

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1935

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125113). Claimant filed a timely request for hearing. On December 9, 2014, ALJ R. Frank conducted a hearing, and on December 12, 2014 issued Hearing Decision 14-UI-30314, concluding claimant's discharge was not for misconduct. On December 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant as a referral testing specialist from October 10, 2005 to October 17, 2014.

(2) The employer expected claimant to interact with her coworkers in a respectful and professional manner. During claimant's employment, claimant's supervisors identified many instances in which claimant's communication style, particularly in emails, was considered angry, disrespectful, or insubordinate. The employer issued claimant a series of oral and written warnings concerning her behavior, including a final written warning on January 30, 2014, which was based in part on two incidents that had occurred on successive days in mid-January in which claimant's email communications to a supervisor and coworker were deemed unacceptable by the employer.

(3) Claimant understood as a result of the January 30, 2014 final written warning that her job was in jeopardy should she engage in further communications the employer considered disrespectful or otherwise inappropriate. Between January 31, 2014 and October 13, 2014, the employer did not warn or counsel claimant because of her communication style with others, and had at one point discussed with claimant her improvement in that area.

(4) On October 14, 2014, a specimen test claimant had ordered was canceled in error by the testing facility to which the sample had been sent. Claimant was concerned that the order had been canceled,

and, in an attempt to resolve the issue, sent an email to the testing facility employee with whom she typically communicated about such things that stated,

PAML canceled a test in error and is saying that I told them to cancel it.

[content omitted]

I did NOT ever say to cancel this test. The manifest did not say to cancel this test. It was ordered first as a Ref. to ARUP and that one was canceled. We reordered it, correctly, as a Ref. to PAML and the test should have been done under that order. I have given this information to client services at least twice now and nobody will give us the results of the test or admit that it was PAML's error.

Please pull our manifest from that date and look at them and resolve this issue immediately. The provider is waiting for the results.

Exhibit 1 at 4. Claimant copied three additional individuals on the email, including a coworker called "Erica." She also printed a copy of the email, wrote "Don't cancel stuff that shouldn't be canceled" on it, and placed that copy on Erica's desk. Claimant provided Erica with that copy because she knew Erica sometimes did not read emails for several days, and wanted to make sure Erica was aware claimant was handling the issues pertaining to the canceled test.

(5) Claimant's supervisor considered it appropriate that claimant had emailed the testing facility about the error, and that she had sent copies to various supervisors and coworkers, but she considered the content of claimant's email to be "angry," have a disrespectful tone, and be "very unprofessional" because of the way it was worded and her use of capital letters and underlining. Audio recording at ~11:25. Erica considered it inappropriate that claimant had printed an extra copy of the email for her and considered the note "aggressive." Audio recording at ~14:40. The testing facility email to whom claimant had addressed the email did not consider claimant's email "angry" or otherwise complain or state that she was offended by it.

(6) Claimant's supervisor, in consultation with others, determined that the October 14, 2014 email was another example of claimant's ongoing communication style problems, and, without discussing the email with claimant, discharged her on October 17, 2014.

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 had the right to expect claimant to communicate with her coworkers and supervisors in a respectful, professional manner. Claimant understood that expectation, and understood that she would likely face discharge if she violated that expectation after the oral and written warnings she had received for violating that expectation between 2011 and mid-January 2014. The employer considered claimant's October 14th email as a violation of its expectation, particularly since she capitalized one word and underlined two others for emphasis, and handwrote a note on a printed copy she gave to a coworker that was construed as too aggressive a communication.

For a claimant's conduct to disqualify her from receiving unemployment insurance benefits, however, her behavior must be shown not only to have violated the employer's expectation, but also for the violation to have been done either willfully or with a wantonly negligent mental state. Put another way, she must have done it on purpose, or with a conscious disregard for a known standard of behavior. The record fails to show that claimant acted with the requisite consciousness of her conduct. Claimant testified at the hearing that she had "impulse control" issues. Audio recording at ~25. It is undisputed that claimant had medical conditions affecting her impulse control and was receiving ongoing medical treatment for them between January and October 2014. Exhibit 2. One supervisor opined that claimant's "biggest" issue communicating with others "seems to be the lack of self-awareness in spite of repeated coaches." Exhibit 1 at 13. Claimant's letter to her supervisor, written after being discharged because of the October 14th email, explained her intent was to resolve the problem with the test specimen and be helpful to her coworker, and that she was not aware how her email might or would be construed by others. Exhibit 2. Claimant's sincere testimony at hearing that she wrote the email knowing her job was in jeopardy, and did not believe that anything was wrong with it, further shows that she was not aware that capitalizing a word, underlining words, printing the email or handwriting the comment on it would or might violate the employer's expectations. Audio recording at ~25. Finally, her testimony that had she suspected it might she would have re-worded the email further shows she did not act with indifference to the employer's expectations with respect to the October 14th email. It is more likely than not that claimant was unaware when she sent the October 14th email that she was or might be violating the employer's expectations. In the absence of evidence that claimant acted willfully or with wanton negligence with respect to that email, the record fails to show that claimant's violation of the employer's expectations in that incident was willful or wantonly negligent misconduct for purposes of the unemployment insurance program.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 14-UI-30314 is affirmed.

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

DATE of Service: February 3, 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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