

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0603

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 82147). Claimant filed a timely request for hearing. On April 2, 2015, ALJ Murdock conducted a hearing, and on May 12, 2015, issued Hearing Decision 15-UI-38358, affirming the administrative decision. On May 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marion County employed claimant as a mental health associate from March 24, 2008 to February 13, 2015. Claimant's duties included monitoring the waiting room at the employer's Psychiatric Crisis Center (PCC) to ensure that clients were promptly assisted by staff screeners. If claimant determined that a client had been waiting an excessively long amount of time to see a screener, she was expected to notify a supervisor about the problem.

(2) On June 27 and July 4, 2014, claimant left work early without authorization. On July 18, 2014, the employer reprimanded claimant in writing for these incidents and other violations of its policies and expectations. In the written reprimand, the employer instructed claimant to contact an "on call supervisor" if she needed to leave early and no supervisor was available at her work location. Exhibit 1.

(3) On September 6, 2014, claimant failed to notify her supervisor that she would be late for her scheduled shift. On September 29, 2015, the employer suspended claimant without pay for two days for this incident and other violations of its policies and expectations.

(4) On January 9, 2015, left work an hour before her shift was scheduled to end because she did not feel well. At the time claimant left, no supervisor was on duty at her work location. Although claimant's supervisor was available by telephone, claimant did not contact the supervisor to obtain permission to leave early.

(5) On January 24, 2015, a screener at the PCC sent a client to the hospital for an overnight evaluation. The screener determined that the client would probably be placed in a detoxification center.

(6) Sometime during the morning of January 25, 2015, the client sent to the hospital the previous day was returned to the PCC. Claimant told the screener about the client's arrival; the screener told claimant to put the client's paperwork on her desk. Shortly before claimant took her lunch break, she checked with the screener who told her she had not yet seen the client. When claimant returned from her break, she asked the client what the screener had told her. The client, who apparently thought claimant was referring to her January 24 discussion with a screener, responded that she was going to a detoxification center. Claimant, however, thought that the client was referring to a January 25 discussion with the screener, and that the screener had determined an appropriate placement for the client. It was not uncommon for clients scheduled to go to a detoxification center to remain several hours in the PCC waiting room until transportation could be arranged. At approximately 4:30 p.m., the employer's clinical supervisor checked the PCC waiting room and discovered that no screener had yet attended to the client. The client waited at least five hours in the PCC waiting room before she was assisted by a screener. Exhibit 1 at 6.

(7) On January 31, 2015, the employer's health department administrator notified claimant that, in accordance with the applicable collective bargaining agreement, he would conduct a due process meeting with claimant prior to imposing economic sanctions up to and including discharge. The stated reasons for the proposed discipline were claimant's failure to notify a supervisor before leaving her shift early on January 9, 2015, and claimant's failure to ensure that the client was assisted by a screener in a timely manner on January 25, 2015.

(8) On February 6, 2015, the employer's health department administrator met with claimant and her representative for the due process meeting. By letter dated February 13, 2015,¹ the health department administrator dismissed claimant because he concluded that the charges in the January 31 due process letter were substantiated.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and

¹ The letter employer's letter is dated January 13, 2015. This appears to be a typographical error; the correct date of the letter is February 13, 2015.

good faith errors are not misconduct. OAR 471-030-0038(3)(b). A conscious decision not to comply with an unreasonable employer policy or expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

The employer asserted two reasons for discharging claimant: her failure to obtain a supervisor's permission to leave early on January 9, 2015 and her alleged failure to ensure that a client was promptly assisted by a screener on January 25, 2015. The record shows that the employer was likely aware of claimant's January 9 conduct when it occurred, but only decided to discipline claimant up to and including discharge after the January 25 incident. It therefore does not appear that claimant's January 9 conduct was the proximate cause of her discharge. Instead, we focus on the January 25 incident as the reason for her discharge.

Regarding claimant's alleged failure to ensure that a client was promptly assisted by a screener, the record shows that claimant contacted the screener as soon as the client arrived from the hospital; claimant checked with the screener again before taking her lunch break, and the screener told her the client had not yet been assisted. Claimant thus took reasonable initial steps to attempt to get a screener to promptly attend to the client. After she returned from her lunch break, claimant mistakenly concluded, based on the client's assertion that she was going to a detoxification center, that the screener had talked with and arranged an appropriate placement for the client, and that the client was awaiting transportation to the detoxification center. Claimant therefore believed that the amount of time the client spent in the PCC waiting room was reasonable and appropriate, and that she had no obligation to notify a supervisor that the amount of time the client spent waiting for a screener was excessive. Claimant's conduct in allowing a client to remain in the PCC waiting room for up to five before receiving assistance from a screener resulted from a good faith mistake. Good faith errors are not misconduct under OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-38358 is set aside, as outlined above.

Sue Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: July 8, 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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