

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1103

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 9, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 123144). The employer filed a timely request for hearing. On September 4, 2015, ALJ Shoemake conducted a hearing, and on September 11, 2015 issued Hearing Decision 15-UI-44258 reversing the Department's decision. On September 15, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, which she did not serve on the employer, stating, "I do not want to send my previous employer a copy of this [argument] as I don't want any contact with them." Claimant's Written Argument, September 22, 2015. However, OAR 471-041-0080(2)(a) (October 29, 2006) requires that a party certify that he or she has provided a copy of an argument submitted to EAB to the other parties. Because there are no exceptions to this requirement, EAB did not consider claimant's written argument as a result of her failure to comply with OAR 471-041-0080(2)(a).

FINDINGS OF FACT: (1) Southern Oregon Adolescents/Kairos employed claimant as a skills coach from March 1, 2010 until June 18, 2015. Claimant worked at a residential facility for adolescents and young adults with mental health disorders.

(2) The employer expected claimant to follow each resident's behavioral support plan when providing services to the resident. Claimant understood the employer's expectation.

(3) On June 10, 2015, during the night shift, claimant was on duty with a senior skills coach and both were supervising and monitoring the residents in a particular wing. Sometime after claimant reported for work, the senior skills coach told claimant that they needed to maintain "line of sight" supervision of a resident who was experiencing suicidal ideations. Audio at ~12:30, ~31:48. The senior skills coach told claimant that she did not need to maintain "line of sight" monitoring of the resident when he was in

his bedroom or asleep. At such times, the senior coach told claimant that the resident was subject to “routine supervision,” which meant that his activities in his room were checked every 15 minutes. Audio at ~25:36. Sometime during the night, claimant was sitting on a chair monitoring residents who were in their bedrooms. The bedroom doors were open. Sometime later, the resident with suicidal ideations left the living room where he had been and entered his bedroom. From her chair, claimant observed the resident get into his bed and close his eyes as if to sleep. Sometime after, claimant left the chair in the hallway to help another resident. Claimant thought that it was permissible to break her constant observation of the resident with suicidal ideations because he was in his bedroom and the senior skills coach had told her the resident was then subject to routine supervision.

(4) On June 10, 2015, the employer placed claimant on administrative leave because she had not maintained “line of sight” supervision of the resident when she briefly left her chair in the hallway. On June 18, 2015, the employer discharged claimant for not maintaining constant “line of sight” supervision of the resident on June 10, 2015.

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. The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1977).

In Hearing Decision 15-UI-44258, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant was wantonly negligent to have left her chair in the hallway for a short period of time and to have interrupted her constant observation of the resident who was having suicidal thoughts. Hearing Decision 15-UI-44258 at 3. We disagree.

The employer’s witness testified that the behavioral support plan for the resident with suicidal ideations stated that he was subject to line of sight monitoring, and that claimant would have known of this monitoring level in various ways, including being informed by coworkers at daily floor meetings. Audio at ~11:53, ~13:20. Aside from this general assertion, the employer did not provide any specific information about how claimant was made aware of the resident’s required level of supervision on June 10, 2015. In her testimony, claimant stated that the senior skills coach told her on June 10, 2015 that the resident was subject to line of sight supervision except when he was in his bedroom, at which time he was subject to regular supervision. Audio at ~25:36, ~29:13, ~29:54, ~32:44. The employer’s witness did not dispute claimant’s testimony, and agreed that the senior skills coach might have told claimant that line of sight supervision of the resident was needed only when the resident was outside of his bedroom. Audio at ~35:54. On these facts, it does not appear that claimant acted in conscious violation of the employer’s expectation when she reasonably relied on what she had been told by the senior skills coach about the level of monitoring required when the resident was in his bedroom, which was routine supervision, and briefly broke her constant observation on June 10, 2015 to assist another resident. The employer did not meet its burden to show that claimant acted willfully or with wanton negligence when she left the chair in the hallway and briefly ceased constantly observing the resident.

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

DECISION: Hearing Decision 15-UI-44258 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 12, 2015

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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