EO: 200
BYE: 201714

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

303
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0814

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73032). Claimant filed a timely request for hearing. On June 22, 2016, ALJ Ballinger conducted a hearing, and on June 23, 2016 issued Hearing Decision 16-UI-62386, affirming the Department's decision. On July 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Department of Justice employed claimant from February 28, 1995 until April 14, 2016, last as a paralegal in the Civil Enforcement Division.

(2) The employer expected claimant to perform her assigned duties adequately and promptly. Claimant understood the employer's expectations as a matter of common sense and as she reasonably construed them.

(3) On July 16, 2014, the employer issued a letter of expectation to claimant setting out how it wanted her to perform her duties. On February 10, 2015, the employer issued a letter of reprimand to claimant for certain alleged inadequacies in the billings she prepared for client agencies, for missing deadlines and for unprofessional behavior. On May 28, 2015, the employer issued a financial sanction to claimant and reduced her pay for allegedly violating the employer's client confidentiality standards. In early December 2015, one of claimant's coworkers reported several concerns about claimant's performance and workplace behavior to the employer. On January 12, 2016, the employer convened a meeting with claimant to investigate the reported concerns. The employer did not place claimant on leave as a result of its ongoing investigation.

(4) On Thursday, January 14, 2016, at around 4:00 p.m., an assistant attorney general (AAG) with whom claimant worked sent claimant an email asking claimant to prepare a subpoena for a medical professional to secure his appearance at a placement hearing for a minor child scheduled for January 27, 2016. The AAG also asked claimant to confirm that the address the employer had for the witness and

where the subpoena would be sent was correct. Claimant prepared the subpoena on Friday, January 15, 2016. The AAG with whom claimant worked was out of the office that day, and claimant did not seek to have an AAG who was in the office sign the subpoena so it could be mailed out that day. On Monday, January 18, 2016, neither claimant nor the AAG worked because that day was a federal holiday, Martin Luther King Day, and the employer's workplace was closed.

(5) On Tuesday, January 19, 2016, the workplace was open and claimant performed an internet search to confirm that the address the employer had for the medical professional the AAG wanted to subpoena was accurate. Claimant had the AAG sign the subpoena in preparation for its issuance. At that time, the AAG asked claimant to contact the medical professional to verify that the address shown on the subpoena was accurate since the AAG questioned the correctness of it. The AAG also asked claimant to prepare subpoenas for two additional witnesses and to contact them to confirm the accuracy of their addresses. Claimant performed internet searches to determine the accuracy of the addresses for the two additional witnesses that were subpoenaed and asked a law clerk to call the subpoenaed witnesses to confirm the accuracy of the addresses. Later, claimant asked the law clerk if she had contacted the witnesses, and the law clerk said she had. The subpoenas were then mailed out on January 19, 2016, eight days before the hearing at which the witnesses' testimonies were sought. Somehow, copies of the issued subpoenas were not stored in the employer's document management system, when such storage was a standard workplace practice.

(6) Sometime before the hearing on January 27, 2016, the AAG contacted claimant and told her that one or more of the three subpoenaed witnesses had just received the subpoenas and, since they had not previously been aware that subpoenas were going to be issued, they had not kept the hearing date open and were not available to testify. None of the three witnesses for whom claimant had prepared the subpoenas received a subpoena in sufficient time to attend the January 27, 2016 hearing. That hearing needed to be rescheduled and did not occur until approximately five weeks later.

(7) On January 29, 2016, the employer placed claimant on administrative leave, principally because it considered the manner in which claimant handled the issuing of the three subpoenas to be such seriously deficient job performance that it could no longer trust claimant to discharge her duties.

(8) On April 14, 2016, the employer discharged claimant.

CONCLSUSIONS 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. 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. The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-62386, the ALJ concluded that the employer demonstrated that it discharged claimant for misconduct. The ALJ reasoned first that it was appropriate to disregard claimant's testimony about matters in dispute since claimant had initial difficulty in recalling the correct sequence of events and some of the information in claimant's hearing testimony might not have been included in prior statements she gave to the employer. Hearing Decision 16-UI-62836 at 1-2. The ALJ further reasoned, based on evidence the employer offered, that claimant willfully violated the employer's standards when she failed to complete "the assigned work [in issuing the subpoenas for the January 27, 2016 hearing] in a timely manner" and she failed to "preserve copies of the [subpoenas]" in the employer's document management system. Hearing Decision 16-UI-62836 at 7. We disagree.

At the outset, the employer presented evidence about many instances in which claimant allegedly violated the employer's performance standards in addition to the matter of the subpoenas for the January 27, 2016 hearing. However, while his decision was implicit, the ALJ appropriately limited the misconduct inquiry to the subpoenas. The testimony of the employer's witness made clear that the subpoenas constituted the final instance of alleged misconduct and the employer considered claimant's alleged dereliction in connection with the subpoenas to have raised a "performance concern that was egregious enough that management immediately felt that the trust [the employer had] in [claimant] was broken and [it] could no longer have her in the workplace." Transcript at 11. Since claimant's alleged dereliction in connection with the subpoenas was the proximate cause of the employer's decision to discharge claimant, it is the proper focus of our misconduct analysis.

As a second matter, the ALJ should not have disregarded out-of-hand claimant's testimony and adopted that of the employer's witness in reaching his decision. Rather than her testimony being internally inconsistent, showing a lack of familiarity with the relevant events or suggesting deception, the record shows claimant was initially confused as to the precise sequence of events and the dates on which some events occurred, but readily corrected herself upon further questioning. Transcript at 49-50. None of the confusion involved matters significant to the claim that claimant engaged in misconduct and, on matters of significance, claimant's testimony was confident and clear. While claimant's testimony might have contradicted that of the employer's witness, that alone is no reason to doubt its accuracy, particularly since claimant presented first-hand information and the employer's evidence consisted largely of hearsay information. We therefore disagree with the ALJ's decision to ignore claimant's testimony.

In connection with claimant's alleged misconduct in handling the subpoenas for the January 27, 2016 hearing, the employer's witness specified that claimant did not act in a timely manner to prepare them and failed to follow the instructions of the AAG to call each subpoenaed witness before the subpoenas were mailed. Transcript at 12-14, 25-26. While claimant might not have prepared the subpoenas the same day she received the request to do so from the AAG, there was still almost two weeks before the hearing, and given that January 18, 2016 was a holiday, she did not finalize the subpoenas and send them out in the mail until January 19, 2016, which was still eight days in advance of the hearing. The employer did not present evidence that claimant was explicitly instructed at any time that she needed to expedite the preparation and mailing of the subpoenas or any facts from which it can be inferred claimant knew or should have known that if she mailed the subpoenas eight days before the hearing that was likely insufficient time for one or more of the witnesses to make arrangements to appear at the hearing. Absent a showing that claimant was on notice that mailing the subpoenas on January 19, 2016

was not performing that task with reasonable promptness, the employer did not meet its burden demonstrating that the length of time claimant took to prepare and mail the subpoenas was a willful or wantonly negligent violation of the employer's expectations.

In connection with the AAG's instructions to call the subpoenaed witnesses to confirm the accuracy of the addresses on the subpoenas, the employer did not present evidence that, for some reason, claimant was instructed that she alone had to make the calls and she could not enlist the law clerk to do so. While the employer presented some evidence in an attempt to discount claimant's testimony that she asked the law clerk to make those calls, principally that the law clerk did not list making such calls in her daily billings for January 19, 2016, the employer did not rule out that the clerk simply failed to accurately record her actions on January 19, 2016. Since the employer did not call the law clerk as a witness to directly impeach claimant's testimony and apparently never interviewed the law clerk about the truth of claimant's testimony that she asked the law clerk to call the subpoenaed witnesses, claimant's first-hand information outweighs the employer's speculation that she did not seek the assistance of the law clerk in telephoning the witnesses. Transcript at 63, 65; Exhibit 3 at 7. On these facts, the employer did not effectively rebut claimant's testimony and did not show that her asking the law clerk to call the witnesses was a willful or a wantonly negligent violation of the employer's expectations.

In connection with claimant's alleged failure to store copies of the prepared subpoenas in the employer's document management system, the employer did not contend that claimant actually did not prepare or mail the subpoenas, as requested, on January 19, 2016 or that the failure to store the copies was some type of covert action against the employer. Transcript at 29, 21. Claimant testified at hearing she did not know how it happened that copies of the subpoenas were not in the employer's document management system. Transcript at 52. Since no reason was offered as to why claimant would have knowingly failed to store copies of the subpoenas, it is as likely that claimant forgot to store copies or by some error her attempt to store them was not successful as that she knew they were not being stored and was indifferent to the consequences of her actions. Simple negligence, errors, inadvertent lapses or accidents of which a claimant is not aware at the time of occurrence are not accompanied by the consciously aware mental state necessary to establish wanton negligence. *See* OAR 471-030-0038(1)(c). Since the employer did not present evidence showing that claimant consciously neglected to store the subpoenas in the document management system, or consciously engaged in other conduct she knew or should have known would probably result in their failure to be stored, the employer did not meet its burden to establish that claimant acted willfully or with wanton negligence.

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

DECISION: Hearing Decision 16-UI-62386 is set aside, as outlined above.

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

DATE of Service: <u>August 24, 2016</u>

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.