

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0935

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 121944). The employer filed a timely request for hearing. On July 20, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI041705, concluding that the employer discharged claimant for misconduct. On August 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments to the extent that they were relevant and based on evidence in the record.

FINDINGS OF FACT: (1) The Confederated Tribes of Siletz employed claimant as Quality Improvement Coordinator and Community Health Director from November 10, 2013 to April 29, 2015.

(2) The employer's personnel policies required that employees treat customers, visitors, and coworkers in a courteous manner, and refrain from behavior or conduct that was "offensive, undesirable, or contrary to the Tribe's best interests." Exhibit 1. Claimant knew about and understood this policy.

(3) The employer required that every employee new to a position complete a six month probationary period. Claimant completed her initial probationary period, but on May 16, 2014, her supervisor placed on disciplinary probation for two months. In the "Disciplinary Notice" notifying claimant about the additional probationary period, her supervisor stated that claimant had violated the employer's policy regarding courteous treatment of coworkers by her "[i]nappropriate communication with co-workers – disrespectful, rude, unwillingness to consider other's opinions and idea [sic]." Exhibit 1. Claimant's

supervisor directed claimant to “[i]mprove communications and interactions with all staff” and warned her that “[f]ailure to improve communication and interactions with co-workers will result in additional disciplinary action, up to and including termination.” *Id.* Claimant appealed the imposition of a disciplinary probation, but the employer’s general manager denied her appeal. Exhibit 2.

(4) Claimant successfully completed her disciplinary probation. From the date on which she completed her disciplinary probation until April 10, 2015, neither claimant’s supervisor nor any other manager discussed concerns about claimant’s behavior or conduct with her, or notified her of any problems with the way in which she interacted with coworkers.

(5) On April 10, 2015, claimant’s supervisor notified her that she was suspended with pay until further notice. In the “Disciplinary Notice” in which claimant was notified of her suspension, her supervisor stated that the reason for the action was “[m]ultiple written and verbal concerns reported in the past 60-days describing Kelley’s verbal and non-verbal communication as rude, abrasive, disrespectful, and belittling.” Exhibit 3. After suspending claimant, the employer investigated complaints employees had made about claimant’s behavior.

(6) In an April 17, 2015 memorandum to claimant, the employer’s general manager told her that the investigation into her behavior had included interviews with numerous employees “representing a wide spectrum of co-workers and subordinates,” and that in these interviews, many employees “expressed that their interactions with [claimant] were intimidating, rude, disrespectful, and threatening.” The general manager directed claimant to provide her by April 20 “with a written response addressing the following: (1) how you see your behavior in the workplace and its impact on others; and (2) because your colleagues describe their experience with you as intimidating, disrespectful, rude, and threatening, how you would remedy your behavior and its perception by others on an ongoing and sustained basis.” Exhibit 4.

(7) Claimant responded to the general manager in an April 19, 2015 memorandum. In her memorandum, claimant stated that:

It is difficult to respond to your questions because I am never provided the opportunity to know the situation in which ‘my colleagues’ observed and report this type of inappropriate behavior.

I don’t see me the same way others do. I see me as a black and white, rule following person who can be the go to person when needed because I am intelligent and adaptable and I never say ‘No.’ I can be the person to help in any situation and step up to just about any challenge. Unfortunately, this can be both a strength and a weakness.” Exhibit 5.

Claimant explained that the clinic in which she worked had many employees “with a lot of bad behaviors that have been tolerated by supervisors and management and therefore it becomes the norm. It is a difficult environment to work in with these behaviors.” *Id.* She admitted that she had been rude and disrespectful in some of her interactions with coworkers, explaining that “[s]everal staff in this facility have bad behaviors that have grown over the years. I have become one of them.” In regard to how she would make ongoing and sustained changes in her behavior, claimant stated that she hoped to be “surrounded by positive attitudes with the occasional negative behavior. I would have to always be

aware of my verbal and non-verbal communication.” *Id.* She concluded the memorandum by stating “I will just have to be more aware of my behavior and my communication on a daily basis and think about what others see.” *Id.*

(8) By letter dated April 27, 2015, the general manager discharged claimant for behavior that violated the personnel policies requiring her to treat coworkers with courtesy and respect, and for her refusal to change these behaviors. In her letter, the general manager stated that claimant’s coworkers “are nearly unanimous in having complained regarding your behavior or in supporting complaints made by others that you were rude, disrespectful, intimidating and threatening during a conversation.” Exhibit 6. The general manager also stated that claimant’s April 19 memorandum indicated that claimant lacked self-awareness, “which is critical to you successfully addressing your deficiencies. *Id.*

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. 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 discharged claimant because she failed to treat her coworkers with courtesy and respect, as required by the employer’s policies, and because she was unwilling to change these behaviors. Claimant knew about and understood the employer’s expectations regarding behavior in the workplace. In regard to her interactions with coworkers, the employer repeatedly asserted that many employees repeatedly complained about claimant’s behavior. However, it never provided evidence of any specific situations where claimant behaved inappropriately or particular conversations in which claimant spoke to her colleagues in a rude, intimidating or disrespectful manner.¹ We therefore conclude that the employer failed to meet its burden to show that claimant violated its expectations regarding courteous treatment of her coworkers.

In regard to the employer’s contention that claimant was aware of her conduct, but deliberately refused to change, we also conclude that the employer failed to meet its burden to show that claimant’s behavior constituted misconduct. After claimant successfully completed her disciplinary probation in July 2014,

¹ The only specific evidence of claimant’s rude or discourteous interactions with coworkers was provided by claimant. In her April 19 memorandum, she described conversations with coworkers on April 3 and April 8 in which she admitted that her behavior (and the behavior of her coworkers) was inappropriate. Exhibit 4. These incidents apparently were not considered in the decision to discharge claimant, however; in the April 27 letter in which the general manager discharged claimant, the general manager noted that these encounters were not reported to her and were not discovered during the investigation. Exhibit 6.

she was never notified about any problems with her coworkers until April 10, 2015, when the employer suspended her. The employer never told her about any specific interactions or conversations in which she had behaved inappropriately or particular individuals who felt threatened, intimidated or offended by her behavior. Claimant was therefore unaware of how she failed to meet the employer's expectations.² Claimant's conduct was not willful or wantonly negligent because she did not consciously engage in conduct she knew or should have known would violate the employer's expectations.

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-41705 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 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 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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² Claimant testified that she did not know "what to apologize for." Audio recording at 32:26.