

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0022

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 81626). Claimant filed a timely request for hearing. On December 16, 2015, ALJ Upite conducted a hearing, and on December 22, 2015 issued Hearing Decision 15-UI-49816, reversing the Department's decision. On December 31, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Willamette View, Inc. employed claimant as a certified nursing assistant (CNA) from February 23, 2015 until September 15, 2015. The employer operated an assisted living facility that provided different levels of care for residents depending on their needs. The units where the employer provided care were a skilled nursing facility unit (SNF) and more general care units, known as "neighborhoods."

(2) The employer expected claimant to give accurate statements when questioned about her behavior at work and to refrain from deterring other employees from reporting for work.

(3) Claimant usually worked in the unit known as the "Glacier Lily neighborhood." On September 9, 2015, while she was at work, claimant spoke in passing with a person in the employer's staffing department. The staffing person told claimant it appeared the employer would be short-staffed on September 10, 2015 in the "Trillium neighborhood" and needed a CNA to work there. Claimant told the staffing person that she was not familiar with the needs of the residents in Trillium, but she was willing to work in the "Wisteria neighborhood" or the SNF. The staffing person told claimant that she would inform the nurse who would be in charge of Wisteria or the SNF on September 10, 2015 that claimant was going to work there that night.

(4) On September 10, 2015, claimant reported for work and some of her coworkers told her that the employer needed a CNA to work in the Trillium neighborhood that night. Claimant told the coworkers that it had been arranged that she was going to work that night in either Wisteria or the SNF. Claimant then went to Glacier Lily, her regular unit. When she arrived, the nurse told her a CNA was needed in Trillium. Claimant told the nurse she thought it was arranged that she was going to work on the Wisteria or SNF units and one of the other CNAs was going to work at Trillium. The nurse spoke to two other CNAs who stated they did not want to work on the Trillium unit. The nurse then went to the charge nurse's office to discuss who was going to be assigned to Trillium. Claimant followed her because she did not know where to report to begin work. The charge nurse ultimately told claimant to go to Wisteria to work and assigned another CNA to Trillium. Claimant went to Wisteria to work.

(5) Sometime before September 12, 2015, claimant's car began to malfunction and claimant arranged with another CNA to cover her scheduled shift on September 12, 2015 so she could take in her car for repairs. By September 12, 2015, the director of nursing had become aware that claimant had arranged, without the director's permission, to have another CNA cover her shift on September 12, 2015. The director of nursing did not want to allow claimant to take September 12, 2015 off from work. She called claimant at 9:19 a.m. and 9:49 a.m. and left voice messages stating that she was not allowing claimant to take her shift off on September 12, 2015. The director of nursing also sent a text message to claimant at 9:21 a.m. which repeated that she did not approve claimant's request for time off, and the staffing department left claimant a message at noon stating that the director had not approved her absence on September 12, 2015 and she was expected to report for her shift on September 12, 2015 at 10:45 p.m., the time the shift was scheduled to begin. Claimant did not hear or see that any messages had been left for her because she was feeling ill, had taken some Nyquil early in the morning and had gone to sleep. Claimant woke up at approximately 10:22 p.m., saw that some messages had been left for her and accessed them. After listening, claimant immediately drove to the workplace to report for work. Claimant arrived ten minutes late for her shift, at 10:55 p.m.

(6) Sometime during claimant's shift on September 12, 2015, the employer issued a written warning to claimant for trying to switch her shift on that day without approval from the director of nursing and for reporting late for her shift.

(7) After September 12, 2015, the director of nursing started an investigation of claimant's recent behavior. Some employee or employees told the director of nursing that claimant had refused to work in the Trillium neighborhood on September 10, 2015, had stated she was going to leave if she was required to work in Trillium and had behaved angrily and unprofessionally in front of other employees when asked to report to Trillium. Another employee told the director of nursing that claimant had told her not to respond to the employer's request on September 12, 2015 for additional employees to work.

(8) On September 14, 2015, the director of nursing met with claimant to discuss her recent behavior. Claimant stated she had not responded to the director's communications on September 14, 2015 because she was not aware she had received them until 10:22 p.m. Claimant told the director of nursing that, although she had tried to have September 12, 2015 off in order to have her car repaired, she had missed the repair appointment as a result of sleeping through it. Claimant also denied that she had refused to work at Trillium on September 10, 2015 and denied she had behaved unprofessionally on September 10, 2015. After this interview, the director of nursing concluded that claimant had been dishonest about not refusing to work at Trillium, had been dishonest about the reasons she wanted to take September 12,

2015 off and had been dishonest about the reasons she did not respond to the director's attempted phone contacts on September 12, 2015.

(9) On September 16, 2015, the employer discharged claimant for making dishonest statements during the director of nursing's investigation.

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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer witness, its human resources generalist, laid out many instances of claimant alleged misconduct. However, the witness was very clear that the reason the employer discharged claimant was because of what it discovered after September 12, 2015, including that she allegedly refused to work at Trillium on September 10, 2015, she allegedly advised a coworker not to report for work on September 12, 2015 and she allegedly was dishonest in the explanations she gave to the nursing director on September 14, 2015. Transcript at 17, 23. Accordingly, the misconduct analysis is limited to these issues.

While the employer's human resources generalist contended that claimant refused to work at Trillium on September 10, 2015, it was apparent that the employer's witness had no first-hand knowledge of claimant's behavior and did not conduct the interviews of claimant's coworkers that formed the basis for the employer's contentions. Transcript at 10. The employer's witness was also unable to identify the staff members who gave information about claimant's alleged behavior to the director of nursing. Transcript at 57. In contrast, claimant testified that she never refused to work at Trillium, but was under the impression, based on her conversation with the staffing person, that she had been assigned to work either at Wisteria or the SNF on September 10, 2015. Transcript at 38-42, 43, 54, 56. Claimant also testified she did not raise her voice when speaking to coworkers about Trillium or threaten to leave if she was required to work at Trillium. Transcript at 42, 56. Claimant's first-hand evidence is entitled to more weight than the employer's hearsay, particularly when the employer's witness was unable to identify the precise sources of the hearsay. On this record, the employer did not demonstrate that claimant refused to work at Trillium on September 10, 2015 or that any explanation she gave to the director of nursing about her alleged refusal to work at Trillium was necessarily dishonest because it conflicted with an alleged hearsay statement from an unidentified declarant. The employer also did not meet its burden, in light of claimant's rebuttal, to show that claimant behaved unprofessionally in any communications about Trillium on September 10, 2015.

With respect to claimant's alleged communication with a coworker advising her not to report for work on September 12, 2015, claimant agreed she had contact on that day with the coworker the employer identified, but denied she told the coworker not to respond to the employer's request seeking volunteers to work. Transcript at 45-46. The employer's witness admitted that the employer did not have a copy of

the text message that supposedly advised the coworker not to report for work, and had no way independent of hearsay to verify its existence or its contents. Transcript at 17. As with the employer's hearsay addressed in connection with Trillium, the employer's hearsay about claimant's supposed communication with the coworker is entitled to less weight than claimant's first-hand evidence on that issue. Consequently, the employer did not meet its burden to show that claimant advised the coworker not comply with the employer's request for additional staffing.

With respect to claimant's alleged dishonesty about the reasons she did not respond to the director of nursing's telephone messages on September 12, 2015, it is not logical that claimant would intentionally ignore the messages, but rush to work when she became aware of their contents. Claimant's explanation for why she missed the messages was not implausible. On this record, the employer did not present sufficient evidence to rule out that claimant missed the messages due to taking Nyquil, or that the explanation she gave to the director of nursing was dishonest.

Although the employer discharged claimant, it did not demonstrate that it discharged her for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-49816 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 28, 2016

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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