

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1076

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 133731). The employer filed a timely request for hearing. On August 31 and September 13, 2016, ALJ Murdock conducted a hearing, and on September 14, 2016, issued Hearing Decision 16-UI-67445, affirming the administrative decision. On September 16, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From December 28, 2004 until May 24, 2016, St. Charles Health System employed claimant as a phlebotomist.

(2) On May 8, 2014, claimant's supervisor gave her a "Final Written Warning" for an incident that occurred on May 6, 2014. In the warning, claimant's supervisor described a May 6 argument between claimant and a coworker that occurred in the emergency department in an area where they could be overheard by patients and their families. According to claimant's supervisor, the argument involved "yelling, fowl [sic] language and disrespect to one another"; the supervisor said that claimant's behavior as "unacceptable." Claimant's supervisor told claimant that this would be her "only written warning" and that the supervisor "will not continue to employ a person that exhibits this type of behavior." Exhibit 6.

(3) In a form dated January 30, 2015, claimant's supervisor rated claimant's work performance for the 2014 calendar year. In the evaluation form, claimant's supervisor found that claimant had "met expected results" in all goal areas, except that she had demonstrated "inconsistent results" in achieving the goal of showing "attitudes, behaviors and values that promote a cooperative, collaborative and mutually supportive workplace." Exhibit 6.

(4) In a form dated January 26, 2016, claimant's supervisor rated claimant's work performance for the 2015 calendar year. In the evaluation form, claimant's supervisor concluded that claimant had "met expected results" in all goal areas. In the narrative portion of the evaluation, claimant's supervisor

stated that claimant was “working on maintaining her positive outlook during a time of continuous change in the healthcare environment.” Exhibit 6.

(5) On February 22, 2016, claimant sent an email to her supervisor in which she protested a new procedure that the supervisor had implemented, and sarcastically stated that she was “amazed you [the supervisor] were able to change a procedure so quickly! Amazed!” Exhibit 2. On March 2, 2016, claimant’s supervisor gave her a written warning about claimant’s email, describing the email as including “sarcasm and complaints” about the supervisor’s performance, and showing a “disregard for [the supervisor’s] position and authority.” Claimant’s supervisor warned that “[s]imilar conduct in the future will not be tolerated,” and that the supervisor would “not continue to employ any caregiver that demonstrates a persistent lack of professionalism.” Claimant’s supervisor placed claimant on a “corrective action plan” which, among other things, directed claimant to “be courteous and cooperative with supervisors and other staff” and use established procedures to resolve any conflict that might arise. *Id.*

(6) On May 10, 2016, claimant became frustrated and stressed by the busy workload with which she and her coworkers were confronted. A coworker concluded that claimant had spoken angrily and inappropriately to her, and complained to the employer’s labor and caregiver relations specialist about claimant’s behavior.

(7) The employer investigated the May 10 incident, and concluded that that claimant had behaved in a discourteous and disrespectful manner toward the coworker. On May 26, 2016, the employer discharged claimant for engaging in an “unprofessional exchange of words” with her coworker on May 10. Exhibit 1. In the letter notifying claimant of her discharge, claimant’s supervisor noted that claimant had been formally warned about similar conduct on May 8, 2014 and March 2, 2016, but had “not corrected this pattern of behavior.” *Id.*

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 a discharge case, the employer has the burden to demonstrate willful or wanton negligence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for engaging in an angry argument with a coworker on May 10, 2016. Claimant, as a matter of common sense and because she had been warned about inappropriate behavior with coworkers on March 2, 2016 and May 8, 2014, knew that the employer expected her to interact with her coworkers in a respectful and courteous manner. According to the employer’s

witnesses, claimant engaged in a “negative interaction” with a coworker on May 10, during which claimant became angry and used foul language. 8/31/16 Hearing Transcript at 14. Claimant, however, denied that her conduct on May 10 had been inappropriate or unprofessional, and also denied that she used foul language. Claimant testified that she and her colleagues were faced with a busy and stressful work environment on May 10, that she did not want to be “negative” toward her coworkers, and that she showed frustration, but no anger, in her dealings with the coworker who complained about her. 8/31/16 Hearing Transcript at 28-29. The evidence the employer presented about claimant’s behavior on May 10 consisted of testimony by the employer’s labor and caregiver relation specialist and a manager, neither of whom witnessed the May 10 incident, and whose understanding about what occurred on that date was based on the accounts of claimant’s coworkers. We conclude that claimant’s first hand testimony about the events of May 10 is entitled to greater weight than the hearsay testimony of the employer’s managers. The employer therefore failed to meet its burden to demonstrate that claimant willfully, or with wanton negligence, violated its expectations regarding workplace behavior on May 10.

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-67445 is affirmed.

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

DATE of Service: October 11, 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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