

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1020

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 120623). Claimant filed a timely request for hearing. On August 10, 2016, ALJ Wyatt conducted a hearing, and on August 12, 2016, issued Hearing Decision 16-UI-65585, concluding that the employer discharged claimant, but not for misconduct. On September 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was relevant and based on the record.

Evidentiary Matter: At the August 10 hearing, the ALJ admitted documents submitted by the employer into the record as Exhibit 1. On this record, however, the exhibits admitted were not marked. Accordingly, we have marked Exhibit 1 based on the ALJ's description. Exhibit 1 consists of the following eight pages: a fax transmission cover sheet, a cover letter to the ALJ, a copy of the notice issued for the August 10 hearing, a copy of a June 27, 2016 letter terminating claimant's employment, a copy of a July 31, 2015 "Supervision," a copy of a January 14, 2016 "Supervision," and a copy of an "Employee Ethics Statement" issued by the employer and signed by claimant on September 29, 2014.

FINDINGS OF FACT: (1) From September 29, 2014 until June 27, 2016, Columbia Care Services, an agency that provides mental health services, employed claimant as an intensive case manager.

(2) The employer required that employees agree to comply with an "Employee Ethics Statement" which included, among other expectations, the expectation that employees "maintain professional and appropriate business relationships when doing business on behalf of [the employer]," and that they "[a]pproach organizational and operational duties with a positive attitude and constructively support open communication..." Exhibit 1 at 7-8. On September 29, 2014, claimant signed a copy of the "Employee Ethics Statement" to indicate that she had read and reviewed the statement, and agreed to comply with its requirements. Exhibit 1 at 8.

(3) Sometime in January 2016, claimant asked her supervisor for assistance in obtaining information from a hospital that treated the employer's clients. The hospital had changed its policies and told claimant it could not give her the information she needed. The supervisor told claimant to tell the hospital that a particular Oregon Administrative Rule required that the hospital give claimant the information she was requesting. Claimant cited the rule to a hospital representative, who disliked the manner in which claimant interacted with the representative. Transcript at 23. A hospital representative subsequently complained to the employer about claimant. On January 21, 2016, claimant's supervisor presented her with a "Supervision" document which stated that a hospital representative had complained to the employer that claimant was "perceived by [hospital] office staff as being 'rude and demanding.'" Exhibit 1 at 6. The "Supervision" instructed claimant to be "attentive to her tone of voice during phone interactions with [the hospital] and other community partners." *Id.*

(4) On June 22, 2016, claimant participated in a staff meeting with her supervisor and other employees. Because two of the meeting participants sat at desks next to the chair in which claimant sat, and another meeting participant sat behind claimant, claimant had to turn her chair around to address the meeting participants. Claimant's supervisor believed that claimant was "somewhat abrupt and dismissive" in answering questions from the employee who sat behind claimant, that claimant's body language indicated a disrespectful attitude toward this coworker, and that claimant turned away from the coworker. The coworker commented that there was tension in the room, and the supervisor told claimant that her body language was not helpful. Claimant denied that her body language was inappropriate or that she had displayed a disrespectful attitude in answering her coworker's questions. The meeting participants were eventually able "to get the meeting back on track and complete the meeting." Transcript at 7.

(5) After the June 22 meeting, claimant spoke with the coworker who had complained about claimant's behavior at the meeting. The coworker told claimant that she believed that claimant had created "tension" at the meeting. When claimant asked for specific examples, the coworker told claimant that claimant had rolled her eyes. Claimant denied that she had rolled her eyes. The coworker then said that claimant seemed to be indicating that she did not need the coworker's help. Claimant told the coworker that she had needed and wanted the coworker's assistance to understand what the coworker was asking of claimant. Transcript at 21-22. After this conversation, the coworker reported to claimant's supervisor that claimant had continued to be dismissive of the coworker's questions and concerns. Transcript at 8.

(6) On June 27, 2016, the employer discharged claimant. In the letter notifying claimant of her discharge, the employer explained the reasons for its action as follows:

[The employer] has provided supervision and supports to help assist you in meeting professional relations standards; however, there has been a continued struggle in this area. This has directly impacted your ability to be a true team player and work with our program as a team member. In addition, we have received feedback from our community partners that your interactions with them lack professionalism and have cause [sic] disruptions for them. Therefore, you are not meeting the overall customer service goals that the team strives to achieve. Exhibit 1 at 4.

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 connected with work. 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.

In its letter notifying claimant of her discharge, the employer provided two reasons for its actions – her inability to meet “professional relations standards” in interactions with her coworkers, and her “lack of professionalism” in working with the employer’s “community partners.” The problems with the employer’s “community partners” cited by the employer is an apparent reference to a January 2016 complaint a hospital made about claimant’s behavior. The employer did not discharge claimant until after the June 24, 2016 meeting, however. We therefore consider claimant’s behavior at this meeting the proximate cause of her discharge and the proper focus of our misconduct analysis.

The employer expected claimant to maintain a positive attitude when performing her work, communicate openly with her coworkers, and treat coworkers with respect. Claimant understood these expectations, some as matter of common sense and others because they were specified as requirements in the “Employee Ethics Statement” with which claimant agreed to comply when she was hired. The employer alleged that claimant violated these expectations at a June 24 staff meeting by behaving in a deliberately hostile manner toward a coworker. According to claimant’s supervisor, claimant answered the coworker’s questions in an “abrupt and dismissive” manner, rolled her eyes when the coworker spoke, and turned away from the coworker. Transcript at 6. Claimant, however, testified that she did not roll her eyes when the coworker spoke, and that she may have appeared to turn away from the coworker because she needed to turn her chair around to speak to everyone participating in the meeting. Transcript at 20. Claimant also testified that that she had no intention of being disrespectful or dismissive of anyone at the meeting, but was only asking that the other meeting participants help her understand what was expected of her. Transcript at 22. The evidence regarding whether claimant consciously engaged in behavior she knew or should have known was disrespectful at the June 24 meeting is equally balanced. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is party that carries the burden of persuasion in a discharge case. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to meet its burden to demonstrate that claimant willfully, or with wanton negligence, violated its expectations regarding workplace behavior at the June 24 staff meeting.

The employer discharged claimant, 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-65585 is affirmed.

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

DATE of Service: September 29, 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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