

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0713

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92627). Claimant filed a timely request for hearing. On April 16, 2014, ALJ Frank conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16104, affirming the Department's decision. On April 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Parkside Adult Care Home employed claimant as a caregiver from September 12, 2014 until February 12, 2014. The employer operated a home for adults who were not able to care for themselves.

(2) The employer expected claimant to follow the instructions of the employer's owner. Claimant understood this expectation as a matter of common sense.

(3) Sunday, February 2, 2014, claimant started work at approximately 7:00 a.m. Claimant thought that February 2nd was not a scheduled shower day for residents and she had not stripped the residents' beds in anticipation of giving showers. At approximately 11:00 a.m., the owner told claimant to give a resident a shower. The owner and claimant were in the restroom and the resident was on the toilet. The resident was generally confined to a wheelchair and transferring him from the toilet to the shower chair would be difficult. Claimant told the owner that a shower for the resident was not scheduled that day and questioned why the owner was giving this instruction. The owner again told claimant to give the resident a shower. Claimant again told the owner that this day was not a scheduled shower day for the resident. The owner and claimant became frustrated and irritated with each other in front of the resident as they continued speaking with each other. Claimant ultimately told the owner she would give the

resident the shower after she took her scheduled break. The owner did not hear claimant say that she would give the shower as instructed and told claimant that she was discharged.

(4) On February 2, 2014, the employer discharged claimant for refusing to perform work as instructed by the owner.

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-16104, the ALJ disregarded claimant's testimony at hearing and concluded, based on the owner's testimony, that claimant had engaged in misconduct when she refused to give the resident a shower on February 2, 2014. Hearing Decision 14-UI-16104 at 4. The ALJ reasoned that claimant's contention that she had ultimately told the owner that she would give the shower to the resident was not credible because her testimony was not consistent about whether she told the owner she would give the shower before or after taking her break and because claimant's explanation that the owner apparently failed to hear her agree to shower the resident was "unlikely." Hearing Decision 14-UI-16104 at 4. We disagree.

The ALJ's conclusion that parts of claimant's testimony so fundamentally undercut her credibility that claimant's entire testimony should be disregarded was unsound. It is not uncommon for parties at hearing to have minor inconsistencies in their testimony, and to clarify through their later testimony what they intended to state. Claimant first testified that she told the owner she would need a break after she gave a shower to the resident, and then later testified three times that she told the owner that she wanted to take her break before she gave the shower. Audio at ~17:28, ~17:52, ~18:01, ~20:36. Viewing claimant's testimony as a whole, it appears that the inconsistency upon which the ALJ seized was simply a first mistaken reference to when claimant wanted to take the break, and was not a sufficiently glaring inconsistency on which to base a conclusion that claimant's entire testimony was undermined. The ALJ's second point, that claimant's testimony that she ultimately told the owner that she would give the shower was unlikely since it did not explain why the owner discharged her, was also insufficient to support the ALJ's decision to disregard claimant's testimony. On the facts in the record, it was not utterly implausible that the owner failed to hear claimant's belated expression of agreement when claimant was questioning the owner's instructions in front of the resident and both claimant and the owner were growing increasingly frustrated and irritated with each other. Audio at ~19:29. There was nothing in the substance of claimant's testimony that was sufficiently unlikely or implausible to allow the ALJ not to consider it when weighing the evidence to determine whether, more likely than not, claimant engaged in misconduct on February 2, 2014.

Because there is no sound reason in this record to prefer the owner's testimony over claimant's testimony, the evidence is evenly balanced on whether claimant refused to give the resident a shower on

the morning of February 2, 2014. When the evidence on a disputed issue is of equal weight, the uncertainty must be resolved against the employer, because it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, it is more likely than not that claimant ultimately agreed to give the resident a shower, although the owner might not have heard claimant express this willingness. The owner did not meet its burden to demonstrate that claimant refused to comply with the owner's instruction to shower the resident. The owner therefore did not show that claimant engaged in misconduct on February 2, 2014.

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

DECISION: Hearing Decision 14-UI-16104 is set aside, as outlined above.

Susan Rossiter, Tony Corcoran and J.S. Cromwell, participating.

DATE of Service: June 4, 2014

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.