

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0447

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 105800). The employer filed a timely request for hearing. On March 12, 2014 ALJ Micheletti conducted a hearing, and on March 18, 2014 issued Hearing Decision 14-UI-12751, affirming the Department's decision. On March 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Douglas County School District 15 employed claimant as its business manager from March 10, 1998 to December 3, 2013.

(2) During the course of claimant's employment her workload increased as the Oregon Department of Education (ODE) requirements increased. At times, claimant was unable to complete all of her required duties in a timely manner.

(3) Beginning in December 2013 claimant's adult son required 3.5 hours of dialysis three times per week. Claimant often had to drive her son either to or from dialysis, a distance of 40 to 45 miles, during her scheduled shift. At times, claimant had to drive her son to dialysis, wait while he underwent dialysis, and then drive him home.

(4) Prior to July 2013, the employer allowed claimant to miss work because of her son's dialysis appointments. Claimant attempted to make up the time by working late and on weekends. However, she increasingly became unable to perform all her required duties in a timely manner.

(5) In July 2013, the employer hired a new superintendent. The superintendent told claimant she was expected to work her scheduled shifts, and required claimant to take paid sick leave when she missed work to assist her son. Claimant complied with that requirement, and continued attempting to make up

the time by working late and on weekends. However, she continued being unable to perform all her required duties in a timely manner.

(6) On October 10, 2013, the superintendent placed claimant on a written plan of assistance for poor job performance. The plan stated, in part, that claimant was expected to improve in the following areas:

- Professional Growth Goals and a Job Description (if available).
- Prepare, amend and implement the District Budget according to policy DB.
- Improve organizational skills and time on task.
- District Audits (policy DIE) must be completed on time and according to school accounting procedures.
- Complete all required daily/weekly tasks (bank reconciliations, credit cards, student activity accounts, expense reimbursements, cash in buildings, etc.) in a timely manner.
- Grant allocations/applications-monitoring and reporting deadlines (Title I, SPED/IDEA, etc.).
- Develop a Personnel Department process/protocol – applications, screenings, interviews, responses – updated and secured files – insurance/benefits, FMLA WC, Unemployment Benefits, Bargaining Agreements, etc.
- Analysis and monitoring of district's financial status with ideas for increasing revenue or cost savings for the district to include all the maintenance and operations, programs, staffing, etc.
- Monthly financial reports and statements (see Policy DICO) to monitor school revenues and expenditures
- All aspects of payroll (policy DL) including payday schedules, draws, deductions, OT/CT, EP.
- Purchasing/procurement and payment procedures for accounts payable (see policy DJ and DK)
- Capital, community and human resource assets
- Inventory (policy DID and depreciation to include grounds and building maintenance
- Communicate on a regular basis (at least weekly) with the Superintendent to insure that there is a working knowledge for all activities involving Fiscal Management according to District Policy, ORS/OAR (Program Budgeting and Accounting Manual – ODE and Federal Law.

Exhibit 1 at 4. The plan stated that it would be reviewed by claimant and the superintendent no later than November 8, 2013.

(7) Based on her October 10, 2013 meeting with the superintendent, claimant believed her highest priority was provide information to the employer's independent auditor prior to the end of December 2013, so that the auditor could complete the employer's 2012-2013 audit. Claimant therefore focused on that task, but attempted to improve her performance in all the areas set forth in the plan of assistance.

(8) Claimant continued missing work during her scheduled shifts to assist her son. Claimant continued attempting to make up the time by working late and on weekends. However, claimant continued being unable to complete all her assigned duties in a timely manner.

(9) On November 5, 2013, claimant and the superintendent met to review the performance improvement plan. Based on that meeting, the superintendent determined that claimant had made “no progress” in any of the areas set forth in the plan of assistance. Transcript at 45. The superintendent therefore placed claimant on paid administrative reassignment pending further investigation.

(10) On December 3, 2013, the employer discharged claimant for allegedly making no progress in any of the areas set forth in the plan of assistance.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant’s discharge was 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. 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).

On November 5, 2013, the employer effectively suspended, and later discharged, claimant for allegedly making no progress in any of the areas set forth in the October 10, 2013 plan of assistance. At hearing, claimant testified that she performed all duties set forth in the plan of assistance to the best of her ability, but that she was unable to meet the employer’s expectations due to the need to miss work to assist her son with his dialysis. Transcript at 21-38. To the extent the employer expected claimant to forgo missing work to assist her son after giving her permission to miss work for that reason, that expectation was unreasonable. The record fails to show claimant knew or should have known that focusing on providing information to the employer’s independent auditor probably violated the employer’s expectations, or that claimant consciously engaged in other conduct she knew or should have known would probably result in a violation of the expectations set forth in the plan of assistance. Nor does the record show that claimant was indifferent to the consequences of her actions, given that she worked late and on weekends in order to comply with the employer’s expectations. The employer therefore did not show that claimant’s failure to meet the expectations set forth in the plan of assistance was willful or wantonly negligent. Absent such a showing, we cannot find misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-12751 is affirmed.

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

DATE of Service: April 24, 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.