

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1383

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73458). Claimant filed a timely request for hearing. On September 27, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for October 11, 2016 at 9:30 a.m., at which claimant failed to appear. On October 11, 2016, ALJ Murdock issued Hearing Decision 16-UI-68959, dismissing claimant's request for hearing for failure to appear. On October 14, 2016, claimant filed a request to reopen the hearing. On October 28, 2016, OAH mailed notice of a hearing scheduled for November 15, 2016 at 10:45 a.m. On November 15, 2016, ALJ Seideman conducted a hearing, and on November 23, 2016 issues Hearing Decision 16-UI-71718, allowing claimant's request to reopen and concluding that claimant's discharge was for misconduct. On December 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of the ALJ's decision allowing claimant's request to reopen; we therefore confined our review to whether claimant was discharged for misconduct. EAB considered claimant's written argument to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Albany General Hospital employed claimant as a dietary assistant from January 8, 2004 to July 11, 2016.

(2) The employer expected employees to treat each other with professionalism, kindness, courtesy, and respect while at work. The employer repeatedly notified claimant of those expectations, and she understood them. Until 2014, the employer had concerns about claimant's interactions with her coworkers and issued claimant a series of escalating corrective action notices. In 2015 and 2016, claimant improved her performance and received complimentary comments in performance evaluations.

(3) On June 16, 2016, the employer received a report that, three days earlier, claimant made a comment that one employee perceived "had been made rudely." Transcript at 61. Claimant, a team lead, also

opined to another team lead that a team lead trainee should not become a lead, and later commented, “god, I hate stupid people.” Transcript at 22, 32-33. Although claimant did not intend it as such, those who heard the last comment thought it was overly loud and in reference to the team lead trainee.

(4) On June 25, 2016, claimant told the nutrition supervisor that a coworker’s learning style reminded her of a previous, unsuccessful, employee, and said she did not believe the new coworker would succeed. Claimant believed her comments were appropriate in her capacity as a team lead. The nutrition supervisor considered claimant’s comparison inappropriate, and thought her assessment of the coworker created an environment where people could not come to work without being criticized.

(5) On June 26, 2016, while mentoring two new employees and responsible for three telephone lines, claimant offered to show that same coworker how to perform a task. While with the coworker, claimant received an order via the telephone headset. The coworker asked claimant a question as another call was coming in, which claimant was expected to answer by the third ring. Claimant knew she was going to have to walk away from the coworker to answer the call and wanted to “giv[e] her the tools” to answer her own question. Transcript at 53. Instead of answering, she showed the coworker where to find the answer.

(6) After her June 26 interaction with claimant, the coworker cried at work. The coworker reported to the employer that claimant snapped at her, she did not feel comfortable asking claimant questions, and she did not understand why claimant was not nicer to her. The coworker largely attributed her crying to being “sensitive” because of a close relative’s death and the funeral that was scheduled for the next day. Transcript at 40. Another employee corroborated that she felt claimant was rude and had “made” the coworker look at the paperwork instead of answering her question. Exhibit 2. Employees reported feeling that if they were on good terms with claimant it was because they avoided speaking with her. Transcript at 36. Claimant did not know and had not been told in or around June 2016 that her coworkers thought she had been rude or inappropriate.

(7) On July 5, 2016, the employer met with claimant about the complaints. The employer concluded that claimant had been abrupt and rude, that she had engaged in inappropriate behavior that caused her coworker to become upset at work, and that her conduct was a continuation of the behavior that had resulted in her 2014 final written warning, and, on July 11, 2016, discharged her.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant’s discharge was 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that claimant's discharge was for misconduct, summarily finding that her "acts were a willful or wantonly negligent disregard of what any employer has the right to expect, and constituted misconduct," and could not be excused as an isolated instance of poor judgment because "[t]hey happened over a long period of time" even though her final warning had occurred two years before her discharge, "and she well knew that her behavior had to improve." Hearing Decision 16-UI-71718 at 4. We disagree.

As a preliminary matter, we find that the final incidents and proximate cause of claimant's discharge were her June 25th comment about her coworker and the June 26th incident when she was alleged to have been rude and inappropriate to a coworker and held responsible for that coworker crying in the workplace. The record shows that although the employer also had concerns about claimant's conduct on June 13th, the employer learned of that conduct on June 16th and continued to employ claimant without interruption or investigation. It was not until the employer received further reports of claimant's June 25th comment and June 26th behavior that the employer decided to discharge her. Those incidents are, therefore, the initial focus of the discharge analysis. Only if we conclude claimant's conduct in those instances was willful or wantonly negligent would we then analyze the prior incidents for evidence of willful or wantonly negligent misconduct.

On June 25th, claimant compared her coworker to a previous employee who had not been successful in his placement within the nutrition department and expressed concern about the coworker's ability to be successful. The employer's nutrition supervisor considered claimant's comparison inappropriate and thought claimant should not have made the comments. At the time, however, claimant reasonably believed she was acting appropriately in her role as a team lead by reporting her concerns to the nutrition supervisor. Moreover, the employer did not assert or show that the coworker's learning style was dissimilar to that of the previous employee, or that claimant's assessment of the coworker's learning style or work performance was unfounded and not based upon her observations of the coworker and her 12 years of experience doing the same type of work the coworker did. Nor did the employer assert or show that claimant used an unprofessional tone, language or demeanor when speaking to the supervisor. The record therefore fails to show that claimant's statements were willful or conscious deviations from the employer's expectation that she behave with professionalism, kindness, courtesy and respect.

On June 26th, the same coworker cried after interacting with claimant, and the coworker and another employee both considered claimant to have been rude. Notably, however, the employer's evidence about claimant's conduct toward the coworker was entirely hearsay, and the hearsay did not include many details about the context in which claimant's interaction with the coworker occurred, indicating that claimant was rude, but not why they considered her rude. It is also notable that the employer's witnesses omitted context from their initial testimony about the events in question. For example, although the employer established that claimant was discharged based on complaints of inappropriate behavior "that resulted in an employee becoming emotional at work," the employer's witnesses did not reveal, until asked by claimant on cross examination, that the coworker complained about claimant but, with respect to crying at work, she had "passed it off to" being "sensitive because my uncle had just died." Transcript at 21, 40. In later testimony, another employer witness initially testified with respect to how claimant treated coworkers that "in Betty's own words you either sink or you swim. And – and

she's not always going to give you the information you need to – to swim. She – that's – that's in her own words in the investigatory meeting.” Transcript at 45. In claimant's actual statement, however, she stated, “you'll either sink or swim and that she will give new people the tools to swim.” Exhibit 2 at 2.

Given the employer's failure to initially testify that the coworker did not attribute her crying episode at work solely to claimant, and the employer's misquoting of claimant's statement to make it seem as though claimant was generally unwilling to give coworkers the information they needed when in fact she had said the opposite, where the employer's hearsay evidence was in conflict with claimant's evidence, we found the employer's evidence no more than equally balanced with claimant's. Claimant credibly rebutted the employer's allegation that she was rude to her coworker and made her cry with evidence that she was balancing her need to answer the coworker with her need to answer the phone. Her inability to answer the coworker's question in the manner the coworker desired was not, in and of itself rude or inappropriate, particularly where, as here, the record fails to show that she made inappropriate comments or used inappropriate body language toward her coworker. Claimant indicated that she was not aware, and had not been told within the two years prior to her discharge, that she needed to change the way she was behaving toward the coworker or other employees, much less that she had been rude or inappropriate to any of them. Nor did the employer assert or show that she had any reason to believe that claimant might be behaving in a way that violated the employer's expectations. We therefore conclude that the evidence fails to show it was more likely than not that claimant willfully or knowingly violated the employer's expectations by acting unprofessional, unkind, discourteous, or disrespectfully toward the coworker on June 26th.

For those reasons, we conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-71718 is set aside, as outlined above.¹

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

DATE of Service: January 10, 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.