EO: 200
BYE: 201929

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-0963

Reversed
Disqualification

PROCEDURAL HISTORY: On August 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 93058). The employer filed a timely request for hearing. On September 12, 2018, ALJ Amesbury conducted a hearing, and on September 18, 2018 issued Order No. 18-UI-116806, affirming the Department's decision. On October 4, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) City of Woodburn employed claimant as an associate planner in its community development department from July 20, 2015 to July 23, 2018.

(2) Claimant's duties included interpreting and applying city code provisions regarding zoning and planning matters. The employer had policies prohibiting employees from willfully giving false information, engaging in misrepresentation and being dishonest. Claimant was aware of the employer's policies and understood its expectations.

(3) In June 2017, claimant suffered a mental breakdown that resulted in hallucinations, and was diagnosed with sever clinical depression and insomnia. Claimant took a 12-week medical leave of absence, during which she was treated with medications to regulate both conditions. In September 2017, claimant was able to return to part-time work without the need for further accommodations. In December 2017, claimant returned to full time work without accommodations.

(4) In March 2018, the employer learned that in January and February 2018, claimant consistently took excessively long, and an excessive number of, breaks from work without clocking out. When

confronted with that information, claimant initially asserted that she was owed time from the employer for working during her lunches the previous summer. However, when claimant's supervisor explained that he had never authorized claimant to work during her lunch break, claimant stated that she was referring to times she worked during her lunch breaks in 2016, under her previous supervisor. However, claimant subsequently conceded that the times she worked during her lunch breaks in 2016 may have been part of a flex-time arrangement with her previous supervisor, and she therefore wasn't owed any additional time from the employer. On March 30, 2018, the employer disciplined claimant by temporary decreasing her pay, in part for being dishonest regarding her breaks.

(5) In the spring of 2018, claimant reviewed a building plan that involved residential garages. The employer had a city ordinance stating that the façade containing the vehicular entrance for an attached garage shall not comprise more than 65% of the total façade of the structure facing the street. Claimant mistakenly indicated that the requirement was 35%, not 65%, which ultimately resulted in the employer having to refund the builder $11,000. When claimant's supervisor asked claimant about the mistake, claimant asserted that that was how her previous supervisor had applied the ordinance, how he had taught claimant to apply the ordinance, and how claimant had always applied the ordinance. Claimant's supervisor ordered a review of single-family-home permits approved over the previous three years, including those claimant processed. That review, along with a review of communications from claimant's previous supervisor, showed that the employer had never applied the ordinance in such a manner, and consistently took the position that the requirement was 65%, and not 35%. When claimant's supervisor confronted claimant with that information, claimant's only response was to say that she must have "misremembered." Exhibit 2 at 10.

(6) At a hearing on May 16, 2018, claimant told her supervisor that she was surprised that the employer had to refund the builder $11,000 for her error because she had specifically instructed the employer's building inspector not to review the building permit plans until after she had completed her planning review. However, the building inspector subsequently denied that claimant had ever asked him to delay his review of the building permit plans, asserting that he could not recall ever being asked not to review plans by a planner and would certainly remember if he had been told to do so. The building inspector further asserted that he had reviewed the builders plans when they were submitted, as he always did.

(7) The employer placed claimant on paid administrative leave and conducted an investigation into the statements she made regarding her misapplication of the ordinance on residential garage facades and her communications with the building inspector. During the investigation, claimant again asserted that she "misremembered" the ordinance's 65% requirement as 35%, asserting that she had understood and applied the ordinance correctly prior to her medical leave of absence in 2017, but reversed the numbers in her mind while on leave, and returned to work with that misunderstanding. Claimant also admitted that her previous supervisor had never trained her that the ordinance's requirement was 35%, and not 65%.

(8) Regarding claimant's communications with the building inspector, when interviewed, the building inspector again denied that claimant ever asked him not to review the building permit plans until claimant finished her review, asserting he did not take direction from assistant planners and that his reviews were often conducted simultaneously and independent of the planner's review. The building inspector further asserted that that any such request from claimant would have resulted in him having a conversation with claimant's supervisor due to the timelines he was required to follow. Claimant, when

interviewed, admitted that she had not instructed the employer's building inspector not to review the building permit plans until after she had completed her planning review. Claimant instead asserted that she removed the building permit plans "from the "pending" shelf and put them in the "hold" box, and that the building inspector would have taken them from the hold box and seen that claimant had not signed off on them, which would have let the building inspector know to "halt" his review. Exhibit 2 at 14. However, claimant admitted that the building inspector may have already completed his review when claimant put her review in the hold box.

(9) The employer discharged claimant, in part, for willfully making false statements regarding her misapplication of the ordinance on residential garage facades and her communications with the building inspector.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for willfully making false statements regarding her misapplication of the ordinance on residential garage facades and her communications with the building inspector. The employer had policies prohibiting employees from willfully giving false information, engaging in misrepresentation and being dishonest. Claimant was aware of the employer's policies and understood its expectations.

With respect to claimant's false statements regarding her misapplication of the ordinance on residential facades, the ALJ concluded that the employer failed to establish they were willful. In support of that conclusion, the ALJ asserted that claimant explained that she had misremembered what she had done and learned in the past about the applicable percentages, that she had conflated the two percentages, and that her severe mental health problems that might have contributed to her being incorrect. The ALJ therefore determined that claimant likely forgot, conflated the figures or became confused, perhaps on account of the memory problems caused by her mental health issues.[1]

However, when claimant's supervisor first questioned claimant about her misapplication of the ordinance, claimant did not state that she had forgotten or was confused about what she had done and

[1] Order No. 18-UI-116806 at 5.

learned in the past. She unequivocally stated that she had applied the ordinance the way her previous supervisor had applied it, how he had taught her to apply it, and how she had always applied it. It was only after claimant's supervisor showed claimant that those statements were false that she first asserted that she "misremembered," without further explanation. And it was only during the employer's investigation that claimant first asserted that she had understood and applied the ordinance correctly prior to her medical leave of absence in 2017, but reversed the numbers in her mind while on leave, and returned to work with that misunderstanding. However, even that assertion is inconsistent with the employer's review of single-family-home permits approved over the previous three years, which showed that claimant had applied the ordinance correctly both before and after her medical leave of absence. We find it unlikely that any memory problems cause by her mental health issues resulted in claimant mistakenly remembering that her previous supervisor had applied the ordinance incorrectly, that he taught her to apply it incorrectly, and that she had always applied it incorrectly. More likely than not, claimant's false statements regarding her misapplication of the ordinance on residential garage facades were willful.

With respect to claimant's statement regarding her communication with the building inspector, the ALJ again concluded that the employer failed to establish that claimant's statement was willfully false. In support of that conclusion, the ALJ asserted that claimant initially stated to the employer that she "told" the building inspector not to review the building permit plans until after she had completed her planning review, and later clarified that she told him that by withholding her signature from the building permit plans and placing them in a hold box.[2] However, the record shows that claimant initially told the employer that she "specifically instructed" the building inspector not to review the building permit plans until after she had completed her planning review. Transcript at 33; Exhibit 2 at 10, 13, 17. The record fails to show, and we find it implausible, that claimant sincerely believed withholding her signature from the building permit plans and placing them in a hold box amounted specifically instructing the building inspector to delay reviewing the building permit plans. More likely than not, claimant's initial statement to the employer that she had specifically instructed the building inspector to delay reviewing the building permit plans was willfully false.

Claimant's willfully false statements regarding her misapplication of the ordinance on residential garage facades and her communications with the building inspector were willful violations of the employer's reasonable policies prohibiting employees from willfully giving false information, engaging in misrepresentation and being dishonest. Claimant's conduct cannot be excused as an isolated instance of poor judgment because she repeatedly made willfully false statements to the employer. *See* OAR 471-030-0038(1)(d)(A). Nor can claimant's conduct be excused as a good faith error, as the record fails to show that claimant sincerely believed, or had a rational basis for believing, the employer would condone her making willfully false statements to the employer.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits.

DECISION: Order No. 18-UI-116806 is set aside, as outlined above.

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

[2] *Id*.

DATE of Service: November 9, 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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