

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1391

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 102918). The employer filed a timely request for hearing. On July 31, 2014 and August 7, 2014, ALJ Seideman conducted a hearing, and on August 8, 2014 issued Hearing Decision 14-UI-23068, reversing the Department's decision. On August 21, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Conklin Insurance Agency, Inc. employed claimant as an office manager from July 1, 2013 until June 9, 2014. Claimant worked for the predecessor business entity to the employer, a sole proprietorship, from January 21, 2010 until the employer was organized as a corporate entity on July 1, 2013. On January 25, 2012, the predecessor entity promoted claimant to office manager, the position she held until her work separation.

(2) The employer expected claimant to refrain from unprofessional behavior in the workplace and from unreasonably disclosing information to subordinate employees that she learned because of her position as office manager. Claimant was aware of the employer's expectations as she reasonably interpreted them.

(3) The employer operated an office with two employees that claimant, as the office manager, trained and supervised. On January 25, 2012, when claimant was promoted to office manager, the employer's owner, who later became the employer's president, informed claimant that, as office manager, she was expected to keep subordinate staff on task, to set a good example for them, to be the employer's "eyes and ears" and to "keep a line" between herself and staff who might also be her personal friends. Exhibit 7 at 2.

(4) Sometime in the spring of 2012, claimant had an encounter with a customer in which the employer thought that claimant had not behaved appropriately. Exhibit 1 at 1. As a result, the employer gave claimant an oral reprimand.

(5) On February 28, 2014, claimant had an interaction with a subordinate employee in which that employee accused claimant of intentionally pushing her. Claimant told the employer's president that she had accidentally bumped the subordinate. Exhibit 6 at 1; Transcript at 15. Because the president had not observed the incident, he told both claimant and the subordinate employee that, if there was another incident between them, he would discharge both of them immediately. Transcript at 17.

(6) On June 3, 2014, claimant went to the president's office to discuss the unwillingness of one subordinate to perform certain work and that subordinate's repeated requests for more training. This subordinate was the same employee who had accused claimant of pushing her in February 2014. Claimant stated to the president that, in view of the subordinate's complaints about her training, she and her subordinates might all need to all receive additional training so they would all "be on the same page" about the president's expectations. Transcript at 20. The president already knew about the subordinate's complaints. Although the president had intended to bring up the topic at a meeting with claimant in the following week, he told claimant that he had received complaints about her negative and poor attitude from some customers and from her subordinate employees. In response to claimant's questions, the president was willing to identify only one customer who had made a complaint and not any others. Transcript at 29. The president also mentioned to claimant that she "made fun" of some of the employer's customers and that claimant needed to stop doing so because the subordinates modeled their behaviors on hers. Transcript at 21. The president further commented to claimant that she spent too much time on the telephone with one of the subordinates having personal conversations. Transcript at 23. At the conclusion of the meeting, claimant told the president that she was happy with her job and was ready to move forward. Transcript at 22. During this meeting, claimant did not "yell" at the president or raise her voice or use any "rude" language. Transcript at 21.

(7) After the meeting on June 3, 2014, the subordinate about whom the president had told claimant that she spoke with too much about personal matters called claimant on the phone. Claimant told the subordinate that, if the call was a personal one, she had to hang up because "I just got my ass chewed out for spending too much time on the phone with you." Transcript at 23. Claimant then initiated an instant messaging conversation with the subordinate telling the subordinate that she expected the subordinate to speak with her about issues before making complaints to the employer's president. Exhibit 3 at 5. Claimant told the subordinate that "you kind of attacking [the president] about a[] [training] issue we had already discussed puts me in a bad position[.]" Exhibit 3 at 5. The subordinate told claimant, "[Y]es[,] it would bother me a lot but you are g[oo]d at what you do[.] [Y]ou can handle this really well[.]" Exhibit 3 at 4. Claimant then responded that she had brought up the issue of additional training for the subordinates with the president because she had wanted the two subordinates and herself "to be on the same page to make the office run better" and "not for you to think that everything you do is wrong or that I am pointing the finger[.] We all have things to work on[.] Exhibit 3 at 4. The subordinate replied, among other things, "I[']m sorry you got your ass chewed[.] I[']m sure I will get mine [chewed] too[.] Exhibit 3 at 2. The conversation continued on principally addressing some business matters and discussing some birthday gifts that claimant had received. *Id.*

(8) On Wednesday, June 4, 2014, when claimant arrived at work, claimant asked both of the subordinates if any customers had complained to them about her attitude or the manner in which she had treated them. Transcript at 24. Both said that none had. Claimant asked them specifically about the customer whom the president had identified as having made a complaint about her, and both also said

that they were not aware of any such complaint. *Id.* Claimant was upset. Claimant then commented to the two subordinates that the president must have "lied" to her about that complaint and the other complaints. Transcript at 26. During this conversation, claimant did not "yell" or raise her voice. Transcript at 26. Claimant might have raised her voice at some points during the day of June 4, 2014, but only to capture the attention of one of the subordinates who had a separate office to discuss a business matter. *Id.* Near the end of the workday on June 4, 2014, claimant initiated an instant message conversation with one of her subordinates and told her that she was thinking of looking for new work and that she had emailed the president to tell him. Exhibit 3 at 9. Claimant expressed her upset at the president for not revealing the identities of most of the customers who had supposedly made complaints about her. *Id.*

(9) On June 4, 2014, the president was out of the office, but was told by phone about claimant's conversation with the two subordinates and had received the email in which claimant told him that she might look for other work. The president concluded that claimant had disrupted the office and intended to quit work. After the close of business on June 4, 2014, the president sent claimant a text message informing her that she was suspended with pay and instructing her not to report for work on Thursday or Friday, June 5 and 6, 2014. The president's text message told claimant that he wanted to talk with her when he returned to the office on Monday, June 9, 2014. Transcript at 13, 26. Claimant replied to the president that there was no need to wait until Monday if the president only intended to discharge her and give her a final paycheck. Transcript at 27.

(10) On June 9, 2014, claimant met with the president at the workplace. The president offered to allow claimant to resign. Exhibit 4 at 2. Claimant refused. Although the president did not tell claimant that she was discharged until June 9, 2014, he stated that the discharge was effective as of June 6, 2014. *Id.*

**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-23068, the ALJ concluded that the employer had established that claimant engaged in misconduct on June 3 and June 4, 2014 by willfully disregarding the employer's expectations that she refrain from disruptive behavior. The ALJ reasoned that, although claimant denied the employer's allegations about her behavior on those days, the hearsay testimony of the employer's president was more credible than claimant's. The ALJ found that the employer had demonstrated that, after the June 3, 2014 meeting, claimant had "said mean things" to her subordinate employees and had "accused them of trying to punish her." Hearing Decision 14-UI-23068 at 4. We disagree.

At the outset, although the employer submitted exhibits describing all of claimant's alleged past transgressions, the president testified that he discharged claimant for her behavior during the June 3, 2014 meeting with him, the instant messages she exchanged with the subordinate on June 3, 2014 and

her alleged disruptive behavior in the office on June 4, 2014. Transcript at 5, 7, 9, 10, 12, 13, 15. Based on that testimony, the evaluation of claimant's discharge is properly focused on claimant's behavior during and after the June 3, 2014 meeting. 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).

With respect to claimant's behavior in the workplace, it is assumed as a matter of common sense, that claimant was aware that the employer expected her to refrain from behavior that was unreasonably disruptive to office operations. The president contended that during the June 3, 2014 meeting, claimant went "on and on" and spoke to him so loudly that another employee had to shut the door to his office to muffle the sound. Transcript at 7. The president did not contend that claimant used foul, insulting or inappropriate language in the meeting. With respect to claimant's behavior toward the subordinate employees on June 4, 2014, the president contended that he received reports that claimant "started to blow up" at the subordinates, "became angry" and placed the office in a "total uproar." Transcript at 9. The president did not allude to any supposedly offensive language that claimant directed at the subordinates on June 4, 2014 or give any further specifics about claimant's behavior that day. Claimant denied that she had "yelled," been "rude" or raised her voice either during the June 3, 2014 meeting or on June 4, 2014, when she spoke with her subordinates about her meeting with the president. Transcript at 20, 21, 26, 33, 34, 35. The instant messages exchanged between claimant and one of the subordinates on June 3 and June 4, 2014, as well as instant messages between the two subordinates on June 4, 2014, do not refer to any disruptive behavior by claimant on either day and seem amicable insofar as claimant was concerned. See Exhibit 3 at 2-11. There was no discernable reason in the record for the ALJ to conclude that the president's testimony was more credible than claimant's detailed testimony denying the employer's account. Claimant's first-hand testimony about her own behavior is entitled to greater weight than the employer's hearsay testimony, and the failure of the instant messages to corroborate the president's account further undercuts its persuasiveness. On this record, it is more likely than not that claimant did not behave disruptively on June 3 or June 4, 2014. We have adopted claimant's accounts of her behavior on both days in our findings of fact. By the manner in which claimant expressed herself on June 3 and June 4, 2014, the employer did not establish that claimant engaged in misconduct.

The president also contended that the substance of the instant messages that claimant exchanged with the subordinate on June 3 and June 4, 2014 breached the employer's trust because claimant "lied" to the subordinate about the June 3, 2014 meeting, discussed a "disciplinary" issue with the subordinate and tried to insinuate that the subordinate was "in trouble" as a result of the June 3, 2014 meeting. Transcript at 12, 13. The instant messages exchanged are plainly an account of the June 3, 2014 meeting from claimant's perspective. In their testimony, the president and claimant ultimately agreed on most of the topics at the June 3, 2014 meeting, and, after reviewing the instant messages from claimant it cannot be concluded that anything in them is a clear fabrication or a "lie," although they do present an account that is filtered through claimant's lens. Exhibit 3 at 2-11. The contention that claimant tried in the text messages to give the subordinate the impression that the subordinate was "in trouble" with the

president is belied by the language of those messages. Specifically, claimant commented to the subordinate in the messages exchanged that "I am sure you won't [get your ass chewed]," "really he [the president] is not going to talk to you," and "he [the president] can[']t blame you for anything." Exhibit 3 at 2, 3. With respect to the president's final contention, it is not clear where the expectation arose that claimant was prohibited from discussing the contents of the June 3, 2014 meeting because it involved her own "discipline." Transcript at 12. Although the president testified that it was a "clear expectation" from the meeting in which he described his expectations to claimant when she was appointed office manager, the president's notes from that meeting do not address any such expectation about disciplinary matters or any expectations about confidentiality. Transcript at 12; Exhibit 7 at 2. From those notes, it does not appear that such an expectation was specifically communicated to claimant. Moreover, while under appropriate circumstances it might be reasonable to infer an expectation that claimant would not discuss her discipline of one subordinate employee with another subordinate employee, the disciplinary matters at issue involved claimant as the employee who received the discipline. It does not appear to us, absent a clear communication of its specific expectations, that the employer can reasonably expect claimant to have been aware as a matter of common sense that the employer prohibited her from discussing a reprimand that she, herself, received from the president. On this record, the employer failed to establish that the substance of the instant messages to the subordinate employee violated the employer's reasonable expectations in the manner described by the employer's president.

As a final matter, the president contended that, as office manager, the employer trusted claimant "not to stir the pot" when the president was out of the office and claimant should not have questioned her subordinates on June 4, 2014 about the accuracy of the president's statements or discussed the June 3, 2014 meeting in the instant messages to her subordinate. Transcript at 13. As addressed above, however, it was not reasonable for the employer to expect, absent a specific instruction, that claimant would keep confidential the reprimand that she had received. It was also understandable that claimant would try to identify the customers who had supposedly complained about her by asking her subordinates. The president did not contend that claimant had these discussions and asked these questions for no reason other than to disrupt the employer's office or to upset the subordinate employees. On this record, it cannot be concluded that claimant's discussions of, and questions about the complaints underlying her reprimand, were willful or wantonly negligent violations of the employer's expectations as she reasonably understood them.

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

**DECISION:** Hearing Decision 14-UI-23068 is set aside, as outlined above.

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

**DATE of Service:** September 26, 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](http://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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.