EO: 200
BYE: 201732

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

643
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1343

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 171729). Claimant filed a timely request for hearing. On November 9, 2016, ALJ S. Lee conducted a hearing, and on November 14, 2016 issued Hearing Decision 16-UI-71112, affirming the Department's decision. On December 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) SAIF Corporation employed claimant from June 6, 1994 until August 12, 2016, last as an EIAP specialist responsible for processing and making decisions on claims for benefits and responding to inquiries from insured employers.

(2) The employer expected claimant to comply with the employer's reasonable instructions. Claimant understood the employer's expectation as a matter of common sense.

(3) In 2013, claimant received a performance evaluation from the employer that concluded she did not meet certain expectations. In 2014, claimant received a performance evaluation that stated she "need[ed] development". In 2015, claimant received a performance evaluation that stated she was achieving expectations, and noted that she demonstrated "appropriate [knowledge] of EAIP rules and had [recorded] claim notes and justification detail [on claims] as appropriate." Exhibit 2 at 38, 102.

(4) Sometime before January 2016, claimant was on leave from work due to her own and her spouse's health conditions. In January 2016, claimant returned to full-time work. Sometime before or around

February 2016 claimant obtained a workplace accommodation from the employer based on depression and anxiety and her reaction to the stress she perceived in the workplace. The request for accommodation was supported by a certification from a mental health provider who was treating claimant for her conditions. The accommodation required, among other things, that claimant receive advance notice of workplace matters that might evoke stress in order to allow her time to adjust and formulate a non-emotional response to those matters, and also that she work on a flexible schedule or be allowed to telecommute. During at least all of 2016, claimant continued to see her mental health provider for therapy sessions.

(5) In February 2016, claimant was assigned a new supervisor. The new supervisor required claimant to change her work approach and to comply with the way in which he required claims to be processed and documented. Since claimant's previous supervisor's management style and interpretations of the claims process had been different from the new supervisor's, claimant became confused and sometimes did not know what the new supervisor expected of her in her work. Claimant considered the new supervisor's management style stressful. At around this time or shortly before, claimant's caseload was increased, and she became responsible for three new policy holders and several new return-to-work consultants.

(6) On March 2, 2016, claimant's mental health provider spoke with one of the employer's human resources representatives and expressed concern about claimant's response to her new supervisor, stating that she was "going back to full panic." Exhibit 2 at 17. The provider requested that claimant be assigned to another supervisor because of her panic reaction to the new supervisor's requirements and management style. Exhibit 2 at 18. The request was denied. *Id.*

(7) On April 13, 2016, claimant's supervisor met with her to discuss her performance. The supervisor told claimant that, as of that time, she was not meeting the employer's 2016 production goals of issuing sixty claim decisions each month or performing tasks related to sixty claims each month. Before that meeting, claimant had not known that her productivity was less than was expected or that the new supervisor was focused on quantitative productivity. Claimant's prior supervisor had been more lenient about productivity. After this meeting, claimant worked to improve her productivity. On May 5, 2016, claimant's supervisor met with her again and told her that while she had improved her productivity since they met in April 2016, the quality of some of her decisions was an issue. He told claimant that both the quantity and quality of her work needed to be considered to determine the adequacy of her performance.

(8) On June 20, 2016, claimant's mental health provider sent her to a specialist and claimant was diagnosed with Bi-Polar II disorder in addition to depression and anxiety. After this diagnosis, claimant's prescribed medications were changed and for some time she experienced significant side effects as a result of this change.

(9) On July 7, 2016, claimant's supervisor met with her to discuss her performance again. At this meeting, the supervisor questioned claimant about why she had placed certain claim files in a pending status when the employer had yet issued payment on them and told her that she was not meeting the employer's goals for timeliness. Claimant told the supervisor that she had been covering work for employees who were out of the office, and she thought it was permissible for her to categorize their files as "pending" if she had done all necessary work on them and all that remained was for the employer to pay the claim. The supervisor told claimant that the files needed to remain in "open status" until they were paid to maintain the accuracy of the employer's records.

(10) After July 7, 2016 and before July 28, 2016, claimant did not complete some reports on time, incorrectly entered information in some files that some work had been completed when it had not and incorrectly authorized two payments. When the supervisor questioned claimant about why this happened, he was not satisfied with her explanations.

(11) Before July 28, 2016, the employer had not issued any formal disciplinary warnings to claimant in the approximately 21 years she had been employed. On July 28, 2016, claimant's supervisor hand delivered a memorandum to her as well as a draft of a last chance agreement that would allow claimant to continue working only if she signed it. The memorandum listed several alleged past performance deficiencies by claimant that allegedly had persisted after she was counseled about them and stated that claimant needed to sign the enclosed last chance agreement by August 4, 2016 or she would be discharged. Exhibit 1 at 1-2. In addition to setting out performance goals under which claimant's employment would be continued, the last chance agreement required claimant to acknowledge that she had violated the employer's policies in several specified, that she had not corrected those performance deficiencies despite past counseling, that those deficiencies and violations were reasons to discharge her, that she had been able to "consult with anyone she desires about [the last chance agreement]" and that she agreed she was signing the agreement "free of any duress or coercion" Exhibit 2 at 3, 5. The supervisor did not at that time tell claimant what the documents he had delivered to her were or discuss the documents with her because of the accommodation in place which required the employer to provide ample time for claimant to deal with matters that were anticipated to be anxiety-provoking.

(12) Shortly after July 28, 2016, claimant read the employer's memorandum to her and the last chance agreement. She emailed them to her mental health provider to assist her in reviewing them and in formulating her response because she was in a "panic." Exhibit 2 at 75. Claimant disagreed that she had violated the policies of the employer in the manners stated in the last chance agreement. On August 1, 2016, the mental health provider notified the employer that the provider was authorizing a leave for claimant based on her mental health condition. Exhibit 2 at 76. In response to emails from claimant about her reaction to the last chance agreement, the provider prepared several suggested questions for claimant to ask the employer about the last chance agreement to determine the factual bases for the allegations, and to challenge them and the conclusion that claimant had violated the employer's policies. Exhibit 2 at 75-79. The provider urged the employer in a separate communication to provide responses to claimant's questions before the employer met with claimant to formally discuss the last chance agreement. Exhibit 2 at 75. On August 2, 2016, claimant sent an email to the employer detailing her questions about the last chance agreement and asking for specific examples of her alleged past performance violations. Exhibit 2 at 82. On August 3, 2016, claimant sent another email to the employer asking that the employer to provide answers to her questions before she met in person with the employer because her mental health conditions required her to have "clear and concise explanations" before any such meeting so she could adequately participate in any meeting with the employer about the last chance agreement. Exhibit 2 at 84. On August 4, 2016, claimant's mental health provider notified the employer that claimant would not be at work that day and until the provider released claimant to work. Exhibit 2 at 85-87. Thereafter, the employer exchanged emails with claimant's mental health provider about when she was going to release claimant for work.

(13) On August 6, 2016, claimant's mental health provider notified the employer that claimant was not in a "stable place to come to work without advance notice of [the] details to be discussed [at a meeting]

other than what was outlined in the memo," and in order for claimant to be "prepared mentally and professionally" the employer needed to answer the questions claimant had previously asked about the last chance agreement to avoid having the meeting "end[] up in tears, defensiveness and [claimant] saying things she does not mean in the moment of extreme panic." Exhibit 2 at 94. On August 6, 2016, claimant's mental health provider asked for further accommodations based on claimant's depression, anxiety and bipolar disorder. Exhibit 2 at 94-95. Later, claimant's provider released her to return to work on August 11, 2016. Before August 11th, the employer did not respond to the questions claimant had asked about the last chance agreement, despite the urging of claimant and her provider.

(14) On August 11, 2016, claimant reported for work and met with her supervisor, a representative from the human resources department and a manager. Claimant did not agree with the allegations in the last chance agreement that she had in the past violated the employer's standards and how she had done so. At that meeting, claimant asked questions about the factual support underlying the performance deficiencies list in the last chance agreement. The employer's representatives understood claimant did not agree with the assessment of her past performance as set out in the last chance agreement. Claimant understood the employer was unwilling to change the assertions about her alleged past performance deficiencies that were outlined in the last chance agreement or that they were violations of the employer's policies. The employer did not tell claimant it would change the last chance agreement to remove the provision requiring her to admit the accuracy of the past performance violations it alleged or that she agreed she had in the past violated the employer's policies by her performance. The employer did not tell claimant that she could submit a written protest to the last chance agreement that would be appended to it. Claimant was unwilling to sign the last chance agreement, as written, because of the admissions it required her to make, and "because signing it would say the stuff that was inaccurate in my opinion was true." Transcript at 42. The representatives told claimant she would be discharged unless she resigned or she signed the last chance agreement and returned it to the employer before the close of business on August 11, 2016.

(15) Claimant did not return the signed last chance agreement on August 11, 2016 and did not resign. On August 12, 2016, claimant reported for work. At that time, the employer discharged her for refusing to sign the last chance agreement, which required her to admit facts and allegations with which she disagreed.

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. 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). 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).

In Hearing Decision 16-UI-71112, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that the requirement that claimant sign the last chance agreement was reasonable since it was no different from a requirement that an employee sign a disciplinary notice "whether the employee agrees with the contents or not." Hearing Decision 16-UI-711112 at 5. The ALJ further reasoned that "while claimant's reluctance to sign a document she did not agree with is natural, she intentionally failed to follow instructions and did not ask if she had the option of submitting her own information with the last chance agreement." Hearing Decision 16-UI-71112 at 5. We disagree.

Claimant made clear at the hearing that she refused to sign the last chance agreement because the agreement required her to acknowledge past performance deficiencies with which she disagreed. Transcript at 41, 42. The ALJ reasoned that an employer may reasonably expect an employee to sign and acknowledge a customary disciplinary notification. In this case, however, the last chance agreement differed from typical disciplinary notifications. Not only did it set out the employer's allegations of claimant's past performance inadequacies but it required claimant to agree that she had committed them as a condition of remaining employed. Nowhere in the record does it appear that claimant was challenging the authority of the employer to impose future performance requirements on her based on its perceptions that her past performance had been inadequate. Rather, it appears from the record that claimant in good faith disputed the factual allegations underlying the employer's conclusion that she had engaged in past misconduct, and refused admit that she had engaged in such behaviors. It was not reasonable for the employer to require claimant to admit doing things she believed she had not done as a condition of continued employment. Claimant's decision not to sign an admission of conduct she did not commit was, therefore, a decision not to comply with an unreasonable employer policy. A conscious decision not to comply with an unreasonable employer policy is not misconduct under OAR 471-030-0038(1)(d)(C).

The ALJ also reasoned that rather than refusing to sign the last chance agreement based on her disagreement with the allegations of past misconduct it contained, claimant should have inquired of the employer if she could submit a formal written protest to those allegations before deciding she would not sign the agreement. However, the existence of reasonable alternatives to a work separation is only relevant in under the voluntary leaving rules, and does not exist in the rule governing disqualifications based on a discharge. Even if we were to determine that claimant could or should have done something other than consciously violate an unreasonable employer policy in this case, there was no reason to doubt claimant's testimony that she was not aware that she had the option to submit a written protest to the employer. The employer's witness testified that the employer did not inform claimant of that alternative, if indeed it existed, and it was not one that was "traditionally offered." Transcript at 54-56. Viewed against the backdrop of claimant's mental health condition, the persistent efforts of claimant and her mental health provider to obtain answers to claimant's questions about the allegations in the last chance agreement from the employer before the meeting on August 11, 2016, the employer's knowledge of claimant's state of mind surrounding the meeting, and the employer's failure to provide the answers that claimant sought before the meeting or to propose that she could submit a protest to the employer's allegations, claimant's failure to inquire about the existence of such an alternative did not make her refusal to sign the agreement willful or wantonly negligent.

On this record, the employer's requirement that claimant sign an agreement admitting to past instances of wrongdoing with which she disagreed was an unreasonable employer instruction, and claimant's refusal to sign it was not misconduct. The employer therefore did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-71112 is set aside, as outlined above.

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

DATE of Service: January 13, 2017

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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