

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0356

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 17, 2013, the Oregon Employment Department (the Department) served notice of two administrative decisions concluding that the employer suspended claimant for misconduct (decision #90549), and the other concluding that the employer discharged claimant for misconduct (decision #91958). Claimant filed timely requests for hearing. On December 27 and December 31, 2013, ALJ Monroe conducted a consolidated hearing, and on February 12, 2014 issued Hearing Decisions 14-UI-10228 and 14-UI-10227, concluding claimant was suspended and discharged, but not for misconduct. On March 3, 2014, the employer filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-10228 and 14-UI-10227. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2014-EAB-0356 and 2014-EAB-0357).

FINDINGS OF FACT: (1) Mt. Scott Care Home Hoodview employed claimant from October 8, 2008 to September 26, 2013 as a mental health aide.

(2) The employer expected claimant to sign the residents' medication administration records (MAR) every time she administered or verified a medication, and to circle and sign a MAR if she did not provide or verify the medication. The employer also expected claimant to complete and sign each item on the task sheet for each shift she worked. The employer also expected claimant to communicate with residents in a respectful manner and to refrain from arguing with residents. Claimant understood those expectations.

(3) The employer also expected claimant to conduct all personal telephone calls in a designated break area and not where a resident might overhear her conversations. Claimant worked at two different locations. One of the employer's administrators who supervised claimant told her that, rather than always taking her break in the break room, she could take her break outside in the patio area if no residents were present in the patio area to overhear personal telephone conversations.

(4) On September 19, 2013, claimant took a break outside of the designated break areas. She used her telephone to view Facebook during her break, but did not have a spoken conversation on her telephone.

(5) On September 19, 2013, claimant was on duty for approximately sixteen hours because she worked two consecutive shifts. During each shift, she was training a new employee. While claimant was training one of the new employees about how to prepare dinner for the five residents in the care home, one of the residents returned from having received a required injection. Claimant forgot to sign the MAR verifying the resident had received the injection.

(6) On September 19, 2013, the employer suspended claimant for two days, on September 23 and 24, 2013, for taking a break in an unauthorized area and for failing to record a resident's injection on the resident's MAR.

(7) Claimant returned to work on September 25, 2013, and worked two consecutive shifts, until the morning of September 26, 2013. One resident repeatedly insisted that her laundry be finished before the end of claimant's second shift at 7:00 a.m. Another employee completed the resident's laundry near the time when claimant was to complete the shift change. The resident was dissatisfied with her laundry because it had not been folded, and complained that it was damp. Claimant felt the clothing, and it did not feel damp. Claimant made suggestions to the resident to calm and assist her, including that she could start folding her own laundry or wait until after the shift change when claimant would assist her or finish folding her laundry. The resident was yelling and using foul language towards claimant, so claimant ended the discussion, and told the resident they could continue the discussion after claimant completed the shift change. Claimant closed the doors to the room, and completed the shift change. The resident asked to speak with a supervisor, and did not continue the discussion with claimant.

(8) On September 26, 2013, the employer discharged claimant for engaging in an argument with a resident.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer suspended and discharged claimant, but not for misconduct.

ORS 657.176(2)(b) and (2)(a) require a disqualification from unemployment insurance benefits if the employer suspended or 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. In a suspension or discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Suspension. The employer suspended claimant because she took a break outside the employer's break room, and because she failed to record a resident's injection on the resident's MAR. The employer had a right to expect employees to take breaks in designated areas, and to refrain from talking on the telephone where residents could overhear their personal telephone conversations. The employer had a rule that employees were to take their breaks only in the designated break room in each care house. However, it was undisputed that the one of the administrators who supervised claimant had told claimant

she could take her break outside the break room, on the patio outside, so long as no residents were there to overhear her personal telephone conversations. On September 19, 2013, claimant took her break outside the break room, and did not talk on her telephone during her break. Because the employer had allowed her to take her break on the patio provided that no residents were present to overhear her personal telephone calls, claimant assumed she could take her break in places other than the break room, provided she did not engage in telephone conversations that could be overheard by the residents. Because the employer had not enforced its own rule that employees take their breaks only in the break room, and because the purpose of the rule was primarily so residents would not overhear employees' private conversations, the record fails to show that claimant knew or should have known that taking a break outside of the break room, without having a personal conversation that residents could overhear, violated the employer's expectations. Absent such a showing, we cannot find that claimant engaged in misconduct when she took her break outside the break room on September 19, 2013.

Nor did the employer show claimant engaged in misconduct by failing to record a resident's injection on the resident's MAR on September 19, 2013. Claimant testified that on September 19, 2013, she was working a double shift, and was training a new employee in addition to completing her own duties. Transcript (December 31, 2013) at 36. Claimant testified further that she was training the new employee how to prepare dinner for the residents, and forgot to record the injection in the resident's MAR when claimant finished working in the kitchen. Transcript (December 31, 2013) at 37. Claimant's unrefuted testimony shows she did not consciously neglect to sign the MAR, or consciously engage in other conduct she knew or should have known would probably result in her failure to do so. Claimant's failure to complete the MAR after she finished training the new employee in the kitchen was careless, arguably negligent, but it was not willful, or wantonly negligent as defined under OAR 471-030-0038(1)(c).

Thus, we conclude the employer suspended claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her suspension.

Discharge. The employer provided hearsay evidence that claimant argued with a resident about the resident's laundry, told the resident to fold her own laundry, and shut the doors while the resident was speaking, which the employer considered to be abusive. Transcript (December 31, 2013) at 18, Exhibit 1. Claimant plausibly testified that she followed the employer's procedures during the incident by ending the discussion with the resident while the resident was yelling and using foul language towards claimant. Transcript (December 31, 2013) at 46 to 47. Claimant testified further that she closed the doors to the area where the resident stood to prevent the incident from escalating further, and that the resident was not attempting to walk into the room at the time. Transcript (December 31, 2013) at 47. Claimant told the resident claimant had to complete the shift change, but that the resident could begin folding her own laundry, and that claimant would assist her if she needed after claimant finished the shift change. Transcript (December 31, 2013) at 49 to 50. Claimant denied having argued with the resident. Transcript (December 31, 2013) at 45 to 46. Absent a reason to disbelieve claimant's first-hand account of the final incident, and absent a basis to conclude that claimant engaged in behavior that was argumentative or disrespectful towards the resident, or that otherwise was a willful or wantonly negligent violation of the standards of behavior which the employer had the right to expect of claimant, the record fails to show the employer discharged claimant for misconduct.

Thus, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decisions 14-UI-10227 and 14-UI-10228 are affirmed.

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

DATE of Service: March 27, 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.