

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0693

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93853). The employer filed a timely request for hearing. On June 6, 2016, ALJ Micheletti conducted a hearing, and on June 7, 2016 issued Hearing Decision 16-UI-61201, affirming the Department's decision. On June 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the entire hearing record, and the parties' written arguments to the extent they were based on the hearing record, when reaching this decision.

EVIDENTIARY MATTER: The ALJ admitted Exhibits 1 and 2 into evidence without objection at hearing. However, the ALJ failed to mark those documents. Since the ALJ described the content of Exhibits 1 and 2 during the hearing and the documents were readily identifiable, EAB marked the documents as a clerical matter. Audio Record at 2:51 to 4:19.

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant as a hospital cook from November 7, 2010 until March 14, 2016.

(2) The employer expected claimant to maintain a professional standard of conduct, including treating his coworkers with courtesy and respect. Claimant understood the employer's expectation.

(3) On December 2, 2015, the employer gave claimant a written warning after a coworker overheard claimant call her and another coworker "lazy" on November 28, 2015 when they refused to help claimant with a work task. The warning reminded claimant to be courteous and respectful towards his coworkers.

(4) On February 22, 2016, claimant commented to a coworker who had overcooked a turkey that the coworker "had not been educated in" how to cook a turkey and keep it warm. EAB Exhibit 2 at 2. The

coworker was offended by claimant's comment and complained to the employer. On February 29, 2016, the employer gave claimant a warning, and the human resources representative told claimant to avoid conversations with his coworkers that might cause a conflict.

(5) On March 1, 2016, the employer issued a final written corrective action to claimant after the two coworkers claimant called "lazy" on November 28, 2015 complained that claimant refused to engage in conversation with them.

(6) On or about March 8, 2016, the human resources staff person who gave claimant the warning on March 1 greeted claimant as she was leaving the employer's café and claimant was entering it. Claimant felt upset about the recent discipline he had received and did not return the greeting. The staff person walked back into the café and said "hi" to claimant again. Again, claimant did not return the greeting.

(7) On March 14, 2016, the employer discharged claimant for failing to greet the human resources staff person in the employer's café.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 for failing to return the greetings from the human resources staff person. The employer had a right to expect claimant to treat his coworkers in a courteous and respectful manner. However, claimant testified that he did not greet the staff person when she said "hi" to him in the hospital café because he was "so upset still" about how the staff person had handled the complaints that lead to claimant's warnings, and believed the employer would condone his attempt to avoid conflict by refusing to "engage" with the staff person while he was still upset. Audio Record at 34:12 to 35:46. Claimant also testified he did not know that a failure to greet the staff person could lead to his discharge. *Id.* The record fails to show that claimant knew from prior experience or warnings that failing to return a greeting from the human resources staff person in the employer's café when they were not discussing a work matter would violate the employer's expectations. Nor do we find the employer's expectations to be so obvious that claimant should have known the expectation as a matter of common sense. Although claimant violated the employer's expectations regarding courtesy when he failed to greet the staff person, claimant acted on the basis of his good faith belief that the employer would excuse his attempt to

avoid conflict when he was upset. Thus, regardless of the fact that the employer did not, in fact, condone or excuse the conduct, claimant's good faith error in the final incident was not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-61201 is affirmed.

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

DATE of Service: July 19, 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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