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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0724

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 72041). The employer filed a timely request for hearing. On April 5, 2014, ALJ Triana conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-15019, affirming the Department's decision. On May 1, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

Although he prevailed at hearing, claimant nonetheless submitted a written argument to EAB. In his argument, claimant presented new information and documents that were not offered into evidence at the hearing. Claimant did not show in his argument or elsewhere that factors or circumstances beyond his reasonable prevented him from offering the information or documents during the hearing as required under OAR 471-041-0090(2) (October 29, 2006). Under ORS 657.275(2) and OAR 471-041-0090(2), EAB did not consider this new information when reaching this decision.

The employer also submitted a written argument to EAB. The employer's argument was interspersed with new facts not presented at the hearing, and included as new evidence an employment agreement between claimant and the employer and a factual rebuttal to the new information that claimant presented in his written argument. Since EAB has not considered claimant's new information, the employer's factual rebuttal is not relevant and EAB did not consider it. The employment agreement is not relevant to whether claimant engaged in misconduct, as defined by OAR 471-030-0038(a), and EAB therefore did not consider it. *See* OAR 471-041-0090(2)(a). The employer also did not show that factors or circumstances beyond its reasonable control prevented it from offering the new information contained throughout its written argument during the hearing as required under OAR 471-041-0090(2). EAB did not consider the employer's new information when reaching this decision. In its written argument, the employer also recited from Exhibit 1, which claimant offered into evidence at the hearing but the ALJ did not admit. *See* Hearing Decision 14-UI-15019. Since Exhibit 1 was excluded from evidence, EAB

did also did not consider the documents comprising it when reaching this decision or the parts of the employer's written argument that relied on documents contained in it.

EAB considered only information received into evidence at the hearing when reaching this decision, and relied on the testimony of the parties about the contents of claimant's communications with the employer's staff.

FINDINGS OF FACT: (1) Coastal Home Health & Hospice employed claimant as its executive director from June 4, 2012 until December 17, 2013. In his position, claimant's supervisor was the employer's board of directors and he reported to the board. Claimant was responsible for the operations of the several departments in the employer's organization.

(2) The employer expected claimant to treat all employees respectfully and fairly, but did not further define its expectations. Claimant was aware of the employer's expectations as he interpreted them.

(3) Sometime in approximately August 2013, claimant overheard the director of nursing speaking with some other nurses and understood her to state that the employer's nurses should receive special treatment and rewards from the employer because their work generated most of the employer's revenues. Claimant thought that the comments of the director of nursing undermined his concept of teamwork, that all staff members were on the team and that none was entitled to receive special benefits as a result of the position that they held. In the middle of August 2013, claimant sent an email to the entire staff about his concept of teamwork and leadership, which made alluded to what claimant thought he had heard the director of nursing state earlier in the month. In that email, claimant wrote, in part, "You're welcome to come to my office if you bring ideas for the team. . . but if you're coming [to me] for special perks or to tell me, you know, that you deserve special treatment for being a nurse, please don't come to my office, because you're poking the big dog." Transcript at 33. Claimant intended the email to rebuke the nurses about the conversation that he had overheard in a humorous way by referring to himself as the "big dog." Almost immediately, the director of nursing sent an email to claimant telling him that his email "sounds like bullying," In addition, the employer's human resources person came to claimant's office and told claimant that some staff members were upset by the email. Transcript at 33, 34. Claimant sent an email to the director of nursing telling her that he had not intended to bully and the comment to which she objected had been a misguided attempt at humor. Claimant said the same thing to the human resources person and also said that he had not meant to "disrespect [any] staff" and that he had been "trying to get everyone back on the team." Transcript at 25. Claimant also sent an email to the entire staff apologizing for any offensive or disrespectful statements that he might have made in the earlier email. After this incident, as a precaution, claimant sent drafts of his emails to the human resources person to review them for content that might be construed as disrespectful or offensive before he sent the emails to their intended recipient(s). Transcript at 25.

(4) On September 25, 2013, several managers and department directors sent a letter of concern about claimant to the employer's board of directors. The principal point of the letter was to let the board know that that the letter represented a "formal vote of no confidence in our Executive Director [claimant]." Exhibit 2 at 3. The letter referred specifically to the August 2013 email in which claimant referred to himself as "the big dog" as being offensive. Exhibit 2 at 3. The letter listed several other concerns that its signatories had with claimant's management of the employer, ranging from alleged nepotism, misuse of funds, "disdain" for the board, condoning fraudulent practices, a lack of planning, unrealistic

standards for nurse and unspecified "bullying" of staff members. Exhibit 2 at 3-5. The letter concluded, "We believe it is time for a change." Exhibit 2 at 5.

(5) Sometime in late September 2013, the board initiated an investigation of the allegations contained in the September 25, 2013 letter and assigned the acting president and the employer's human resources person to conduct the investigation. The investigation involved interviewing all of the signatories to the September 25, 2013 letter based on a set of approximately six identical questions. Transcript at 21. The principal inquiry of the questions was whether the signatories thought that they could continue to work with claimant, and whether they thought claimant should be discharged. Transcript at 21, 22. The result of the investigation was that all the signatories to the September 25, 2013 letter recommended claimant's discharge. During the investigation, several of the signatories stated that they had received "threatening" emails from claimant, but the specifics underlying their conclusions are unknown. Transcript at 22. The employer did not tell claimant about the investigation or that his managers had lost confidence in him. At some point, the board concluded that the allegations made about claimant's communication style did not violate the employer's harassment policy. Transcript at 22.

(6) On October 7, 2013, the board of directors met and received a report of the results of the investigation. At the meeting, the board decided not to discharge claimant. It voted to retain the services of workplace mediator, hoping to facilitate a better working relationship between claimant and the employer's managers and department directors.

(7) On October 8, 2013, the board prepared a memorandum to claimant that summarized the results of its October 7, 2013 meeting. The memorandum stated that the board had investigated the issues raised by the September 25, 2013 letter and that "[w]hile the specific claims in the letter were found by us not to be of a nature that would cause the Board to terminate your employment, we did find that there is an over-arching and ongoing problem with your communication and leadership style in the organization. The relationship you have with your management team is broken." Exhibit 2 at 7. The memorandum notified claimant that the board had decided to hire a mediator to resolve the issues in the workplace and stated that "[y]our participation in the process will be a signal to this Board of your continued interest in holding the position of Executive Director." *Id.* The memorandum concluded that "[i]f, in the mediator's professional guidance, the Board finds that the relationship between you and your management team is not salvageable, we will be forced to take other corrective action." *Id.* On October 8, 2013, some members of the board met with claimant and gave claimant a copy of the October 8, 2013 memorandum. Claimant told the board members who were present that he was willing to participate in the mediation process.

(8) Between October 8, 2013 and November 6, 2013, claimant continued to work for the employer as its executive director. Beginning on November 7, 2013, claimant was away from work on an approved medical leave.

(9) Sometime before November 22, 2013, the board retained the services of a mediator. The mediator interviewed the employer's management staff and interviewed claimant by telephone. Claimant cooperated with the attempt at mediation. On November 22, 2013, the mediator sent a report to the employer's board informing it that he did not think that mediation would successfully resolve the issues between claimant and the employer's staff.

(10) On December 13, 2013, the board of directors sent a letter to claimant notifying him that he was discharged effective December 17, 2013. The letter indicated that the decision to discharge was based on the mediator's finding that "no reconciliation [between claimant and management staff] was possible" and the results of the board's earlier investigation, which it said had substantiated "some of the claims [in the September 25, 2013 letter]." Transcript at 7. The letter did not specify which claims had been substantiated or the nature of any substantiating evidence.

(11) Throughout claimant's employer, the employer never warned claimant that his communication style was disrespectful or that he was not treating staff members fairly.

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 a discharge case, EAB traditionally limits its analysis to the proximate cause of the discharge in determining whether claimant engaged in disqualifying misconduct.[1] Although the employer contended in its written argument that the employer discharged claimant for the alleged violations of policy specified in the letter that management staff sent to the board of directors on September 25, 2013 as well as the mediator's determination that claimant's issues with management staff could not be successfully resolved through mediation, the October 8, 2013 memorandum from the board to claimant plainly stated that, after investigating the allegations in the letter, the board had decided that those allegations did not merit claimant's discharge. Employer's Written Argument at 2, 5, 6, 7, 9, 10; Exhibit 2 at 7; Transcript at 11. The hearing testimony of the employer's acting director specifically confirmed that the employer actually discharged claimant not for the behavior alleged in the September 25, 2013 letter, but because of the mediator's evaluation that a successful mediated resolution was unlikely. Transcript at 14. Based on this evidence and because the discharge occurred so closely in time to the board's receipt of the mediator's conclusion, it appears that the proximate cause of claimant's discharge was the mediator's conclusion. The employer's witnesses did not present any evidence showing or tending to show that any specific behaviors of claimant had subverted the efforts at a mediated resolution, and did not dispute claimant's evidence that he cooperated with the mediator during the attempted mediation process. Transcript at 36. The employer's written argument suggests that the witnesses were unable to address the reasons why the mediation failed because of confidentiality requirements applying to mediations. ~~,~~

[1] *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).

However, this assertion, if true, does not remove (or lessen) the employer's burden to demonstrate, more likely than not, that it discharged claimant for misconduct. Employer's Written Argument at 6. We also do not accept the assertion implicit in the employer's written argument that EAB should defer to the mediator's conclusion as evidencing that claimant must have engaged in some form of misconduct by causing an irreparable breach of trust with the management staff. Employer's Written Argument at 10-11. There are many reasons why the mediator might have reached the conclusion that he did, and we are unwilling to speculate blindly. Given the lack of evidence that any specific behaviors on claimant's part, or claimant's lack of cooperation, caused the mediator's negative evaluation, the employer failed to meet its burden to demonstrate, more likely than not, that the reason for which it discharged claimant was a willful or wantonly negligent violation of the employer's standards.

The allegations contained in the September 25, 2013 letter from the managers to the board of directors comprised the bulk of the employer's written argument to EAB. To the extent the board of directors decided to discharge claimant based on those allegations, the employer did not meet its burden to demonstrate, more likely than not, that claimant's behavior underlying them actually constituted misconduct. The letter, alone, is an insufficient basis to conclude that claimant engaged in the behaviors it alleged or that, if he did so, it was with a willful or wantonly negligent state of mind. *See* Exhibit 2 at 3- 4. Indeed, claimant generally disputed the accuracy of the claims made in the letter. Transcript at 32. When the employer's two witnesses were asked to specifically describe the factual bases underlying those allegations, neither was able to do so. Transcript at 8, 11, 19, 20. In describing the board's investigation into the claims made in the letter, the witnesses could not recall what, if anything, the signatories of the September 25, 2013 letter had told them about the bases for their allegations, but simply recited the conclusions that that the signatories felt "harassed," "bullied" and "threatened" by claimant. Transcript at 11, 19. 20, 22. The only specific evidence that the employer's witnesses were able to provide at hearing to flesh out the September 25, 2013 letter was that claimant sometimes "rolled his eyes" when other people were speaking, adopted an unspecified "dismissive attitude" and that the content of the email that claimant sent to all staff in August 2013 offended some staff members. Transcript at 9, 25 33. To the extent the witnesses were able to describe specific behaviors that the employer considered objectionable, it does not appear that claimant's behavior fell outside all reasonable definitions of "respectful" behavior, or was a willful or wantonly negligent violation of the employer's reasonable standards for respectful workplace behavior. In connection with the email claimant sent in August 2013, although it might be construed as expressing some displeasure about nursing employees wanting special rewards, there was nothing overtly threatening in its language to nurses or to any other employees. Transcript at 33. The email was not, by all reasonable interpretations, "bullying." Further, that claimant's staff might have come to "lack confidence" in him, while likely a matter of great concern to the employer, is insufficient, taken alone, to establish that that any misconduct on claimant's part caused this reaction. Transcript at 5. While the employer took the implicit position in its written argument that we should defer to and adopt to the supposed conclusion of the board of directors that claimant must have engaged in misconduct when it took the unusual step of hiring a workplace mediator instead of discharging claimant, the fact remains that the most reliable evidence of the board's intention is the October 8, 2013 memorandum in which the board explicitly stated that the behaviors alleged in the September 25, 2013 letter did not merit claimant's discharge. Employer's Written Argument at 7, 10. Moreover, we will not blindly defer to a supposed interpretation of the board's intentions that causes us to abdicate our responsibility to ensure that, before disqualifying a claimant from benefits, an employer must present *evidence* showing that its conclusion about claimant's alleged misconduct was sound. On this record, the employer did not present sufficient

evidence to show that, more likely than not, claimant's behaviors, as described in the September 25, 2013 letter or the testimony of its witnesses at hearing, violated the employer's standards for respectful behavior or fair treatment of all employees or were otherwise misconduct.

In its written argument, the employer relies on *Callaway v. Employment Department*, 225 Or App 650, 202 P3d 650 (2009) for the apparent proposition that an employee's behavior that is "conscious, unprofessional and contrary to [an] employer's interest" can constitute misconduct if an employer reasonably believed that the behavior caused an irreparable breach of trust in the employment relationship." Employer's Written Argument at 8-9. However, the employer's argument conflates a finding of misconduct with the further finding that the misconduct exceeded that which is excused under OAR471-030-0038(3)(b) as an isolated instance of poor judgment because it caused an irreparable breach of trust in the employment relationship under OAR 471-030-0039(1)(d)(D). In *Callaway*, the court was addressing whether a claimant's misconduct was properly excused as an isolated instance of poor judgment. It was not holding that, as a general proposition, EAB must defer to an employer's determination that it has lost trust in an employee and must then necessarily conclude that claimant's misconduct has been shown. 225 Or App 650, 653-654. Most definitely, the holding in *Callaway* does not relieve the employer of its obligation to demonstrate, based on sound, specific evidence that a claimant has engaged in willful or wantonly negligent behavior that he knew or should have known violated the employer's reasonable standards. Here, the employer did not demonstrate by a preponderance of the evidence that claimant engaged in any behavior that was reasonably proscribed by the employer's standards. Nor did the employer demonstrate by a preponderance of the evidence that, if claimant did so, he acted with the requisite mental state.

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

DECISION: Hearing Decision 14-UI-15019 is affirmed.

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

DATE of Service: <u>July 9, 2014</u>

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.