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BYE: 201441

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

533
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0185

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 29, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162506). Claimant filed a timely request for hearing. On January 22, 2014, ALJ Seideman conducted a hearing, and on January 23, 2014 issued Hearing Decision 14-UI-09021, affirming the Department's decision. On January 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Project D O V E employed claimant as an advocate from June 13, 2011 until October 25, 2013. The employer provided emergency shelter and other services for victims of domestic violence and sexual assault.

(2) The employer employed claimant in a "co-located" position in which claimant split her days between working on the employer's premises and at a Department of Human Services' (DHS) site. As an advocate, claimant's duties included making home visits to victims and assisting victims in completing various forms, including restraining orders.

(3) The employer expected claimant to report and remain at work when scheduled, whether at the employer's site or at the DHS site. The employer also expected claimant to perform the duties of her position at the employer's worksite and at DHS. Claimant was aware of the employer's expectations.

(4) Near in time to November 2012, claimant did not have a car and, at claimant's request, the employer's executive director agreed to change claimant's work hours to start at 8:30 a.m. so she could more conveniently get her granddaughter to school before walking to work. In approximately November 2012, claimant obtained a new car and asked the executive director to change her starting time at work back to 8:00 a.m. On November 13, 2012, the employer issued a written "notice" to claimant to inform her that her scheduled work hours remained from 8:30 a.m. until 5:30 p.m. Exhibit 6. The employer thought claimant had been changing her work hours more than was "allowable." Transcript at 5.

(5) On September 20, 2013, claimant had the shelter manager's permission to report for work late, at approximately 12:30 p.m., to enable her to attend a funeral. On that day, sometime before noon, claimant sent a text message to the manager telling her she was going to arrive at work later than 12:30 p.m. because the funeral was delayed and she needed to attend to her daughter, who had become distraught at the funeral. The shelter manager called claimant in response to the text message. Claimant told the manager she did not think she was going to be able to return to work that day and, as a result, the employer needed to handle an appointment that claimant had previously scheduled for herself. Claimant ultimately reported to the workplace at 2:45 p.m. On September 23, 2013, the employer issued a written warning to claimant telling her she needed to call the office if her arrivals were delayed and she needed to let her supervisor know in advance to reschedule appointments for her. Exhibit 4.

(6) On September 30, 2013, claimant asked her fiancé if he could pick-up her paycheck from the employer if the employer approved. Claimant intended to call the employer to determine if it was possible to release her paycheck to someone other than herself. However, claimant forgot to call the employer. When claimant remembered to call, she spoke with the executive director and became confused when the executive director told her that her fiancé had already called the employer about picking up her check. On October 1, 2013, the employer issued a written warning to claimant for failing to take the appropriate steps to arrange for her fiancé to pick up the paycheck. Exhibit 3. The warning notified claimant that she would be discharged if she again failed to follow the employer's procedures.

(7) On October 24, 2013, a representative from DHS contacted the employer and said that DHS was dissatisfied with claimant's work performance. The DHS representative said that claimant was "frequently" not on-site during her scheduled hours at DHS, refused to perform home visits with certain DHS caseworkers and refused to perform some client services involving restraining orders. Transcript at 12, 13.

(8) On October 25, 2013, the employer discharged claimant based on the report from DHS.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) 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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-09021, the ALJ concluded that claimant's conduct, as reported to the employer by DHS, was misconduct. The ALJ reasoned that "[c]laimant's lack of attention and performance [at DHS] was a wantonly negligent disregard of what the employer had the right to expect, and constituted misconduct." Hearing Decision 14-UI-09021 at 3. We disagree.

At the outset, we address the employer's contention at hearing that it discharged claimant for the sum of the alleged misconduct encapsulated in the prior written warnings it had issued to claimant as well as

DHS's October 24, 2013 report of its dissatisfactions with claimant's performance. Transcript at 5 *et seq.* Despite this general contention, one of the employer's witnesses characterized the DHS report as the "final straw" that caused the employer to discharge claimant. Transcript at 20. Moreover, when an employer has issued warnings to an employee for incidents that preceded a discharge, EAB customarily evaluates only the final incident before the discharge to determine whether misconduct has occurred. EAB has adopted this approach because, when an employer was aware of the prior incidents and did not discharge a claimant, it must necessarily have concluded that those prior incidents were not of sufficient gravity to merit discharge. *See Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). Here, the employer was well aware of the past incidents for which it had warned claimant and did not try to discharge her for them. The proximate cause of claimant's discharge, and the proper focus of our discharge analysis, is the report DHS made to the employer on October 24, 2013.

At hearing, the employer's witnesses generally asserted that claimant engaged in misconduct while at the DHS site, but were only able to provide a very generalized summary of DHS's alleged dissatisfaction with claimant's performance. Transcript at 10, 11, 12, 19. The employer's witnesses did not or could not identify any DHS witnesses to claimant's alleged misconduct, nor could they identify any specific incidents of alleged misconduct or any specific dates or periods of time during which that misconduct occurred. *Id.*; *see also* Transcript at 39. Conclusory, hearsay assertions of a claimant's alleged misconduct, without at least some supporting factual detail, are insufficient to allow us to conclude that misconduct occurred. In addition, to the limited extent the employer could describe DHS's dissatisfactions with claimant's work performance, claimant specifically denied she ever failed to report to the DHS worksite when she was scheduled to be there. Transcript at 23, 28, 34, 38. Claimant also denied that she had ever refused to perform a DHS home visit, except she noted that one time she had declined to attend a home visit when the alleged abuser was at the home and, due to safety concerns, the employer's policies prohibited an advocate from being in the home in the abuser's presence. Transcript at 34, 36. Finally, claimant denied that she ever failed to assist in preparing a restraining order, but speculated that there could have been circumstances when obtaining a restraining order might have jeopardized the client's safety and that, as the client's advocate, she might have been noticeably reluctant to urge the client to seek one. Transcript at 35. To the extent that claimant might not have performed as DHS expected in these latter two incidents, DHS's expectations – that claimant refused to visit a home with an abuser present, and was reluctant to urge a client to jeopardize her safety – were unreasonable. A decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-03-0038(1)(d)(c). In view of claimant's rebuttals to DHS's complaints and the inability of the employer to provide more than the most meager of evidence about claimant's alleged misconduct, the employer did not meet its burden to establish, more likely than not, that claimant willfully or with wanton negligence violated the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-09021 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: March 5, 2014

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.
Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.