

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1075

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103540). Claimant filed a timely request for hearing. On September 13, 2016, ALJ S. Hall conducted a hearing, and issued Hearing Decision 16-UI-67402, reversing the Department's decision. On September 16, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From June 15, 2015 to July 20, 2016, Jackson County employed claimant as a qualified mental health associate in a residential treatment facility for mentally ill clients.

(2) Staff shared computers at the employer's treatment facility. The employer expected that if a prior computer user failed to log off from private accounts that he or she had accessed, the subsequent computer user would not access any information in those accounts and would immediately log the prior user off. Claimant understood the employer's expectations.

(3) Sometime before March 28, 2016, a coworker accused claimant of violating the employer's nondiscrimination policy. Claimant did not think she had acted in violation of that policy, but the employer orally reprimanded her. Claimant thought the coworker had intended to undercut her position in the workplace by making the accusation. As time passed, claimant tried to get along with the coworker.

(4) On June 21, 2016 at approximately 9:40 p.m., claimant intended to use one of the shared computers to email an order for supplies. That computer had been used earlier that evening by the coworker who had accused her of violating the nondiscrimination policy in March 2016. The computer was in hibernation mode and claimant wiggled the mouse to activate it. As claimant did so, she observed that the coworker's email account was open and saw that the worker had sent an email that included the words, "Issues with [claimant]." Audio at ~25:25, ~33:27. Claimant immediately closed the email and

logged the coworker off from the coworker's open account. Claimant did not read the email or peruse the account to discover any other emails that the coworker might have sent. Claimant was upset about what she had seen because she did not think there were any current issues between her and the coworker. Another coworker was in the area where the computers were located and claimant told him what she had seen and asked if the first coworker had mentioned having any problems with claimant.

(5) On June 22, 2016, the coworker with whom claimant had spoken on June 21, 2016 reported to the program manager the conversation he had with claimant on June 21, 2016 and that he thought claimant had failed to immediately close the first coworker's email account when she found that it was open. On June 22, 2016, the employer spoke with claimant about whether she had immediately closed the coworker's open email account or whether she had read the email. Claimant denied she read the email and stated she had immediately closed the account.

(6) On July 30, 2016, the employer discharged claimant for failing to immediately close the coworker's open email account, for reading the open email and for not telling the truth about it on June 22, 2016.

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 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. 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).

The employer's witness, the program manager, contended that the second coworker, whom claimant had spoken with on June 21, 2016, had told him that he observed claimant reading the first coworker's email when she discovered that it was open. Audio at ~10:54, ~11:52. Claimant denied she had done so, and testified she closed the first coworker's email and email account immediately after seeing the words, "Issues with [claimant]." Audio at ~25:25, ~33:27, ~34:13. The program manager had only hearsay from the second coworker to present in support of the employer's contention that claimant had failed to immediately close the first coworker's email and email account. Claimant's first hand evidence about her actions is entitled to greater weight than the employer's hearsay evidence about her actions. On this record, the employer did not meet its burden to show claimant violated the employer's expectations by failing to immediately close the first coworker's email and her email account upon discovering that it was open.

The employer's program manager also contended that when he interviewed claimant on June 22, 2016 about her actions in connection with the open email, she first stated she had closed the email immediately and later stated she had observed the email to state, "Issues with [claimant]," which he interpreted as conflicting with her first statement that she had "immediately" closed the email and evidencing that she had been dishonest earlier in the interview. Audio at ~14:22, ~14:52. Claimant's further explanation does not necessarily indicate dishonesty, or that she continued reading the email after she was aware it was open. It is quite plausible that claimant become aware the coworker's email was open and saw the three words of it simultaneously with this realization. Absent evidence that

claimant actually continued reading the email after she was aware it was open, the employer did not show that she did not immediately close it or that her comment that she immediately closed it was an intentional deception. The employer did not meet its burden to show that claimant lied about what she had done in response to realizing the email was open.

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

DECISION: Hearing Decision 16-UI-67402 is affirmed.

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

DATE of Service: October 17, 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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