EO: 200
BYE: 201624

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

053
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0989

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131158). Claimant filed a timely request for hearing. On August 13, 2015, ALJ R. Davis conducted a hearing, and on August 14, 2015 issued Hearing Decision 15-UI-43049, affirming the Department's decision. On August 19, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented facts not offered into evidence at the hearing. Claimant did not explain why she did not present these facts during the hearing or otherwise 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 facts asserted in claimant's argument. EAB considered only evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as information health specialist from December 1, 1997 until June 25, 2015.

(2) The employer expected claimant to participate fully in its disciplinary process, and to prepare and sign any documents that the process required, whether or not she agreed that the allegations on which the discipline was based were accurate. Claimant understood the employer's expectations.

(3) Before June 18, 2015, the employer had not issued any disciplinary warnings to claimant in the approximately 18 years she had been employed.

(4) Sometime shortly before June 18, 2015, claimant expressed to her supervisor that she was upset by the behaviors of certain of her coworkers, including that there were using her fax machine without her permission and one or more of them had told her that she was permitted to use the restroom only during

her regularly scheduled rest breaks and not at any other time. In response to claimant's complaints, the supervisor sent an email to claimant's coworkers informing them that she was scheduling a staff meeting to address their behaviors. Shortly after, some of claimant's coworkers told the supervisor that claimant had recently referred to one coworker as "stupid" and had referred to some of the coworkers, collectively, as "stupid white girls." Transcript at 5, 10, 11. The supervisor, the employer's labor relations consultant and a representative from claimant's union interviewed claimant's coworkers about claimant's and the coworkers' allegations. They concluded that one of claimant's coworkers had behaved inappropriately and took disciplinary action against her. Transcript at 37, 40. They also concluded, based on interviews with the coworkers, that claimant had referred to her coworkers as "stupid" and "stupid white girls" sometime in May 2015. Transcript at 10, 11-12. Because the employer's representatives concluded that the comments that claimant had allegedly made were a serious violation of the employer's behavioral standards, they decided to proceed to the most stringent disciplinary level possible without discharging claimant, level 4 discipline. Transcript at 14. The employer did not intend to discharge claimant for making the alleged comments. Transcript at 14.

(5) On Thursday, June 18, 2015, claimant was called to a meeting at which her supervisor, the employer's labor relations consultant and a representative from her union were present. At that time, the employer issued to claimant a notice of a level 4 corrective action process for "violating behavior standards and []discriminatory comments to co-workers." Exhibit 1 at 2. Claimant denied that she had made the statements alleged by her coworkers. The level 4 corrective notice advised claimant that she had an "opportunity" to change her behavior, and if she chose to remain employed she would need to complete by Monday, June 22, 2015 a draft action plan worksheet and to enter into a last chance agreement that would "specify what is necessary to eliminate the gap between actual and desired performance or behavior." Exhibit 1 at 2. The corrective notice informed claimant that if she did not comply with its requirements, she would progress to level 5 discipline, which could result in her discharge. Exhibit 1 at 2. Claimant was given one paid day off from work, Friday, June 19, 2015, to consider whether she would complete a draft action plan and enter into a last chance agreement. Claimant signed the notice, which stated that she understood its requirements.

(6) Sometime between June 18, 2015 June 21, 2015, claimant concluded that she could not agree to complete the draft action plan worksheet or enter into a last chance agreement because, by doing so, she thought she would be admitting that she had made the alleged comments to her coworkers underlying the level 4 corrective notice. Claimant did not complete the draft action plan worksheet.

(7) On Monday, June 22, 2015, claimant met again with her supervisor, the labor relations consultant and her union representative. Claimant told them that she was had not completed the draft action plan and was not willing to enter into a last chance agreement because she had not made the comments that led to the level 4 corrective notice. Claimant told them that it was "against [her] morals" to admit to something that she had not done. Transcript at 8. Claimant asked whether, by completing the draft action plan and entering into the last chance agreement she would be admitting she had made the comments that she was accused of making. Claimant's supervisor, the labor relations specialist or the union representative did not directly answer claimant's question. Instead, they told claimant that they "encouraged" her or "wanted" her to "engage in the process" and fill out and sign the required documents, and if she did not agree with the notice, she could "use the appropriate process," which was filing a grievance. Transcript at 9, 36, 38, 40. Claimant perceived the lack of direct response to her question to mean that, by completing and signing a draft actin plan and by agreement to a last chance

agreement she would be agreeing that she had engaged in the behavior the led to the level 4 corrective process. Transcript at 27, 28, 29, 30, 31. The participants in the meeting told claimant that the employer would discharge her if she did not agree to complete a draft action plan worksheet and enter into a last chance agreement. Claimant still refused to do so.

(8) On June 25, 2015, the employer discharged claimant for refusing to "engage" in the level 4 corrective process and for refusing to complete a draft action plan or to participate in developing and signing a last chance agreement. Transcript at 8, 9; Exhibit 1 at 3.

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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). 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).

In Hearing Decision 15-UI-43049, the ALJ glossed over claimant's reason for refusing to complete a draft action plan and for refusing participate in formulating and signing a last chance agreement, reasoning that it was sufficient that she was informed that if she disagreed with the basis for the discipline the employer had imposed that she could "grieve the [disciplinary] results through her union." Hearing Decision 15-UI-43049 at 3. Based this assumption, combined with the employer's explicit warnings to claimant that she would be discharged if she did not fully participate in the level 4 disciplinary process, the ALJ concluded that claimant's refusal to complete the draft action plan and to participate in the development of a sign a last chance agreement, was at least a wantonly negligent violation of the employer's expectations. Hearing Decision 15-UI-43049 at 3. We disagree.

While the employer's representatives and the union representative might have told claimant that the union grievance process was available to her if she disagreed with the employer's imposition of level 4 corrective (or disciplinary) measures, the employer did not demonstrate that any of them told claimant that completing and signing the disciplinary documents would not be taken as an admission from her that she had made the alleged comments to her coworkers. The language of the level 4 corrective notice clearly assumes that a draft action plan and a last chance agreement will be created only if the employee has agreed that he or she engaged in the wrongdoing for which the discipline has been imposed. Exhibit 1 at 2. While all the employer's witnesses agreed that claimant had plainly expressed her concern that by creating the action plan and signing the last chance agreement she would be admitting to the behavior alleged, the employer did not show that any of the representatives told claimant that the employer would not consider that she had made an admission. Transcript at 7-8, 13, 15, 17, 19, 20-21, 26, 27, 28, 30, 36, 38. Although one of the employer's witnesses did contend that claimant was told that signing the documents and engaging in the employer's disciplinary process would not be construed as an admission, that witness's testimony is suspect in light of the testimony of the other employer witness that, after claimant raised concerns that her participation would be considered an admission, all of the representatives at the June 25, 2015 meeting proceeded to address claimant's right to file a union

grievance, without directly answering claimant's question about whether the employer would consider it an admission. Transcript at 36, 40-41. In view of this conflicting testimony, the employer did not show that claimant was ever told that the employer would not consider that by creating and signing the draft action plan and the last chance agreement she was agreeing that she engaged in the behavior for which the level 4 corrective process or discipline was imposed.

On these facts, claimant's conclusion that her participation in the disciplinary process would be considered an admission appears to have been reasonable in light of the failure of the other participants in the June 22, 2015 meeting to unequivocally and unambiguously deny that it would be considered so. Since the employer did not demonstrate that its level 4 corrective proceedings did not require claimant to admit to the conduct for which it was imposed or that claimant's understanding of the effects of voluntarily participating in level 4 of the disciplinary process were unreasonable, the employer did not show that its policy was reasonable. It was not a reasonable policy for the employer to require that claimant admit that she had engaged in certain behaviors as a condition of her continued employment when she denied that she had done so. Claimant's conscious decision not to admit to those behaviors, and not to comply with this unreasonable employer policy, was not misconduct under OAR 471-030-0039(1)(d)(C). Rather than requiring claimant to voluntarily admit to the behaviors underlying the level 4 corrective notice, a reasonable policy would had the employer prepare and unilaterally impose on claimant, without her agreement, the level 4 corrective action plan that it wanted.

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

DECISION: Hearing Decision 15-UI-43049 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>September 25, 2015</u>

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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