

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0162

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150057). The employer filed a timely request for hearing. On February 3, 2015, ALJ Vincent conducted a hearing, and on February 6, 2015 issued Hearing Decision 15-UI-33075, reversing the Department's decision. On February 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new information and new documents not offered into evidence at the hearing. Claimant did not explain why she did not present this information or these documents at the hearing, and otherwise failed to show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information or documents when reaching this decision. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as a nurse case manager from January 21, 2003 until November 10, 2014.

(2) As case manager, claimant assisted patients from certain primary care clinics in obtaining the care that they needed, including helping them arrange for necessary follow-up medical visits, necessary testing, and necessary medical equipment. Claimant's job duties generally principally required her to spend time at a computer reviewing and processing electronically generated documents as well as spending a significant amount of time on the telephone speaking with patients, patient representatives or health care providers.

(3) On October 28, 2014, the employer issued to claimant a final written warning because she appeared "disengaged" from her job responsibilities. Transcript at 15. The warning assigned several specific tasks to claimant. One of these tasks was that by Friday, October 31, 2014, claimant would schedule appointments to meet with the office managers of three primary care clinics to which she provided case manager services. A second task was that by Friday, October 31, 2014 claimant would meet with four identified members of the health care team to specifically ask them for ways in which she could improve the services she provided, and by Monday, November 3, 2014, claimant would submit to the employer a written plan for improvement based on the team members' suggestions. A third task was that, beginning on Monday, November 3, 2014, claimant would review the daily inpatient census for the employer's hospital and make daily visits to those hospitalized patients who were seen by primary care physicians in the clinics that were assigned to claimant. Another task was that, starting on Monday, November 3, 2014, claimant would determine if any patients she was managing had been admitted to the employer's emergency room and would work with the emergency room case manager to ensure that those patients received appropriate care, appropriate coordination of services and, as needed, claimant would arrange for follow-up visits for those patients with their primary care providers. All of the specific duties assigned in the warning were in addition to claimant's usual work responsibilities.

(4) On Monday, November 3, 2014, claimant met with the employer's chief operating officer to discuss her progress in completing the tasks assigned to her three full work days earlier on Tuesday, October 28, 2014. With respect to appointments with the clinic office managers, claimant stated that she had called the office manager of Hillsboro Internal Medicine and Orenco Medical Clinic, two separate clinics with the same person as office manager, and the office manager had told her that, because a state audit was planned for those clinics on November 21, 2014, she preferred to make appointments after the audits. Transcript at 24. Claimant did not insist that the office manager agree to make the appointments before November 21, 2014 and planned to call the office manager back after November 21, 2014 to schedule appointments. Claimant tried to make a third appointment with the office manager at Westside Clinic, but the office manager was not in and claimant left a voice mail message for her. With respect to claimant's meetings with four team members, claimant stated that she was only able to meet with three of them and, with respect to the fourth, the employer's medical director, she left a message for him to contact her. Claimant took notes she had taken during her meetings with the three team members to the meeting with the employer's chief operating officer, but had not understood that the employer wanted her to have her notes signed by the team members. During the November 3, 2014 meeting, the chief operating officer told claimant to "go ahead and loop back around" to the three team members with whom she had met to obtain their signatures on the notes. Transcript at 29.

(5) After November 3, 2014, claimant checked the hospital's daily census but, given her regular workload of case manager responsibilities, did not have time to physically visit the newly admitted hospital patients she identified as having primary care providers from the clinics for which she was responsible. However, claimant did speak with the hospital discharge planner about these patients and assisted the discharge planner in coordinating the necessary follow up for them after they were discharged. After November 3, 2014, claimant did not work with the patients of primary care providers from the clinics for which she was responsible who had presented at the employer's emergency room because she was not aware of how to determine that those patients were present in the emergency room. Sometime before November 7, 2014, the employer determined that claimant had not visited nine patients who received regular medical services from the clinics to which she was assigned and who had been

admitted to the employer's hospital between November 3, 2014 and November 7, 2014. Sometime before November 7, 2014, the employer determined that claimant had not visited or facilitated the follow-up medical care for three patients who had presented at the employer's emergency room between November 3, 2014 and November 7, 2014.

(6) Sometime during the week before November 10, 2014, representatives from the employer visited one of the clinics to which claimant was assigned and which had as a patient a baby who had recently received a heart transplant. A physician from that clinic told the employer that the baby was not being brought to the clinic for her weekly laboratory tests and had missed several appointments. The physician further told the representative that she was not the baby's physician and identified the physician who was. The physician also told the employer that she did not think that claimant was contacting the baby's physicians or the baby's mother about the baby's care or keeping up with the baby's care as a case manager should. The employer reviewed the case management logs and determined that claimant had failed to document any case manager activity in connection with the baby's case for some time. However, although claimant had once been the baby's case manager, she had not been the case manager since approximately July 2014, when the baby returned to Oregon after a lengthy hospital stay in California.

(7) On November 10, 2014, the employer discharged claimant for failing to comply with the requirements of the October 28, 2014 warning by not making appointments with the office managers of three clinics, for not meeting with all four team members and producing her meeting notes that the four team members had signed, for not visiting hospitalized patients from the clinics that were assigned to her, for not visiting or coordinating the follow up care for patients from those clinics who presented at the employer's emergency room and for failing to provide appropriate care to the baby who had received the heart transplant and for failing to properly document her case management activities for the baby in the case management log.

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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-33075, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ found that claimant was given "specific instructions" on October 28, 2014 and, since she did not show that her failure to perform follow those instructions was beyond her reasonable control, her behavior was necessarily wantonly negligent violation of the employer's expectations. Hearing Decision 15-UI-33975 at 3. We disagree.

With respect to claimant's alleged failure to make actual appointments with office managers of three clinics, the employer did not challenge claimant's explanation of the reason that she was unable to do so. It does not appear unreasonable that claimant thought that she could make an appointment through one person for two of the office visits since that person was the office manager for two separate clinics. Nor does it appear to have been unreasonable, let alone wantonly negligent of claimant, not to have insisted of that person that the office manager calendar dates for those two appointments immediately when, according to claimant, the office manager had stated a preference to defer the scheduling until after an upcoming visit to the clinics by a state auditor. Transcript at 24. It also was not unreasonable for claimant to have left a message for the office manager of the third clinic when she could not reach that manager to schedule the required appointment. Although the employer might have desired claimant to actually schedule all three appointments before October 31, 2014, it was unreasonable to expect claimant to act without regard to the schedules or preferences of those office managers. Claimant's failure to schedule all three appointments was not a wantonly negligent violation of any reasonable employer standards.

With respect to claimant's failure to meet with all four team members and turn in their signatures on her notes of those meetings, the employer also did not challenge that claimant was unable to make an appointment with one of them, the medical director, before October 31, 2014. Transcript at 16-17. The employer's witness did not present any evidence from which it can be inferred that claimant's failure to meet with the medical director, under the circumstances that she described, was wantonly negligent. Although the employer's witness contended that claimant had been explicitly told that she needed to produce written notes of the meetings that she had with the team members, that were signed by the team members, he did not dispute claimant's explanation that she had not understood the full requirements of that instruction and had thought she only needed to meet with the team members and "get in writing," i.e., to show him her own notes of the substance of what was discussed. Transcript at 29. The employer's witness did not dispute that claimant brought her handwritten notes to the meeting that she had with him on November 3, 2014 to show that she had followed his instructions as she had understood them, and actually had the meetings that she was able to arrange. Transcript at 29. As well, the employer's witness did not rebut claimant's testimony that he told her on November 3, 2014 that she could "loop back around" to obtain signatures from the team members with whom she had been able to meet. Transcript at 29. While claimant's failure to understand the witness's instruction about the signatures might have been a negligent error, it does not appear to rise to the level of wanton negligent, particularly in light of the witness's allowing claimant an unspecified amount of additional time to obtain those signatures after November 3, 2014.

With respect to claimant's alleged failure to make daily visits to all hospitalized patients receiving their regular care from clinics assigned to claimant, the employer's witness did not dispute that this requirement was uniquely imposed on claimant and not on any other nurse case managers. Transcript at 26. The employer's witness also did not present any evidence to rebut claimant's explanation that, given her regular day-to-day work duties, she did not reasonably have the time to make daily visits to the hospitalized patients while continuing to satisfactorily perform her principal work responsibilities. Transcript at 27. A conscious decision not to comply with an unreasonable employer expectation is not misconduct. OAR 471-030-0038(1)(d)(C). In connection with claimant's alleged failure to visit or follow up on patients from her clinics on the day that they presented at the employer's emergency room, the employer's witness did not rebut claimant's explanation that there was no method for her to

determine that the patients were in the emergency room on the very day that they first reported there,. Transcript at 28, 29. The employer failed to demonstrate that the expectation placed on claimant in connection with the emergency room patients was reasonable, or that a failure to comply with it was wantonly negligent under the circumstances disclosed in the record.

With respect to claimant's alleged nurse case manager responsibilities for the baby who had received a heart transplant, the centerpiece of the contentions of the employer's witness was that claimant had not been closely managing the case as of the week before she was discharged. However, the employer's witness did not rebut claimant's statement that she had not been responsible for that baby's case since July 2014, when the baby returned to Oregon after a lengthy stay in California for medical treatment. Transcript at 31. Given claimant's un rebutted evidence, and the failure of the employer to identify any specific entries that claimant neglected to make in the case management log for a period of time when the baby was in Oregon and claimant was the case manager for the baby, the employer failed to demonstrate, more likely than not that any aspect of her management of the baby's care violated the employer's expectations with wanton negligence.

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

DECISION: Hearing Decision 15-UI-33075 is set aside, as outlined above.

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

DATE of Service: April 2, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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.