

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0404

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71346). On February 25, 2015, the Department issued an amended decision # 71346 to include certain notices but not changing the substance of the decision. Claimant filed a timely request for hearing. On March 25, 2015 ALJ R. Davis conducted a hearing, and on March 26, 2015 issued Hearing Decision 15-UI-35857, reversing the Department's decision. On April 7, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Opus Solutions, LLC employed claimant as an events planning manager from July 21, 2014 until January 9, 2015. The employer organized special events for corporate clients.

(2) The employer expected claimant to perform his work adequately and to communicate effectively with the clients for whom he was planning events as well as with the other team members responsible for aspects of that planning. Claimant was aware of the employer's expectations as he reasonably understood them.

(3) By September 2014, the employer was concerned about the manner in which claimant performed his work. On September 23, 2014, the employer placed claimant on a thirty-day performance action plan. The action plan specified that claimant needed to improve his work performance by copying his manager and other team members on emails that he sent to clients; creating and sending agendas to clients and team members in advance of scheduled conference calls; creating and sending wrap-up notes to clients and team members documenting the substance of the matters discussed during conference calls; creating project plans and budgets for every event and project he was managing and sending revisions of both to clients and team members every week; and saving all project files to the employer's shared documents folders where all team members could access them. In the performance action plan,

the employer removed claimant as the lead on a large event he had been planning and instructed him to provide necessary project information to the coworker who had replaced him as the manager.

(4) Sometime after October 23, 2014, one of the employer's directors and claimant's manager met with claimant and told him that his performance had improved in the areas addressed in the performance action plan, and that he was no longer subject to it. In that meeting, the employer representatives told claimant that he was no longer going to be a senior events manager, the position for which he was originally hired, but was going to be demoted to the level of manager because that position was more suitable to his abilities.

(5) The employer held a biweekly "Happy Hour" meeting on Fridays to discuss, among other things, the status of projects on which the staff was working. This meeting was held during the work day, involved all staff and alcohol was served at it. On October 31, 2014, Halloween Day, many of the employer's staff wore costumes to work and their friends and family members were invited to the workplace. Several employees brought alcohol to the workplace that day, and claimant invited coworkers from other departments to come to his department to have a drink. Claimant thought that because the staff was in costume, others were welcomed in the workplace and the atmosphere was celebratory, the employer would allow him to drink along with the employees who had brought the alcohol to the workplace.

(6) On November 14, 2014, claimant was assigned to manage a large event for a client. The event was going to occur in early January 2015. Usually, a manager had approximately six months lead time to organize an event. Claimant had no support to organize this event, and the period during which he was expected to organize it was interrupted by the three holidays. When claimant was assigned this event, the typical organizational and shipping deadlines had already been missed. During the month and a half that claimant was assigned to this event, he also was working on five other events for other clients.

(7) On the day before Thanksgiving, November 26, 2014, claimant brought some alcohol to the workplace and invited his coworkers to share a pre-holiday drink with him. Claimant thought that the employer would permit this drinking in the workplace because of its biweekly "Happy Hour" meetings and because other of his coworkers had brought alcohol to work on October 31, 2014 and November 26, 2014. Sometime after November 26, 2014, the employer issued a written warning to claimant for bringing alcohol into the workplace when the alcohol was not part of an employer-sponsored activity. After claimant was issued this warning he did not again bring alcohol into the workplace or participate with his coworkers in drinking in the workplace other than when the employer supplied the alcohol.

(8) After November 26, 2014, claimant worked on the event he had been assigned to organize on November 14, 2014. Claimant asked the employer's director if he could have assistance in performing the organizational work, but he was given none. Claimant asked the director several times for information on her dealings with the client but she did not provide that information. Claimant held weekly conference call meetings with the client. Sometime before Christmas 2014, claimant became aware that the client desired to upgrade the quality of the event it was sponsoring to include better food, better alcoholic beverages and a better set-up. Shortly before Christmas 2014, claimant sent a rough draft of an event plan to the client summarizing the changes and upgrades that it wanted.

(9) Before January 9, 2015, no employer representatives told claimant that the employer thought his performance was deficient in any way or that he was not continuing to satisfy the performance improvement guidelines set out in the performance action plan issued on September 23, 2014, which was no longer in effect.

(10) On January 9, 2015, the employer discharged claimant because it considered his performance substandard, because he brought alcohol to the workplace on October 31, 2014 and November 26, 2014 and because the employer believed claimant failed to meet performance expectations

CONCLUSIONS AND REASONS: The employer discharged claimant but not 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness contended that the employer discharged claimant because he failed to meet its performance expectations and, in particular, he did not sustain the initial improvement he had shown after the performance action plan was over and because he had condoned the consumption of alcohol in the workplace on October 31, 2014 and November 26, 2014. Transcript at 5, 6, 7, 8, 14, 16, 17. With respect to claimant's consumption of alcohol in the workplace and bringing it into the workplace, claimant contended that he thought the employer would permit it, and that other employees had brought alcohol into the workplace on both of the days at issue. Transcript at 33, 34, 44. While the employer's witness testified that she was not aware that other employees had brought alcohol into the workplace, she did not directly dispute claimant's testimony that they had, and that claimant's first clear notice that the employer prohibited the alcoholic beverages that were not supplied by the employer was when he was warned about it in late November or December 2014. Transcript at 48-49. Furthermore, the employer's witness agreed that, after claimant was told that his understanding of the employer's alcohol policy was incorrect, he never again brought alcohol into the workplace or consumed it at times when it was supplied by the employer at an employer-sponsored event. Transcript at 17, 34, 44. Based on the failure of the employer to clearly communicate or clarify its expectations regarding alcohol to claimant and the practices of his coworkers, we conclude that claimant's behavior in bringing or consuming alcohol in the workplace on October 31, 2014 and November 26, 2014 was a willful or wantonly negligent violation of employer's standards that were known to claimant or reasonably should have been known.

With respect to claimant's alleged failure to meet the employer's performance expectations, the employer's witness was vague both on how claimant failed to do so and how the employer's performance expectations were communicated to claimant other than through the September 23, 2014

performance action plan. Transcript at 5-18. The employer's witness did not specifically articulate how claimant's performance after the action plan was implemented and, ultimately expired, violated the standards set out in that plan. *Id.* While the employer's witness focused her testimony on claimant's performance in connection with the project he was assigned on November 14, 2014, the only deficiency in his performance that she was able to identify was that one of the employer's directors reported that he might not have been "timely" in creating and sending to the client a plan to "up-level" the event as of December 10, 2014. Transcript at 7, 8, 10. The employer's witness did not rebut claimant's testimony that he was assigned to the project late, in mid-November 2014, and the planning and organization that would usually take place over approximately six months were condensed to less than one and one-half months before its scheduled date of early January 2015. Transcript at 29-31. The witness did not dispute that claimant asked the employer for, but was not given, assistance to organize this event even though its organizational timeline was far shorter than typical. Transcript at 30. The employer's witness also did not dispute claimant's testimony that he sent a draft of a plan to "up-level" the event to the client in sometime before Christmas 2014, and did not raise any other allegedly deficient aspects of claimant's performance that violated the standards set out in the September 23, 2014 performance action plan. Transcript at 28, 29, 31, 32. The employer's witness also did not challenge claimant's testimony that he held weekly meetings with that client about the project at issue and communicated with it in a timely manner. Transcript at 28. Absent evidence that claimant was ever clearly informed that he needed to complete a revised "up-level" plan for the client by December 10, 2014, and given the compressed timeframe in which claimant needed to organize the event at issue, we cannot conclude that claimant's failure to produce a plan before Christmas 2014 was a willful or wantonly violation of the employer's standard for "timeliness." Transcript at 33-34. With respect to the generalized contention of the employer's witness that other aspects of claimant's performance failed to meet the employer's expectations, the employer did not specify the nature of claimant's alleged violations and presented no evidence that claimant was ever made aware of the employer's standards. The employer did not meet its burden to show that claimant willfully or with wanton negligence violated the employer's expectations.

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

DECISION: Hearing Decision 15-UI-35857 is affirmed.

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

DATE of Service: May 29, 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.

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