

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1851

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92711). Claimant filed a timely request for hearing. On November 14, 2014, ALJ Murdock conducted a hearing, and on November 17, 2014 issued Hearing Decision 14-UI-28811, concluding claimant's discharge was not for misconduct. On December 4, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Backflow Services Plus employed claimant as office manager from October 29, 2012 to September 24, 2014.

(2) The employer had significant concerns about claimant's work performance, focus, use of company time, misuse of the company credit card, and her attitude. The employer's secretary had discussed the concerns with claimant many times, and issued her a corrective action requiring her to improve in any areas the employer considered her performance deficient.

(3) The secretary also told claimant he wanted her coworker, Candy, to work harder to figure things out on her own, and direct questions about scheduling matters to the secretary. Based on the corrective action concerning her focus, and instructions about how to handle Candy's questions, claimant felt as though she was "getting in trouble" for answering Candy's questions. Transcript at 16-17.

(4) On September 24, 2014, Candy asked claimant a question about scheduling one job, and another question about a second job. Claimant told Candy she was "tired" of "getting in trouble" for helping,

and that Candy should speak with the secretary about her questions. *Id.* Other than answering Candy's questions, or directing her to the secretary, claimant did not speak with Candy on September 24th.

(5) Candy was upset that claimant would not help her, and called the secretary, who was off-site, to complain that claimant was "treating her very rudely and that she was not answering any of her questions about the work she was trying to accomplish." Transcript at 5, 6. Candy also reported that she had moved to another room because she could no longer be in the same room as claimant. The secretary concluded based on his ongoing concerns about claimant's performance that he was "done" with claimant, and immediately returned to the office to discharge her. Transcript at 7.

(6) When the secretary then returned to the office to discharge claimant, claimant handed him a letter she had prepared on company time, which the secretary considered the letter further evidence that claimant was misusing company time. However, the letter did not factor into the discharge decision because he had already decided to discharge claimant based on Candy's report.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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's witness initially testified that the employer discharged claimant because she did not perform her duties and she made unapproved charges on the company credit card. Transcript at 4. He also testified about events that occurred after claimant's discharge. Transcript at 5. However, he also testified that the final incident that caused him to decide on September 24th that the employer no longer wanted claimant to continue her employment was her behavior toward Candy that had occurred that morning. Therefore, because that is the incident that prompted the employer to discharge claimant when it did, that is the proximate cause of the misconduct analysis, and the initial focus of our analysis. Only if claimant's conduct in that incident constituted a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her would we then turn to the employer's other allegations.

There is no dispute that, on September 24th, Candy asked claimant some questions and claimant refused to answer her, instructing her instead to direct her questions to the employer's secretary. There is also no dispute that the employer's secretary had instructed claimant that he wanted Candy to figure things out on her own and to direct scheduling questions to the secretary. The question, therefore, is whether claimant intentionally or knowingly spoke to Candy in a rude or inappropriate manner, in the knowledge that her conduct would probably violate the employer's expectations.

With respect to the specific behavior the employer alleged, the employer's witness testified that Candy reported claimant "was treating her very rudely," but the only description the employer had about claimant's conduct was that claimant "was just talking bad to her," and would not answer Candy's questions, without providing specific information about what claimant said or how she said it. The employer alleged that, ultimately, Candy was forced to work from another room rather than continue working near claimant, although the specific reasons Candy moved from one place to another are, likewise, unknown. Without specific information about the tone and content of claimant's statements to Candy, or a description of any gestures or body language claimant used while interacting with Candy, the record fails to show that claimant's statements or behavior were patently rude or inappropriate, or intended by claimant to be perceived in that manner. Nor, given the secretary's instructions to claimant about how to handle Candy's questions, can claimant's refusal to answer Candy and instruction to contact the secretary for assistance be construed as intentional or knowing violations of the employer's expectations.

Because that incident that prompted the employer to decide to discharge claimant when it did on September 24th was not attributable to willful or wantonly negligent misconduct on claimant's part, the employer's other allegations concerning claimant's conduct are not at issue when determining whether or not claimant should be disqualified from unemployment insurance benefits. Although the employer might have had good business reasons for discharging claimant after considering its other concerns about claimant's employment as a whole, the discharge was not for misconduct under Employment Department law. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 14-UI-28811 is affirmed.

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

DATE of Service: January 15, 2015

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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