

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0945

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74242). Claimant filed a timely request for hearing. On June 15, 2016, June 30, 2016 and July 20, 2016, ALJ Wyatt conducted a hearing, and on July 28, 2016 issued Hearing Decision 16-UI-64676, reversing the Department's decision. On August 15, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Stayton employed claimant from May 23, 2005 until April 20, 2016, last as its finance director. Claimant was responsible for overseeing the City's financial transactions, implementing financial controls against fraud or loss and maintaining financial records. Claimant supervised approximately five employees and reported to the city administrator.

(2) The City expected claimant to treat other employees reasonably. The City expected claimant to perform the duties of her position reasonably and capably. Claimant understood the City's expectations as a matter of common sense.

(3) From at least fiscal years 2011 through 2015, a panel selected the accounting firm that performed a yearly audit of the City's finances and certified the accuracy of its financial statement. For those fiscal years, the auditors determined that the City's financial practices, controls and the records it maintained were adequate.

(4) As of approximately 2014, claimant was the interim city administrator. In approximately 2014, the City hired a new city administrator and claimant assisted him as he assumed the functions of that position. Gradually, the new administrator was able to independently discharge the duties of his position without claimant's assistance. The new city administrator no longer wanted claimant to participate in city administration to the extent she had when she was facilitating his assumption of his duties. The working relationship between claimant and the city administrator deteriorated.

(5) Beginning in approximately 2014 or 2015, the city administrator told claimant he wanted her to adopt the “best practices” of the Government Finance Officers Association (GFOA) in overseeing the City’s finances and in the preparation of its budgets and financial statements. Claimant and the city administrator disagreed on the implementation of GFOA standards since the City was small, non-populous and did not have a large financial staff. However, sometime in September 2015, claimant attended a two-day training sponsored by GFOA to introduce her to GFOA standards and best practices, and how to begin implementing them in the preparation of the City’s annual budgets. This was claimant’s first formal training in GFOA standards.

(6) In late September 2015, the city administrator met with claimant to discuss her annual performance review. The city administrator found claimant’s performance to have been generally satisfactory. However, he advised claimant that she needed to be less harsh with the staff she supervised and to compliment them more often.

(7) On January 12, 2016, the city administrator rebuked claimant for becoming involved in a personnel matter after he instructed her that she should not be dealing with such matters. Shortly after, claimant telephoned a city council member and the city attorney, and told them the city administrator was creating an unacceptable work environment and she thought his management practices and style were counter-productive. Because claimant’s office door was open when she made those calls, other staff overheard the substance of her communications. The contents of claimant’s communications were reported to the city administrator. That same day, the city administrator called city representatives and, in light of claimant’s complaint about him, requested the initiation of an investigation into both his and claimant’s workplace behaviors. On January 19, 2016, the city council directed the city attorney to initiate the requested investigation. The city attorney contacted and retained a law firm, Bullard Law, to conduct the investigation. Beginning on January 20, 2016, an attorney from Bullard Law began conducting interviews of City employees, claimant and the city administrator as part of the investigation.

(8) On February 19, 2016, claimant met with a consultant from City County Insurance Services (CIS) as part of CIS’s audit of the City’s financial practices. CIS was the insurance agent for the City. When the CIS consultant interviewed claimant, she stated that the City’s financial practices conformed to generally accepted best practices.

(9) Sometime after approximately February 19, 2016, Bullard Law retained a certified public accountant (CPA) to perform an independent audit of the City’s financial procedures and controls as part of its investigation into claimant’s management of the finance department. Sometime later, the CIS consultant received preliminary findings from the Bullard investigation and the CPA’s audit of the City’s financial controls. The consultant concluded from those findings claimant had knowingly misled him when she stated that the City’s practices were in compliance with best practices.

(10) On March 3, 2016, the employer suspended claimant based on the preliminary results from the Bullard investigation.

(11) On March 30, 2016, Bullard Law issued the report of its investigation, including the results of the CPA’s audit of the City’s finances (the Bullard report). With respect to claimant, the Bullard report concluded that other employees generally thought she was “knowledgeable in her job” and very intelligent when it comes to finances.” Exhibit 1 at 66. The Bullard report stated some employees

considered claimant to have created a “stressful” work environment and thought she was “intimidating,” a “bully,” “harsh,” “yelled” at them and managed “by fear.” *Id.* However, other employees stated claimant did not “yell” and was “calm, thoughtful, incredibly helpful”, although she was “extremely direct” and “honest and forthcoming” in her communications. *Id.* 67. The Bullard report stated that the employees who were critical of claimant’s behavior did not report it to management due to fear of retaliation. *Id.* at 64. The Bullard report also stated there were no specific incidents of claimant’s alleged retaliation to review.

(12) With respect to the financial practices of the finance department, for which claimant was responsible, the Bullard report relied on the CPA’s audit. The audit found, among other things, that claimant was the sole point of contact for all City bank, investment and credit card accounts, claimant controlled and had access to the user logins and passwords of subordinate employees, there was a general lack of internal financial controls and formal financial policies, a lack of segregation of duties, and ineffective review and oversight in the finance department. Exhibit 1 at 73, 74, 145, 147. The audit found that these practices were inconsistent with accepted accounting standards. The audit concluded while there was “no indication of fraud or intentional wrongdoing” by claimant, the practices and controls in the Finance Department created “an environment and a set of circumstances that presents significant risk to the City for fraud, losses or significant errors to occur and potentially go undetected uncorrected.” *Id.* at 74. The audit also found the financial statements and working papers prepared by the independent auditors were deficient in certain particulars and inconsistent with generally accepted accounting principles. *Id.* at 156. The Bullard report recommended that action should be taken to correct the deficiencies that the audit identified in the City’s financial practices and controls, and that the City terminate its relationship with its current independent auditors. *Id.* at 78. The Bullard report also recommended that the City “hold [claimant] accountable” for her behavior, stated it was unlikely claimant could “effectively continue in the position of Finance Director” and stated “it is unlikely that [claimant] possesses the skills and leadership necessary to continue in the position of Finance Director.” *Id.*

(13) On April 20, 2016, the employer discharged claimant based on the Bullard report, relying principally on claimant’s alleged treatment of other employees, her alleged dishonesty with the CIS consultant and her alleged failure to adopt “best practices” and controls in her management of the City’s finances. Transcript at 7, 8, 10.

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).

At hearing, the City’s witness offered no evidence to justify the employer’s discharge of claimant other than the information contained in the Bullard report and the CPA’s audit. That witness did not appear to have any personal knowledge of the facts relevant to claimant’s discharge other than as described by that

report. The witness contended that the Bullard report, alone, was sufficient to establish that claimant engaged in misconduct for which the City discharged her. Transcript at 22.

With respect to the manner in which claimant allegedly treated those who worked with or for her, it was obvious that the employees interviewed and quoted in the Bullard report had markedly different views of claimant. *See and compare* Exhibit 1 at 66, 67. It cannot be concluded that the Bullard report sets forth a single consensus perception of how claimant treated other employees. While the Bullard report emphasized the finding that many employees feared claimant or claimant's retaliation, as if to suggest that claimant must have done something wrong to engender that reaction, none of those employees were apparently able to describe any specific incidents that gave rise to this reaction. *Id.* at 65. Moreover, although claimant conceded she might have been a "demanding" manager, she denied bullying or mistreating other employees. Transcript at 45, 46. Given claimant's first-hand denials, the dearth of specific facts in the Bullard hearsay report supporting the conclusion that claimant bullied or mistreated employees, the lack of any specific basis for others to fear retaliation from claimant, and the divergent opinions expressed by employees about the manner claimant behaved in the workplace, the City did not establish by a preponderance of the evidence that claimant consciously engaged in conduct she knew or should have known through prior training, experience, prior warnings or as a matter of common sense probably violated the City's expectations regarding her workplace behavior. The employer therefore failed to establish that claimant violated those expectations willfully or with wanton negligence.

Although the City stressed that claimant intentionally attempted to deceive the CIS consultant when she stated she thought the City financial practices were consistent with "best practices," claimant's testimony was unrebutted that she believed they were for a "city our size," and she spoke with the consultant before she knew the results of the Bullard investigation or the CPA's audit. Transcript 48. Given the apparent sincerity of claimant's denial and the lack of evidence that claimant knew specifically what the consultant meant when he inquired about "best practices," the employer did not meet its burden to show claimant was knowingly dishonest to the CIS consultant.

Whether or not the financial practices that claimant condoned in the finance department and the financial controls she put into place violated the City's standards is not an obvious matter. While the City's witness and the Bullard report contended claimant's failure to adopt "best practices" constituted such a violation, neither was clear on how claimant should have known what the "best practices" were, except the witness thought claimant would know as a result of "keeping up" with training. Transcript at 65. Claimant stated she thought the practices and controls she adopted in the Finance Department were appropriate for city as small as Stayton, and with only three employees staffing the accounting department she was limited in what could be done. Transcript at 48. The City's witness appeared to acknowledge the limitations claimant faced when he testified that "we [Stayton] are a small town and I understand that [not being able to follow best practices] does happen in a small town." Transcript at 60. Neither the Bullard report nor the auditor's report evaluated whether the practices and controls they found deficient were likely endemic to a city of Stayton's size, or whether Stayton even had the resources and staff to correct them in the manner that both reports recommended. On this record, the employer did not meet its burden to demonstrate that by the financial practices she condoned in the finance department, claimant consciously engaged in conduct she knew or should have known probably violated the employer's expectations. The employer therefore failed to establish that claimant violated its expectations willfully or with wanton negligence.

As a final matter, it does not appear that claimant engaged in misconduct either by retaining or continuing the City's relationship with its outside auditors. Claimant testified a panel made the decision about the auditing firm to retain, not her alone. Transcript at 50. As well, the City did not present any evidence suggesting or tending to suggest claimant was reasonably expected to participate in detail on an outside audit, or that she had the training and was expected to assess the audit for its sufficiency and compliance with generally accepted accounting principles.

Although the employer discharged claimant it did not establish by a preponderance of the evidence that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-64676 is affirmed.

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

DATE of Service: September 14, 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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