

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1129

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120448). The employer filed a timely request for hearing. On September 17, 2015, ALJ Frank conducted a hearing, and on September 23, 2015 issued Hearing Decision 15-UI-44756, affirming the Department's decision. On September 25, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it contended that the ALJ did not allow the employer's representative "to speak during the hearing" and to present evidence on behalf of its office manager, who was not able to participate in the hearing due to a prior commitment. Employer's Written Argument at 1. However, despite the employer's contention, its representative was invited twice to testify at hearing and ultimately stated that the relevant information that the employer had to offer was summarized in the exhibits it offered at hearing. Audio at ~24:06, ~25:43, ~35:17. EAB has reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue during the hearing and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). EAB considered the employer's remaining arguments when reaching this decision.

FINDINGS OF FACT: (1) Geneva Health Center employed claimant as a front desk receptionist at its Wilsonville, Oregon clinic from August 21, 2006 until June 9, 2015. The employer operated a second clinic in Forest Grove, Oregon, out of which the employer's office manager and the clinic lead for both clinics worked. The office manager and the lead did not visit the Wilsonville clinic very often. Audio at ~17:00.

(2) The employer expected claimant to comply with its policies about proper apparel when working in the clinic. The employer's policy required claimant to wear scrubs while at work and stated that she was allowed to wear sweaters or other apparel over her scrubs if the temperature in the clinic was uncomfortably cold. Exhibit 3 at 23, 24.

(3) On January 28, 2015, the employer issued a warning to claimant for, among other things, failing to complete required work, forwarding phone calls to the Forest Grove clinic when she could have handled the calls from the Wilsonville clinic, being “difficult” to work with and for making recurring work errors. Exhibit 3 at 11.

(4) On March 10, 2015, the employer read a warning over to claimant over the telephone for making injudicious and unflattering comments to and about a coworker and the coworker’s fiancé. Exhibit 3 at 8. On that same day, claimant was read a second warning over the phone for closing the clinic earlier than the scheduled time. Exhibit 3 at 10. Sometime in March 2015, the employer’s office manager told claimant that, although she had up to that time worn garments from her personal wardrobe while at work, she was expected to wear scrubs. After she received this notice, claimant wore scrubs to work each day.

(5) Sometime in approximately early June 2015, the clinic lead received a call from a medical assistant in the Wilsonville clinic stating that she and claimant had just had a dispute over answering telephone calls to that clinic. The lead reported this call to the employer’s office manager, who reached the “boiling point” due to claimant’s perceived inability to “multi-task” in the workplace. Audio at ~19:20.

(6) On approximately June 9, 2015, claimant wore an unbuttoned suit jacket over her scrubs while at work. *See* Exhibit 3 at 7 (describing the final incident leading to claimant’s discharge as a failure to comply with the employer’s dress code.) Claimant thought that she was allowed to do so because it was cold in the clinic that day and she wanted to stay warm. Claimant did not wear combat boots or hiking boots as footwear that day.

(7) On June 9, 2015, at the end of claimant’s work day, the office manager and the clinic’s physician told claimant that she was being let go. Claimant was not given a reason for the discharge but was told that the physician would write her a letter of recommendation to assist her in finding new employment. On June 21, 2015, the physician gave claimant a letter of recommendation in which he stated that claimant was let go because her position had been eliminated due to the implementation of a new electronic medical record system. Exhibit 1 at 2.

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 (1976).

At hearing, the employer’s witnesses were unable to clearly articulate the reason(s) that claimant was discharged when she was. Audio at ~11:15, ~11:28, ~12:12, ~13:30, ~18:17, ~18:66, ~24:44. The only incidents they alleged to have occurred after claimant received March 10, 2015 warning, for which she was not discharged, was the alleged argument with the medical assistant and claimant’s work attire on

June 9, 2015. Since claimant was not let go after receiving the March 10, 2015 warning, or for any alleged misconduct prior to that time, it can only be surmised that any misconduct for which she was actually discharged occurred sometime between March 10, 2015 and June 9, 2015, the date she was discharged. Given the dearth of evidence of other acts of alleged misconduct, the focus of the misconduct analysis is the argument with the medical assistant in early June 2015 and claimant's allegedly inappropriate work attire on June 9, 2015.

With respect to claimant's alleged argument with the medical assistant in early June 2015, claimant denied that it occurred. Audio at ~18:66, ~33:57. Assuming that such a dispute happened, the employer's witnesses were not able to describe it other than that to state that "disgruntled words were said." Audio at ~19:15, ~36:14. The mere fact that claimant might have had a disagreement with a coworker is insufficient to establish that she willfully or with wanton negligence violated the employer's known and reasonable standards. Absent more specific evidence about what claimant did or said during this alleged argument that supposedly did not comply with the employer's standards, the employer did not meet its burden to show that claimant engaged in misconduct.

With respect to claimant's allegedly inappropriate work attire on June 9, 2015, the clinic lead testified that she observed claimant wearing a knee-length dark coat over her scrubs and had the legs of the scrub pants tucked into footwear that resembled hiking boots or ankle boots. Audio at ~12:12, ~13:18, ~37:40. The clinic lead did not dispute that claimant was allowed to wear sweaters or other short garments over her scrubs if she became cold in the workplace, which was permitted under the language in the employer's written dress code, and the clinic lead appeared to contend that the nature of claimant's alleged violation on June 9, 2015 was that she went too far by trying to hide the scrubs with the long coat and tucking the legs of the scrubs into the boots. Exhibit 3 at 23, 24. However, claimant denied wearing a long coat and stated that she had been wearing a short suit jacket over her scrubs due to the temperature in the office that day. Audio at ~29:03. Claimant also denied wearing combat boots or any other type of boot as footwear to work that day, or on any other day, and denied ever tucking the scrubs into any such boots. Audio at ~31:40, ~38:31. There was no reason in this record to doubt the credibility of either party's testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party who carries the burden to persuasion in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Applying this evidentiary rule, the employer did not establish that claimant wore a long coat or boots to work along with her scrubs on June 9, 2015. Since this contention was the basis for claimant's alleged violation of the employer's standards, the employer did not meet its burden to show that claimant engaged in misconduct by her attire on June 9, 2015.

In sum, while the employer discharged claimant it did not show that the reasons for which it discharged claimant constituted misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-44756 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 20, 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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