

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0800

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110413). Claimant filed a timely request for hearing. On April 15, 2014, ALJ Wiperman conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-15880, affirming the Department's decision. On May 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Telecare Mental Health employed claimant as a team lead from November 1, 2010 to February 3, 2014.

(2) The employer expected claimant to avoid using threats or coercion with its clients. The employer required its employees to use therapeutic methodologies that did not involve authoritarian directive stances unless necessitated because of a client-related safety issue. The employer permitted use of dialectical behavioral therapy, a therapy that leveraged a client's relationship with the employee to obtain specific results, to the extent it was consistent with the employer's therapeutic model.

(3) On October 29, 2013, an incontinent client sat on a chair while wet with urine. He had done so repeatedly before the incident, and staff and other clients were concerned or upset about the behavior. Claimant used a stern, loud tone to address the matter with the incontinent client, and "insisted very strongly" that the client help clean the chair or chairs he had soiled. April 18 hearing, Transcript at 6. Claimant understood that the employer's nurses considered the client's behavior of sitting on chairs while wet to be an infection control safety issue. He also knew that other clients were upset and speaking out against the client, and wanted to correct the client's behavior in an effort to improve his relationships with the other clients. Under those circumstances, and because claimant had developed a strong positive relationship with the client, claimant considered it appropriate to use dialectical

behavioral therapy to leverage his good relationship with the client and consequences to correct the client's behavior and motivate the client to refrain from sitting in chairs while wet in the future. Claimant did not notice whether other staff or clients were present at the time of his intervention with the incontinent client.

(4) Staff and other clients overheard claimant's intervention with the client. Some clients made comments that the client was "gross," or belonged in a "nursing home." April 15, 2014 hearing, Transcript at 10. Staff considered claimant's behavior toward the client disrespectful, shaming, and lacking in dignity, and reported the incident to a supervisor, who, in turn, reported the incident to the Marion County Health Department Adult Protective Services office for investigation.

(5) The employer permitted claimant to continue working with the client after the October 29th incident. At one point, the employer instructed claimant to limit his one-on-one interactions with the client to emergencies, and to have another individual present during their non-emergency interactions.

(6) On January 8, 2014, the Marion County Health Department notified the employer that it had concluded its investigation and substantiated the report that claimant had engaged in "abuse" of a client, insofar as he "verbally mistreated" the client to "coerce" him to clean chairs and used "non-verbal posturing" to "intimidate and humiliate" the client in front of others. On February 3, 2014, the employer discharged claimant because of the substantiated report of client abuse.

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 discharged claimant because of a substantiated report of client abuse issued by the Marion County Health Department's Adult Protective Services. In the report, the investigator concluded that claimant had verbally mistreated the incontinent client to coerce him and used non-verbal posturing to intimidate and humiliate the client in front of others. The ALJ concluded that claimant's discharge was for misconduct, because, although "[c]laimant earnestly believed his intervention method was supported under the employer's therapy model," he "should have known his that his actions would probably result in a violation of the standards of conduct employer established" because he had "raised his voice," "assumed a commanding posture," and "performed the behavioral intervention in the presence of other residents and staff [*sic*]." Hearing Decision 14-UI-15880 at 4.

It is unrefuted on this record that claimant's behavior toward the incontinent client on October 29th resulted in a finding by the Marion County Health Department's Adult Protective Services office that he had engaged in abuse toward the client due to verbal and non-verbal mistreatment. However, at issue in

determining whether claimant's conduct in those respects was "misconduct" for purposes of disqualifying him from receiving unemployment insurance benefits was his intent at the time of the incidents at issue.

We disagree with the ALJ that claimant knew or should have known that his conduct would violate the employer's standards of behavior. Regarding the public nature of claimant's client intervention, claimant was unaware at the time of the incident that other residents and staff were present. April 18, 2014 hearing, Transcript at 19. Therefore, he was not consciously violating the employer's standards of behavior when he performed a behavioral intervention in front of others. Moreover, even if he had, claimant's testimony that public interventions were commonplace at the employer's business was uncontroverted, meaning claimant did not have reason to know that intervening with the incontinent client on October 29th in front of staff or other clients would violate the employer's expectations. April 18, 2014 hearing, Transcript at 17.

Regarding claimant's tone and posture with the client, one of the employer's witnesses testified that dialectical behavioral therapy with a client could be utilized in the employer's facility insofar as it was consistent with the employer's therapeutic model, under which employees were to refrain from issuing authoritarian directives to clients unless a safety issue was involved. April 15, 2014 hearing, Transcript at 15. Here, claimant spoke with a loud tone and stern posture because he sincerely believed he was applying dialectical behavioral therapy with the client. Claimant considered dialectical behavior therapy to be a therapy method the employer supported. Claimant also believed applying that type of therapy was appropriate and warranted, even though it was sterner than his usual interventions with the client, based on his belief that the client's behavior of sitting on chairs while wet with urine was considered an infection control issue by staff, and was, therefore, a safety issue. Given that dialectical behavioral therapy and authoritarian directives were, under some circumstances, considered appropriate by the employer, and issuing authoritarian directives to address safety issues was not prohibited, claimant's belief that his interactions with the client were appropriate was a reasonable belief, and his interaction with the client did not involve knowing or conscious violations of the employer's expectations.

We agree with the ALJ that claimant "earnestly believed his intervention method was supported under the employer's therapy model," and his beliefs in that regard were reasonable. Because claimant thought he was acting in accordance with the employer's expectations, and did not intentionally or consciously act in a manner he knew or should have known would be contrary to them, we conclude that claimant's discharge was not for misconduct. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits because of this discharge.

DECISION: Hearing Decision 14-UI-15880 is set aside, as outlined above.

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

DATE of Service: June 18, 2014

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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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