

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0118

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135135). Claimant filed a timely request for hearing. On January 27, 2016, ALJ Seideman conducted a hearing, and on January 29, 2016 issued Hearing Decision 16-UI-51949, reversing the Department's decision. On February 2, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Total Care, Inc. employed claimant as a certified nursing assistant (CNA) providing home care services to its clients from October 22, 2014 until November 16, 2015

(2) The employer expected claimant to refrain from disclosing personal information about clients to anyone other than the client, to refrain from criticizing other caregivers to clients or family members and to refrain from recommending that clients or family members make particular decisions about clients' health care. Claimant understood the employer's expectations.

(3) On May 6, 2015, a client's wife reported to the employer that she had been "uncomfortable" when claimant had discussed certain personal issues with her husband, who was the client. The wife asked that the employer not allow claimant to return and provide services for her husband in the future. On that day, the employer issued a verbal warning to claimant for discussing personal information that was overheard by someone other than the client.

(4) On October 28, 2015, claimant was in a client's home and making a report about that client's status to two other caregivers who were coming on duty after a shift change. In front of claimant, the two other caregivers began to discuss their concerns about another client. Claimant was not acquainted with the client the caregivers were discussing and had never cared for that client. Claimant told the two caregivers they needed to bring up their concerns with the employer and not with her. While claimant continued making her report to the two caregivers, they continued to discuss the client about whom they had concerns. After claimant's shift ended, she called the employer's office to notify it that the two

other caregivers had expressed concerns about another client. By the detail of claimant's knowledge about the other client, the employer concluded she had engaged in actively discussing that client with the two other caregivers. The employer decided to issue a written warning to claimant for discussing personal information about the client with the other caregivers.

(5) On November 4, 2015, claimant cared for a client whose family members were very active in monitoring the quality of care provided to that client. One particular family member reviewed the client's medical chart on almost a daily basis, and asked claimant why she had provided certain care to the client when the client's other caregivers had not. Claimant told the family member she needed to raise concerns about the client's care to the employer and not with her. The client's family members were pleased by the quality of claimant's services to the client and asked claimant to work for the client as much as was possible. When the family members received from the employer a schedule of the caregivers who would be providing care to the client in the upcoming week, they asked claimant why she was not scheduled for more work with the client. Claimant told the family members they needed to speak with the office if they had questions about which caregivers were scheduled to provide services. On November 4, 2015, claimant called the employer's office to discuss the concerns of the client's family members. No family members were present in the client's house to overhear the content of claimant's discussion with the office. The office staff understood claimant to state that the client was being "neglected and abused" by the other caregivers who provided services to the client, and that she was the only caregiver who was providing adequate services. Audio at ~39:12, ~40:31. Later, the employer's client coordinator called the client's family member to follow up on claimant's call to the office about the client. After speaking with the family member, the client coordinator concluded, based on the substance of their conversation, that claimant had discussed personal information about the client with the family member, had criticized the care provided by the client's other caregivers and had told the family that her hours had been cut by the employer.

(6) From on or shortly after November 4, 2015 through November 15, 2015, claimant was unable to work due to medical reasons. Shortly after November 4, 2015, the client coordinator called the employer's corporate office and told the employer's representatives that on October 28, 2015 and November 4, 2014, claimant had violated the employer's prohibitions against disclosing personal client information and making recommendations about client care. Representatives from the corporate office instructed the client coordinator to discharge claimant for these violations.

(7) On November 16, 2015, claimant returned to work. On that day, the employer discharged claimant for violating its policies on October 28, 2015 and November 4, 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 (1976).

Claimant did not dispute that she was aware of the employer's prohibitions against discussing personal client information or recommending that clients or their family members make particular health care decisions. Claimant contended that she did not engage in the actions that the employer alleged had occurred on October 28, 2015 and November 4, 2015. Audio at ~24:48, ~26:10, ~27:24, ~38:24. Claimant's explanation that she did not "engage" in conversations about a particular client with the two caregivers on October 28, 2015, but had been unable to dissuade them from their own discussion and was an unwilling audience to that discussion was plausible. Audio at ~25:02, ~26:10. As well, claimant's explanation about her interaction with the client's family members on November 4, 2015 was equally plausible, and it is quite possible that the family member who spoke later to the client coordinator consciously or unconsciously exaggerated what claimant actually stated in an attempt secure a better level of service for the client and claimant's continued services to the client. While the employer's witness contended, in contrast, that claimant had freely discussed personal client information and made client health care recommendations, there is no reason in the record to prefer the credibility of one party's testimony about these conversations over that of the other. Because the evidence on the conversations is evenly balanced, the uncertainty must be resolved against the employer because it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the employer did not meet its burden to show, more likely than not, that claimant discussed personal client information the two other caregivers on October 28, 2015 or that she discussed such information with family members on November 4, 2015 or that she made negative comments about the client's other caregivers or that she recommended particular actions be made in connection with the client's health care. The employer did not demonstrate that claimant engaged in misconduct.

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

DECISION: Hearing Decision 16-UI-51949 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 26, 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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