

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1206

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 82957). On May 12, 2015, decision #82957 became final without a request for hearing having been filed. On June 3, 2015, the employer filed a request for hearing. On June 11, 2015, ALJ Kangas issued Hearing Decision 15-UI-39931, dismissing the employer's request for hearing, subject to the employer's right to renew the request by responding to an appellant questionnaire within 14 days of the date of the decision. The employer timely responded to the appellant questionnaire. By letter dated July 6, 2015, the Office of Administrative Hearings (OAH) cancelled Hearing Decision 15-UI-39931. On July 21, 2015, ALJ L. Lee conducted a hearing, and on August 3, 2015, issued Hearing Decision 15-UI-42480, dismissing the employer's hearing request as untimely. On August 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB). On August 28, 2015, EAB issued Appeals Board Decision 2015-EAB-0990, concluding that the employer timely requested a hearing, and returning the matter to OAH for a hearing on the merits of decision # 82957.

On September 14, 2015, ALJ S. Lee conducted a hearing, and on September 22, 2015, issued Hearing Decision 15-UI-44641, concluding that the employer discharged claimant, but not for misconduct. On October 9, 2015, the employer filed an application for review with EAB.

FINDINGS OF FACT: (1) Country Counseling employed claimant as a certified alcohol and drug counselor, Level 1, from July 7, 2014 through March 11, 2015.

(2) The employer expected that claimant would maintain accurate and timely records and reports regarding treatment of clients. Claimant knew and understood this expectation because training in record-keeping was included in the program of study necessary to obtain here certification as an alcohol and drug counselor. In addition, the employer's director of recovery services explained the employer's record-keeping system to her when she was hired. At that time, claimant told the director that the

employer's record-keeping system was different from the one she to which she was accustomed. The director told claimant he would train her in the system.

(3) On or about February 17, 2015, claimant and her coworkers were meeting at a local restaurant. Claimant saw one of the employer's clients with whom she had a conflict, and mentioned the client's presence to a coworker. The client subsequently complained to the employer that claimant had made loud and disrespectful remarks to her.

(4) On February 28, 2015, the employer's owners met with claimant to present her with a document entitled "Corrective Interview." The document stated that claimant's performance was deficient in the following areas: "precision and accuracy of record keeping"; "office culture and communication"; "accuracy of time cards"; and "dependability and service to clients." Exhibit 2 at 29. The document identified no specific records that claimant had made that were inaccurate, and the owners provided no examples of inaccurate records during the meeting. In regard to "office culture and communication," the document stated that claimant had numerous "rude and demeaning conversations" with the business manager, and instructed claimant to prepare and deliver a written apology to the business manager for "unprovoked attacks." Exhibit 2 at 30. Concerning "accuracy of time cards," the document stated that a review of claimant's timecards and the employer's computer records showed that during time claimant was supposedly working from home, she was not logged into the employer's computer system. As a result, the employer determined that it "paid [claimant] for many hours with no identifiable productivity to justify the pay." Exhibit 2 at 29. In regard to "dependability and service to clients," the document instructed claimant to send written apologies to clients whose appointments claimant had missed over the past month, and to the client who complained about claimant's February 17 behavior in the restaurant. Exhibit 2 at 30. The document concluded by stating that "[w]e will try this plan for the next 30 days. At the end of that period, we will reevaluate the effectiveness of these interventions and see where we are." Exhibit 2 at 30. Claimant said little during the February 28 meeting, because she was surprised and upset by the criticisms of her performance. Prior to this meeting, the owners had never criticized her work, or told her that her records were inaccurate.

(5) After the February 28 meeting, claimant did not provide the business manager with a written apology because she was unaware that the business manager believed that claimant had been rude to her. Claimant was aware of one phone call during which she and the business manager had vigorously and vociferously disagreed about arrangements for putting a new office in Sweet Home, Oregon. When claimant went to the employer's office the day after this phone call, however, the business manager apologized to claimant and hugged her. Claimant was unaware of any inaccurate time cards she may have submitted; she often performed work for the employer, such as setting up for meetings or reviewing paper files that did not require her to log in to the employer's computer system. Concerning missed client appointments, claimant knew of only two she had missed; she had apologized to these clients, however. Claimant told one of the employer's owners that she would not apologize in writing to the client she had supposedly treated rudely on February 17, 2015. Claimant did not believe that the client's account of their encounter was accurate, and did not think it would help the client to apologize for something she had not done.

(6) Also after the February 28 meeting, claimant attempted to comply with the directive that she maintain accurate and timely records regarding her clients. Claimant had difficulty in doing so,

however, because her work assignments had increased and because she believed she had not been adequately trained in the employer's record keeping system.

(7) On March 11, 2015, the employer discharged claimant for failing to accurately and timely maintain client records and for refusing to apologize to clients she had supposedly offended.

CONCLUSION AND REASONS: We agree with the ALJ. We 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. Exceptions to misconduct include isolated instances of poor judgment, good faith errors and "mere inefficiency resulting from lack of job skills or experience." OAR 471-030-0038(3)(b).

At the hearing, the employer's witness testified that the employer discharged claimant on March 11, 2015 for inaccurate record keeping, for failing to maintain appropriate standards of treatment with clients, and for falsifying her time records by reporting time worked for the employer that she had not actually worked. The employer was aware of these deficiencies on February 28, 2015, when claimant was given a performance improvement plan and told she had 30 days in which she was expected to improve her performance. The employer's witness testified that the employer decided to discharge claimant before the end of the 30 day period because claimant "refused to comply with some of the directives that were given to her for improvement." Transcript at 14. We therefore focus on claimant's conduct between February 28 and March 11, 2015 as the reason for her discharge and address prior incidents only to determine if claimant was discharged for misconduct or an isolated instance of poor judgement.¹

The record shows that claimant failed to comply with two of the directives in the "Corrective Interview" document the employer gave her on February 28 – she did not apologize in writing to clients she had allegedly offended and she did not accurately and timely maintain client records. In regard to the apologies she was ordered to make, we note that the "Corrective Interview" document identifies no specific clients whose appointments claimant missed and to whom she was expected to apologize, and claimant testified that the employer identified none during their February 28 meeting. Claimant asserted that she was aware of two client appointments she had missed, but also asserted that she had apologized to these clients. In regard to the client whom claimant allegedly treated rudely and disrespectfully on February 17, 2015, claimant and the employer's business manager provided conflicting testimony regarding this incident. Claimant testified that she quietly remarked to a coworker that the client, with

¹ Under OAR 471-030-0038(1)(d)(A), an act is isolated if it is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct.

whom she had a conflict, had entered the restaurant where claimant and her coworkers were meeting. Transcript at 49. The employer's business manager, who was present in the restaurant and witnessed the incident, testified that claimant made eye contact with the client and loudly exclaimed "Oh my gah [sic], look who is here. Oh, I can't believe it." Transcript at 44. The claimant and the business manager's accounts about the February 17 incident are both plausible, and there is no reason to doubt the credibility of either witness. Where, as here, the evidence on a disputed issue is equally balanced, the uncertainty must be resolved against the employer because it is the party that has the burden of persuasion in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on this record, we conclude that the employer failed to meet its burden to show that claimant engaged in rude behavior for which the employer could reasonably expect her to apologize, or that claimant refused to apologize to clients whose appointments she had missed.

In regard to claimant's inability to timely maintain accurate client records, The business manager testified that the employer concluded that because claimant made so many errors, the employer determined that claimant was "maliciously falsifying" information in her client records. Transcript at 15. The number of errors claimant made does not provide a plausible reason for concluding that claimant deliberately made mistakes in her client records. Claimant testified that she struggled with the employer's record keeping system because she was unfamiliar with it and because, due to a heavy workload, she was unable to keep up with the client records she was expected to maintain. In addition, claimant asserted that one of the employer's owners is her brother-in-law, and that she would never intentionally do anything on the job to damage that family relationship. We conclude that the employer failed to meet its burden to demonstrate that claimant's inability to keep accurate client records resulted from claimant's conscious disregard of the employer's interests. Instead, find that claimant's problems with record keeping resulted from inefficiency due to a lack of job skills and experience, and therefore did not constitute 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 on the basis of this work separation.

DECISION: Hearing Decision 15-UI-44641 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 29, 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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