

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1057

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103509). The employer filed a timely request for hearing. On May 28, 2014, ALJ Clink conducted a hearing, and on May 30, 2014, issued Hearing Decision 14-UI-18749, affirming the Department's decision. On June 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jason Wilks, DPM employed claimant, last as a receptionist, from April 9, 2012 to April 2, 2014.

(2) The employer expected claimant to refrain from treating patients poorly and to act in the best interests of the employer at all times. The employer's expectations were set forth in its employee policy handbook, which claimant acknowledged being aware of on July 10, 2012. Claimant was aware of the employer's expectations.

(3) On April 1, 2014, a fourteen year patient of the employer was asking claimant some insurance billing questions, when the office manager, who was at a desk behind claimant, answered one of the patient's questions from across the room. When claimant told the office manager she had already given the patient the same answer, the patient became upset with claimant and said to her, "I don't like your attitude." Transcript at 11. Claimant gave the patient a "confused" look because she did not think she had demonstrated a poor attitude. Transcript at 31. However, the patient thought claimant had looked at her "rudely" and with "disgust", cancelled her appointment and told the office manager she would never return. Transcript at 18-19.

(4) On April 2, 2014, the employer discharged claimant for claimant's April 1 conduct with the 14 year patient which it considered a violation of its patient treatment policy.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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's office manager testified about several incidents that led to claimant's discharge but also asserted that the incident that triggered the owner's decision to terminate claimant's employment was claimant's April 1 interaction with his 14 year patient. Transcript at 18. Consequently, that incident was the proximate cause of the discharge and is the proper focus of the misconduct analysis.

Although the employer's witness alleged claimant had, according to the patient, looked at the patient "rudely" and with "disgust" in their April 1 conversation, claimant denied having done so. *Compare* Transcript at 18-19, 31. The employer provided only hearsay evidence regarding claimant's behavior. Absent a basis for concluding that claimant was not a credible witness, we gave her firsthand testimony under oath more weight than the employer's hearsay evidence, and therefore found facts in accordance with her testimony on matters in dispute. The record therefore fails to show that claimant looked at the patient "rudely" or with "disgust" during her April 1 conversation with the patient.

Claimant admitted she felt "shocked" and "confused" when the patient said to her, "I don't like your attitude", because she did not know why that statement was made. Transcript at 31. However, she asserted that any look she gave the patient had to have been "misunderstood" by her as being "a bad look" because she did not intend to treat the patient rudely. Transcript at 31.

On this record, the employer failed to meet its burden to establish that claimant consciously violated the employer's written policy against treating patient's poorly during the course of her April 1 conversation with the 14-year patient. Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-18749 is affirmed.

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

DATE of Service: July 25, 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 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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