

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1348

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 91712). The employer filed a timely request for hearing. On November 4, 2015, ALJ Wipperman conducted a hearing, and on November 9, 2015 issued Hearing Decision 15-UI-47401, affirming the Department's decision. On November 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Senior Housing Management, LLC employed claimant as an executive director from May 21, 2014 to June 5, 2015.

(2) The employer expected claimant to treat everyone in the workplace with respect and dignity. Claimant understood this expectation. At all relevant times, claimant's speaking style was terse and direct, but she was physically incapable of yelling.

(3) On May 8, 2015, claimant sent an email to her supervisor. Claimant did not intend the email to be rude or insubordinate, and thought it was professional in tone and content. The supervisor considered the email rude and insubordinate. Claimant apologized.

(4) Prior to May 11, 2015, an employee used the employer's photocopier for personal reasons. Claimant made copies of the employee's personal item with a note instructing staff not to use the employer's equipment for personal reasons and posted it for public viewing. Claimant considered the posting appropriate as a means of discouraging employees from making personal use of the employer's

photocopier. On May 11, 2015, someone reported claimant's posting to the employer. Claimant's supervisor thought it was disrespectful and planned to counsel claimant for it on May 19, 2015.

(5) Prior to May 13, 2015, claimant intervened with an employee whose actions could have caused harm to a resident in order to stop the potentially harmful action. One of the employer's residents told the resident's case manager that the resident had observed claimant "berating" a staff member. The employer considered claimant's reported conduct unprofessional, and thought it might be a potential instance of elder abuse. On May 15, 2015, the employer suspended claimant pending investigation.

(6) The individuals conducting the investigation heard numerous employee complaints about claimant. The employees reported that they did not like claimant's management style, and thought she was aggressive and unsupportive. Some reported claimant had yelled at them during discipline. Based on the number of complaints the employer received, the employer concluded that employee concerns about claimant's unprofessional behavior were substantiated. On June 5, 2015, the employer discharged her.

CONCLUSIONS AND REASONS: We agree with the Department and 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 concluded, based on a high volume of staff complaints about claimant, that claimant yelled at and otherwise communicated with her supervisor and subordinates in an unprofessional manner, in violation of the employer's expectation that she treat others with respect and dignity. The employer also suspected claimant of having committed elder abuse by berating a subordinate employee in front of a resident. However, claimant was physically incapable of yelling, and intervened with the subordinate employee only because it was necessary to prevent imminent potential harm to a resident. Even if claimant's communication methods violated the employer's expectations, claimant credibly testified that she believed her communications were professional and appropriate. Absent a basis for concluding that claimant was not a credible witness, the record fails to show that claimant intentionally violated the employer's expectations regarding her behavior and communication with others, or that she was even conscious that her communications with others might be construed as unprofessional, disrespectful, or undignified. Therefore, any violations of the employer's expectations that claimant committed were likely unintentional or inadvertent, and cannot be considered willful or wantonly negligent misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-47401 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 18, 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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