

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0259

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 170759). The employer filed a timely request for hearing. On February 25, 2016, ALJ Menegat conducted a hearing, and on March 1, 2016 issued Hearing Decision 16-UI-54024, affirming the Department's decision. On March 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marion County employed claimant as a mental health associate in a residential program from November 2, 2009 until September 23, 2015.

(2) The employer expected claimant to avoid personal relationships with clients in its programs. Claimant understood the employer's expectation.

(3) Between March and May 2015, claimant, who was a male, provided services to a female client in the employer's residential program. The client had been recently released from jail. Claimant assisted the client by, among other things, taking her to appointment and court appearances and in exploring community resources from which she might benefit. The female client was "very inquisitive" about claimant's personal life. Audio at ~29:40. The client asked claimant about recreational activities she might pursue and claimant suggested dancing or martial arts classes and took her to community venues where she could arrange for them. The client asked claimant if he would give her private dancing lessons and claimant responded that he could not, it would be inappropriate and that it was outside the "scope" of the services he provided. Audio at ~31:38. At different times, the client also asked claimant if he would buy her a cell phone and clothes, and assist her in paying rent on an apartment. Claimant told the client that it would be "out of line" for him to do so, and suggested the client obtain a cell phone from a community program that made free phone available for individuals who were unable to afford them. Audio at ~31:16.

(4) Sometime after the client began asking claimant for favors, claimant reported to the client's case manager that she was making inappropriate requests of him.

(5) On August 4, 2015, the client reported to the employer's clinical supervisor that claimant had attempted to develop an inappropriate personal relationship with her, which she had rebuffed. She stated that claimant had offered to give her private dancing lessons off-site, had offered to make arrangements for her to go dancing with him by telling her case manager a story that that would excuse her from the employer's curfew, had taken her to his home, had purchased a dress and shoes for her as well as a cell phone and radio, and had attempted to kiss her after telling her that he loved her. Audio at ~13:23 *et seq.*

(6) Shortly after the client spoke with the clinical supervisor, the supervisor reported the conversation to the employer's administration. The administration informed the employer's human resources department of the client's allegations. A representative from the employer's human resources department advised claimant of the client's report about his allegedly inappropriate behavior and claimant denied the allegations. The human resources department determined that the employer was not going to investigate the validity of the client's allegations internally and contacted the Office of Adult Abuse Prevention and Investigation (OAAPI) in the Oregon Department of Human Services to initiate an investigation. Sometime after August 4, 2015, the employer placed claimant on paid administrative leave pending the completion of the OAAPI investigation into the client's allegations. The employer did not take any further action to determine if the client's allegations were well-founded.

(7) Sometime shortly before September 16, 2015, OAAPI delivered the report of its investigation to the employer. The OAAPI report concluded that two of the client's allegations against claimant were substantiated. On September 23, 2015, the employer discharged claimant solely because OAAPI had substantiated those two allegations.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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).

The employer discharged claimant because a client reported that claimant had attempted to develop an inappropriate personal relationship with her. We do not doubt the testimony of the employer's witness that OAAPI concluded that two of the client's allegations against claimant were substantiated. However, the employer did not offer OAAPI's investigative report into evidence, the employer's witness did not know which allegations against claimant that OAAPI determined were substantiated or why, and the employer did not conduct any independent inquiry into the truth of the client's allegations.

Audio at ~16:54, ~22:16. Claimant denied engaging in any appropriate behavior toward the client, and denied the specific allegations that the client purportedly made against him. Audio at ~30:59, ~31:16, ~32:20, ~32:58. Absent a basis for concluding that claimant was not a credible witness, his first-hand testimony is entitled to more weight than the hearsay of the OAAPI report or the client's report to the employer about the nature of his relationship with the client, particularly when no specifics of the OAAPI report were known at hearing other than the general statement that two of the allegations were "substantiated." Audio at ~11:55, ~16:59, ~22:56. On this record, the employer failed to meet its evidentiary burden to show, more likely than not, that claimant behaved inappropriately with the client or attempted to initiate a personal relationship with her. The employer therefore failed to establish misconduct.

We agree with the Department and the ALJ that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 16-UI-54024 is affirmed.

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

DATE of Service: April 4, 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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