

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0666

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for misconduct (decision # 83650). Claimant filed a timely request for hearing. On June 12, 2018, ALJ Meerdink conducted a hearing, and on June 13, 2018 issued Order No. 18-UI-111257, affirming the Department's decision. On July 2, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Society of St. Vincent De Paul, employed claimant as an onsite property manager, from May 23, 2006 until April 18, 2018.

(2) As part of claimant's responsibilities, claimant monitored the property on a daily basis for compliance violations and reported any violations to employer. She also did landscaping, and reserved employer's community room for the residents' use.

(3) The employer had a code of conduct policy which required employees to treat co-workers and residents professionally and respectfully. The policy also required employees to maintain professional boundaries with residents.

(4) On January 19, 2018, the employer issued claimant a final written warning. The warning stated that claimant's work performance was poor, that she exercised poor judgment, did not work as a team member, did not treat co-workers and residents respectfully, had intimidated co-workers and residents, and had crossed professional boundaries by giving a resident a ride in her vehicle and by allowing a child in her home. In addition, the warning alleged that claimant had not reserved the employer's community room for the residents' use, that she had allowed certain residents and not others to

coordinate events with the resident services coordinator, and had not allowed all residents to attend events on the premises. The warning also stated that claimant had used employers' equipment without the employer's consent. The warning reminded claimant to be respectful and nice to co-workers and residents.

(5) On March 19, 2018, claimant reported an apartment that was in violation of employer's expectations regarding storage of items on patios. Shortly thereafter, claimant's supervisor observed that several other apartment patios were out of compliance and presented a safety risk. Claimant had chosen not to report those apartments. The employer interpreted claimant's behavior as favoritism towards certain tenants.

(6) On or about March 2018, claimant interacted with a resident and called him a racist.

(7) On or about March 2018, claimant's co-worker complained to a supervisor, at a different property, that claimant had told residents that certain former employees had been fired and banned from the property. The employer maintained that discussing former employees was in violation of employer's policies.

(8) On or about April 15, 2018, the employer learned that claimant had cut the property's sprinkler system lines, in order for the cable company to put in their own lines. Claimant had not obtained permission from the employer prior to cutting the sprinkler system lines.

(9) On April 18, 2018, the employer discharged claimant for her cumulative conduct.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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) (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. 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.

The employer discharged claimant because she failed to report the patio compliance violations, called a resident racist, did not maintain professional boundaries with residents and for not seeking the employer's consent prior to cutting the properties' sprinkle system lines. Claimant was aware of her job responsibilities and of the employer's code of conduct policy. At hearing claimant acknowledged that she had received the employer's last written warning, which reminded her to be professional and nice to residents. Recording at 42:00-42:30. Claimant acknowledged that it was part of her daily job description to look for and report patio compliance violations. Recording at 37:00, 44:00-45:00. Claimant further acknowledged that she called a resident racist and that she knew she should not have done so. Recording at 33:00, 43:00. Claimant testified that she had driven a resident in her personal vehicle to the pharmacy.

Recording at 47:00. Finally, claimant admitted that she had cut the employer's sprinkler line system without first asking for the employer's consent. Recording at 48:00. Claimant willfully violated the employer's reasonable expectations by refusing to abide by the employer's code of conduct policies. Claimant also acted with indifference to the consequences of her conduct by choosing to ignore the employer's code of conduct policy and by not performing her job duties. Claimant knew or should have known that her conduct would probably result in a violation of the standards of behavior, which an employer has the right to expect of an employee.

OAR 471-030-0038(3)(b) defines exceptions to "misconduct," including isolated instances of poor judgment and good faith errors. OAR 471-030-0038(1)(d)(A) defines an isolated instance of poor judgment as a "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior". As stated above, claimant's conduct consisted of repeated willful and wantonly negligent violations of the employer's policies and cannot be excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment.

Claimant's behavior cannot be excused as a good faith error under OAR 471-030-0038(3)(b). At hearing, claimant admitted that was aware of and had violated the employer's code of conduct policy, which required her to treat residents respectfully and maintain professional boundaries. She also admitted that she knew and failed to perform her daily job responsibilities which required her to notify the employer of any patio compliance violations. Claimant knew that her acts were not consistent with the employer's expectations.

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

DECISION: Order No. 18-UI-111257 is affirmed.

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

DATE of Service: August 7, 2018

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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