

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0322**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150224). Claimant filed a timely request for hearing. On March 15, 2016, ALJ Triana conducted a hearing, and on March 17, 2016 issued Hearing Decision 16-UI-55225, reversing the Department's decision. On March 21, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) St. Charles Health System employed claimant as an inpatient phlebotomist from December 5, 2014 until January 22, 2016.

(2) The employer expected claimant to communicate reasonably with coworkers, as needed, to facilitate adequate patient care. Claimant understood the employer's expectation as a matter of common sense.

(3) Sometime before August 28, 2015, claimant approached a female coworker whom he came on shift to relieve about phlebotomy work that she had not completed while on duty during the previous shift. The coworker told claimant she was unable to complete drawing blood from a particular patient because of a medical need to limit the number of skin punctures to the patient. Claimant discussed the coworker's explanation with the patient and a nurse and determined the coworker did not have a legitimate reason for failing to complete that patient's blood draws. Shortly thereafter, claimant filed a complaint in the employer's event management system expressing concern about the coworker's management of her workload, and leaving tasks unfinished for him to complete during his shift.

(4) On August 31, 2015, the same female coworker complained to claimant's supervisor that claimant had inappropriately flirted with her on August 28, 2015. On September 3, 2015, claimant met with his supervisor and a representative from the employer's human resources department to discuss this alleged incident of harassment as well as an event in which claimant had mislabeled a specimen. During that meeting, claimant denied that he acted inappropriately with the coworker, and stated he was going to limit his contacts with the coworker to avoid similar accusations in the future. Claimant thought the

coworker had made the accusation against him in retaliation for his recent complaint about her in the event management system. On September 21, 2015, the employer issued a written warning to claimant for the behavior discussed during the September 3, 2015 meeting.

(5) Between August 2015 and November 2015, claimant made several complaints about the coworker's failure to complete work during her shift either to his supervisor or in the event management system.

(6) Sometime before January 20, 2016, when claimant came on shift to relieve the coworker, he asked the worker the reason she had not completed certain physicians' orders for phlebotomy services received during her shift. The coworker did not provide any reasons, and abruptly left the work area. Claimant sent an email to his supervisor complaining about the coworker's continued failure to manage her workload and to complete the work assigned during her shift. Transcript at 21, 35. Sometime later, the coworker reported to the supervisor that claimant had raised his concerns about her work to her in a "passive-aggressive manner" and she did not respond to him because had felt "intimidated." Transcript at 7.

(7) On January 21, 2016, claimant's supervisor sent him a text message on his day off asking him to meet her, her manager, and the coworker in the hope they would have a "productive meeting to help with communication [between claimant and the coworker]." Transcript at 36. Claimant responded to the supervisor he would attend the meeting "if she insisted." Transcript at 26. Claimant's supervisor intended the meeting to be a mediation of what she perceived as claimant's and the coworker's communication problems. Claimant agreed to attend.

(8) On January 22, 2016, claimant, the coworker, the supervisor and the supervisor's manager met in a conference room in the workplace. During the meeting, claimant told those present that he was "uncomfortable" communicating with the coworker since he thought she had accused him of unwelcome flirting with her in August 2015 in retaliation for his earlier complaints about her work, and he feared she would make more complaints about his alleged retaliation if he spoke freely at the meeting or if he attempted to communicate with her at all in the workplace. Transcript at 26. In response to the supervisor's statement that claimant and his coworker needed to communicate "professionally" to exchange work-related information about patients, claimant stated he could obtain adequate information about patient needs at shift changeovers between himself and the coworker from other inpatient phlebotomists who were going off shift when the coworker was. Transcript at 28. Claimant became "upset" during the meeting and stated he still "didn't want to talk with [the coworker]" and was not comfortable doing so at the meeting. Transcript at 28, 29. The supervisor responded several times during the meeting that "[claimant] did not need to be there [at the meeting] and she would not force [him] to [stay]." Transcript at 30; *see also* Transcript at 12, 13. The supervisor never told claimant that if he did not communicate with the coworker during the meeting it would be considered a violation of the employer's standards. In response to claimant's reluctance to speak at the meeting, the supervisor told him "we could just stop the meeting, and [the supervisor] would follow up with [claimant] the next day." Transcript at 13. The meeting then ended and claimant returned to work.

(9) On January 22, 2016, after the meeting concluded, the employer discharged claimant for allegedly refusing to cooperate in the mediation efforts during the January 22, 2015 meeting and refusing to communicate with the coworker. Transcript at 5; Exhibit 1 at 2.

**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).

Claimant's reluctant to speak with his coworker, and his concern that she would use any future negative communications by him as the basis for another complaint appeared sincere. Significantly, the employer did not contend that the coworker's prior complaint against claimant was legitimate, or was not in retaliation for his having made prior complaints about the coworker's work. While the employer's witness generally expressed concern that claimant might not be able to perform his work adequately if he was unwilling to speak with the coworker whom he was relieving at shift change, the witness did not rebut claimant's contention that he had been able, and would be able in the future to obtain the patient information he needed at shift change from other inpatient phlebotomists who were going off shift. Moreover, this record fails to show that claimant had refused or failed to communicate with his coworker; rather, the coworker was the one who had refused to speak with claimant when he attempted to ask her about work-related matters. On these facts, the employer did not demonstrate that claimant's reluctance to speak with his coworker was unreasonable, or that it violated the standards of behavior it expected of him.

To the extent the employer discharged claimant because of claimant's alleged failure to participate fully in the mediation meeting on January 22, 2016, the employer did not show that claimant's alleged failure was misconduct. At the meeting, claimant stated in detail the reasons he mistrusted the coworker, and why he was unwilling to communicate with her. The employer's witness, claimant's supervisor, did not contend that either she or her supervisor insisted claimant address the coworker during the meeting, or told claimant if he did not, the employer would consider him to have violated the employer's standards. Rather, from what the supervisor stated to claimant, it was reasonable for claimant to conclude that, although the employer would have preferred him to speak to the coworker, he had permission to leave the meeting and his supervisor would follow up with him the next day. On these facts, the employer did not demonstrate that claimant was reasonably aware that he was violating the employer's reasonable standards during the January 22, 2015 meeting. The employer did not show that claimant's behavior during the January 22, 2015 meeting was a willful or a wantonly negligent violation of the employer's reasonable standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-55225 is affirmed.

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

**DATE of Service: April 25, 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](http://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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