

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0712

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163261). Claimant filed a timely request for hearing. On April 24, 2014, ALJ Lohr conducted a hearing, and on April 28, 2014 issued Hearing Decision 14-UI-16258, affirming the Department's decision. On April 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a human resources consultant from May 3, 2010 until February 28, 2014. In his position, claimant was required, among other things, to interpret the requirements of collective bargaining agreements and to negotiate with union officials over the employer's proposed disciplinary sanctions for employees who were also union members.

(2) The employer expected claimant to behave courteously and respectfully toward union representatives and to refrain from displays of angry, hostile or intimidating behavior. Claimant was aware of the employer's expectations.

(3) Claimant was an insulin-dependent diabetic. A symptom of claimant's condition was that, if his blood sugar became unstable or he was subjected to stress, claimant became emotionally reactive and he responded disproportionately to situations. Before February 11, 2014, claimant was not aware that diabetes might affect his emotional reactions and behaviors.

(4) On February 11, 2014, claimant was in a second meeting with two union representatives and his manager to discuss the employer's intention to discipline four employees. This meeting was at the request of the union representatives and claimant understood that the union representatives had agreed before the meeting that the behavior of the four employees was wrongful. At the meeting, the union representatives unexpectedly took the position that the employees had not engaged in wrongdoing. When claimant became aware that the union representatives had changed their position, he experienced great anger, lost his temper and yelled at the representatives. Transcript at 27, 29. The manager at the meeting observed that claimant was "red-faced" and she thought that "he was going to stroke out." Transcript at 7-8. Claimant engaged in a tirade and directed foul language at the union representatives. Transcript at 29. Claimant got up from his seat and walked toward the representatives, still shouting. Transcript at 27, 29. One of the representatives objected to claimant's physical proximity to her and claimant stopped his approach. After the meeting, the union representatives complained to claimant's supervisor about claimant's behavior at the meeting.

(5) On February 12, 2014, the employer suspended claimant pending an investigation of his behavior during the February 11, 2014 meeting. On February 17, 2014, claimant had an appointment with his physician to evaluate his condition. The physician attributed claimant's behavior during the February 11, 2014 meeting to an "emotional" or "stress reaction" arising from fluctuations in his blood sugar from diabetes exacerbated by his workload, diet and schedule for administering his insulin. Transcript at 34, 38; Exhibit 1 at 4, 7, 11, 12. The physician noted that, as a result of claimant's condition, he had a "risk for "emotional instability with reaction" if he was under stress or if his medication was not managed. Exhibit 1 at 7, 12. On February 17, 2014, claimant gave the employer a physician's certificate authorizing a medical leave through February 28, 2013 due to "insulin / emotional stress reaction requiring treatment, prescription RX and time off work for recovery." Exhibit 1 at 4. The employer approved the requested leave.

(6) On February 28, 2014, claimant's first scheduled day back at work after his leave, the employer discharged claimant for his behavior during the February 11, 2014 meeting with the union representatives.

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. 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 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-16258, the ALJ concluded that, by his behavior during the February 11, 2014 meeting, claimant engaged in misconduct. The ALJ reasoned that claimant's admission at hearing that

he "lost his temper during the meeting" and the other evidence that the employer presented about claimant's behavior while at the meeting demonstrated that claimant acted with indifference to the consequences of his actions and that his behavior was therefore a wantonly negligent violation of the employer's standards. Hearing Decision 14-UI-16258 at 3. We disagree.

At the outset, claimant did not dispute that he was aware of the employer's expectations about appropriate behavior or that his behavior during the February 11, 2014 meeting violated those expectations as he understood them. Claimant also agreed that he lost his temper during the meeting and yelled at the union representatives and, although he testified that he did not remember using foul language, he stated "I was mad enough, you know, to do so," and did not seriously dispute that he might have, in fact, done so. Transcript at 29. On this record, the employer established that claimant's behavior during the February 11, 2014 meeting was outside any reasonably accepted definition of acceptable behavior.

However, to establish that claimant's behavior on February 11, 2014 was misconduct that disqualified claimant from benefits, the employer must present evidence demonstrating that the behavior was accompanied by a willful or wantonly negligent state of mind. *See* OAR 471-030-0038(3)(a). At a minimum, the employer must show that claimant's behavior was *conscious*, or otherwise within his reasonable control. *See* OAR 471-030-0038(1)(c). The employer did not dispute claimant's contention that his emotionally reactive behavior on February 11, 2014 was an inadvertent product of fluctuations in his blood sugar caused by diabetes and was not behavior that he consciously chose to engage in. Transcript at 34, 38. Claimant's contention was supported by the documents that he submitted from his physician attributing his behavior on February 11, 2014 to an emotional stress reaction occasioned by fluctuations in his blood sugar. Exhibit 1 at 2, 4, 7, 11, 12. From the record, we infer that claimant was not reasonably aware before he visited his doctor on February 17, 2014 that he might disproportionately react to situations if there were problems with the management of his diabetes. The record therefore does not support the conclusion that it was wantonly negligent of claimant not to have taken more aggressive steps to manage his diabetes or his emotional reactions caused by diabetes. Because claimant presented reliable evidence that his behavior at the meeting was not conscious, the employer had the burden to present rebuttal evidence showing that despite his diabetes, claimant's behavior was nonetheless within his control. The employer did not present any such evidence. On these facts, the employer failed to meet its burden to establish that claimant's behavior on February 11, 2014 was willful or wantonly negligent misconduct.

The employer argued at hearing that, because claimant did not notify the employer of any difficulties in controlling his emotional reactions before the February 11, 2014 meeting, it was not appropriate to consider them in determining whether claimant's behavior on February 11, 2014 was misconduct. Transcript at 38. However, the issue in this case is whether claimant should be disqualified from unemployment insurance benefits, and the controlling standards for that determination include claimant's state of mind when he engaged in the alleged act of misconduct. *See* OAR 471-030-0038(3)(a); OAR 471-030-0038(1)(c). It would be error for us evaluate claimant's behavior without such consideration.

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

DECISION: Hearing Decision 14-UI-16258 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 4, 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>.

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