

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0954

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 111559). The employer filed a timely request for hearing. On July 26, 2016, ALJ Vincent conducted a hearing, and on July 28, 2016, issued Hearing Decision 16-UI-64668, affirming the administrative decision. On August 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) From February 18, 2009 until April 20, 2016, Veterans' Care Centers of Oregon employed claimant as an activities aide at its residential facility in the Dalles, Oregon. Veterans' Care Centers provides skilled nursing, rehabilitative, and Alzheimer's and dementia-related care to eligible veterans and their family members in a residential facility.

(2) On April 12, 2016, at approximately 4:44 p.m., while claimant was attempting to prevent a resident with dementia from leaving the residents' unit and entering the main hallway, the resident shut a door on claimant's elbow. Claimant's elbow was bruised and began to swell. She told the registered nurse on duty that the resident had shut her elbow in the door and she asked the registered nurse on duty for an elastic bandage. Transcript at 34. A coworker then helped claimant wrap her swollen elbow with the bandage. Claimant did not believe the injury was severe enough to require any additional medical care, and did not believe she was required to report the resident's behavior or her injury to her supervisor or other manager.

(3) When claimant reported for work on April 13, 2016, a coworker told her she should have her elbow checked and fill out the forms to make a worker's compensation claim "just in case." Transcript at 35. Claimant believed that she needed to seek medical care for her injury if she was filing a worker's compensation claim, and went to a hospital emergency room for treatment of her elbow.

(4) In accordance with its practice of reviewing all incidents involving residents, the employer's assistant director of nursing spoke with other employees who had been present when the April 12 incident involving claimant and the resident occurred. The assistant director of nursing also reviewed video camera recordings of the area where claimant and the resident interacted. Based on her interviews with the witnesses and review of the video camera footage, the assistant director of nursing concluded that the resident did not close a door on claimant's elbow. Exhibit 1.

(5) On April 20, 2016, the employer discharged claimant for falsely claiming that a resident had injured her, and for failing to notify the charge nurse or other manager "of an event involving a resident resulting in harm to another." Exhibit 1, 4/20/16 letter.

(6) By letter dated April 29, 2016, the employer's worker's compensation insurance carrier denied claimant's claim for an April 12, 2016 injury to her elbow because the injury "did not arise out of or occur within the course of your employment." Exhibit 1, 4/29/16 letter from the SAIF Corporation.

CONCLUSION AND REASONS: We agree with the ALJ, and conclude that 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 discharged claimant for violating its expectations by allegedly making a false report that a resident injured her on April 12, and by failing to notify the charge nurse or other manager about this incident.¹ As a matter of common sense, claimant understood that the employer required her to provide it with truthful and accurate information regarding workplace matters. Claimant and the employer provided contradictory accounts of the April 12 incident that resulted in her discharge, however. Claimant testified that the resident shut a door on her elbow on April 12, bruising her elbow and causing it to swell. Claimant sought medical care for her elbow on April 13 only after a coworker suggested she file a worker's compensation claim. The employer made an extensive review of video camera recordings of the area where claimant and the resident interacted on April 12, and found no proof that the resident shut the door on claimant's elbow. Absent any reason to doubt claimant's credibility or the veracity of the employer's review of video camera footage (and we find none), the evidence regarding what occurred on April 12 is, at best, equally balanced. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Department*, 25 Or App 461, 550 P2d 1233 (1976). The employer failed to meet its burden that claimant falsely reported that a resident of the employer's facility injured her on April 12, 2016.

In regard to the employer's charge that claimant failed to report the April 12 incident, we note that the employer failed to provide evidence of any policy or procedure of which employees were aware that specified what type of incidents employees were expected to report, when they were expected to report

¹ We note that the reasons given for claimant's discharge in the employer's April 20, 2016 letter are contradictory. If, as the employer asserted, the resident did not injure claimant on April 12, claimant would have had no obligation to report this matter.

these incidents, and to whom they were expected to report these incidents. The only evidence regarding employees' reporting obligation was provided by claimant, who testified that she understood that she was expected to tell the nursing staff about incidents involving residents and any on-the-job injury she received. Transcript at 33, 37. Claimant fulfilled these expectations when, on April 12, she told the registered nurse on duty that the resident had closed the door on her elbow. The employer therefore failed to meet its burden to demonstrate that claimant violated its requirement by failing to report an on-the-job injuries and incident involving a resident.

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-64668 is affirmed.

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

DATE of Service: September 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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