agreement . . . between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes or services that are similar to the employer’s products, processes or services for a period of time or within a specified geographic area after termination of employment.” ORS 653.295(7)(d). The employer’s policies were not a noncompetition agreement under Oregon law because they did not prohibit claimant from competing with the employer, or providing products, processes or services in the field of travel in any particular geographic location or for any period of time. Claimant was therefore not entitled to the protections afforded an individual presented with a noncompetition agreement. Also, notably, ORS 653.295(5) states that nothing in the noncompetition agreement law “restricts the right of any person to protect trade secrets or other proprietary information.” It therefore appears more likely than not that the employer’s policies were not a noncompetition agreement or tantamount thereto, and that the employer was not prohibited under state law from requiring claimant to keep its trade secrets or other proprietary information protected.

Claimant also argued that neither she nor the employer "owned" her clients, that the employer therefore did not have a right to their information, and that it was unreasonable for the employer to expect her to agree that they owned the client information or to supply the employer with access to that information. We agree with claimant that the clients themselves are not property and were not owned. However, claimant worked for the employer as an employee performing services booking travel for clients who solicited the employer's business. It appears more likely than not that the employer had a proprietary interest in its clients' contact information and any booking data related to trips they booked via the employer's business or its employees, and that the employer had a right to expect claimant to abide by its policies intended to gather and safeguard such information. The employer's expectation that claimant sign its policies and abide by them was, therefore, reasonable.

Claimant willfully violated the employer's reasonable expectations by refusing to sign the employer's policies or agree to abide by them. She knew the employer's expectation and intentionally chose not to comply when she refused to sign the policies**.** Claimant's conduct cannot be excused as a good faith error; her opinion that the employer's expectation that she sign and abide by the employer's policies was not the result of her sincere but mistaken belief that the employer did not want her to sign and abide by its policies, nor a belief that she had in fact already complied with those expectations. Claimant's conduct cannot be excused as an isolated instance of poor judgment; regardless whether claimant's exercise of poor judgment in refusing to sign the employer's policies was isolated or not, her refusal to sign and abide by policies requiring her to keep client information confidential and in the hands of the employer's business amounted to a willful insubordination. No reasonable employer would continue to employ an individual who refused to provide the employer with information about its clients, refused to sign the employer's policies, and refused to agree to keep its client information confidential. Claimant's conduct therefore exceeded mere poor judgment because it caused an irreparable breach of trust and made a continued employment relationship impossible, and cannot be excused.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-111602 is affirmed.

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

DATE of Service: <u>August 1, 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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