

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0674

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #170519). Claimant filed a timely request for hearing. On May 24, 2016, ALJ Micheletti conducted a hearing, and on June 1, 2016 issued Hearing Decision 16-UI-60784, concluding the employer discharged claimant, but not for misconduct. On June 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Supported Independence Services of Oregon LLC employed claimant from March 15, 2015 until March 15, 2016 as a program manager for two of its residential home caregiving facilities.

(2) The employer expected claimant to report to work and clock in at the work site where she was scheduled to begin her shift. Claimant was not permitted to clock in remotely from home unless she had permission from the employer. The employer expected claimant to ensure the health and safety of the clients who lived in the residential home by ensuring she and the home's caregivers recorded documentation of clients' doctor visits and medication needs in a timely manner, and provided the clients with necessary care and medical attention. Claimant understood the employer's expectations.

(3) Claimant often worked off-site because one of her duties was to transport clients to work, appointments and activities such as Special Olympics.

(4) Claimant's work performance was affected by the impact of family matters, including a death and problems with her spouse. Claimant took time off work to address the family matters, but was not able to resolve the issues during her time off.

(5) Before February 18, 2016, the employer discovered that documentation regarding a client's doctor appointment was missing, and that a follow-up appointment did not occur for that client. The employer also discovered that claimant did not ensure that staff addressed another client's medical concern or document another client's symptoms to ensure the client's medication was administered correctly.

Dental appointment documentation was missing for another client, and as a result, claimant did not order medication prescribed for that client. Another client did not have a physical exam when it was due. On February 18, claimant's supervisor met with claimant and counseled her regarding the employer's expectations and the issues it discovered prior to February 18, 2016. The employer reviewed claimant's job description and duties with her, and reviewed ways she could improve her work performance.

(6) Claimant tried to improve her work performance and clients' medical documentation was recorded in a timely manner by taking photographs of the paperwork after each appointment, giving it to staff and directing them to record the paperwork, and reviewing the client records when she had time to do so. Claimant reorganized her schedule to allow her more time for recordkeeping.

(7) On February 22, 2016, a county caseworker conducted a monitoring visit of the employer's client records and found errors for the client records in the homes where claimant worked. Claimant left work early on February 22 and was absent from work from February 23 through 26. The employer was dissatisfied when, one week after the caseworker's visit, claimant had not corrected the errors discovered by the county caseworker. Claimant did not know about the errors until March 1, 2016, and the errors were corrected at that time.

(8) Claimant's supervisor had told claimant to conduct and document daily "check-ins" with a client. On March 3, 2016, claimant told her supervisor she had not been doing the "check-ins" because she had not had time. Transcript at 29.

(9) On March 10, 2016, the employer discovered that claimant failed to schedule a three-month follow-up appointment for a client following an appointment in 2015. The follow-up appointment was two months overdue. The error resulted from a failure to record documentation from the original appointment, which claimant had attended with the client. Exhibit 1 at 5.

(10) On March 11, 2016, claimant was late picking up a client for an appointment. Also on March 11, 2016, the employer discovered documentation from a client's doctor appointment in August 2015 was not in the client's records. Claimant had attended the appointment with the client. Exhibit 1 at 5. Claimant's supervisor also discovered that claimant had not completed a schedule for a client that the supervisor had requested one week earlier.

(11) On March 12, 2016, the employer's director drove by claimant's work site during claimant's shift and did not see claimant's car parked there. The supervisor believed claimant clocked in remotely rather than from the residential home that day. Claimant left the residential home temporarily after she reported to work to complete a work-related errand.

(12) On March 15, 2016, the employer discharged claimant for failing to adequately perform her job duties.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It is undisputed that claimant did not meet the employer's expectations that she maintain accurate, current records for the employer's clients, and ensure that the clients' medical needs were met in a timely manner. However, for claimant's conduct to be considered misconduct that disqualifies her from receiving unemployment insurance benefits, the record must show by a preponderance of the evidence that claimant inadequate work performance was due to willful or wantonly negligent conduct. The record in this case fails to show that it was, because each instance of poor performance can be attributed to the high demands of claimant's job, time constraints that resulted from claimant having to transport clients, and the impact of claimant's personal life on her work. The employer and claimant agreed that claimant was not capable of performing her job duties under the circumstances. Transcript at 18-19. Moreover, rather than showing a conscious indifference to the consequences of her actions, claimant attempted to improve her performance by asking for help from her assistant, changing her schedule to provide more time for recordkeeping, and asking the employer for additional drivers to reduce claimant's driving time and increase time for recordkeeping. We conclude that the employer failed to meet its burden to demonstrate that claimant's inability to keep accurate client records and ensure their medical care was completed on time resulted from claimant's conscious disregard of the employer's interests. Instead, we find that claimant's inefficiency resulted from a lack of job skills and other factors beyond her control, and therefore did not constitute misconduct under OAR 471-030-0038(3)(b).

Regarding the employer's assertion that claimant clocked in remotely to work on March 12, 2016, claimant denied the employer's allegation and testified that she clocked in on time at the work site that day. Transcript at 46. The employer's director did not see claimant's vehicle at the work site. However, claimant left the work site to complete a work-related errand. The employer presented evidence that its global positioning system (GPS) showed that claimant clocked in remotely from her home on March 12. Transcript at 9, 52-53. However, there is nothing in the record that establishes the accuracy of the employer's GPS equipment or the alleged information from it for March 12, 2016. Absent a reason to disbelieve claimant or the employer's witnesses, and because the GPS evidence is of limited reliability, the evidence of whether claimant clocked in from home on March 12 is no better than equally balanced, and the employer has thus failed to establish that it is more likely than not that claimant clocked in to work remotely on March 12.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-60784 is affirmed.

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

DATE of Service: July 13, 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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