

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0329

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71538). Claimant filed a timely request for hearing. On February 21, 2017 and February 24, 2017, ALJ McGorin conducted a hearing, and on February 27, 2017 issued Hearing Decision 17-UI-77748, concluding claimant's discharge was not for misconduct. On March 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

EVIDENTIARY MATTER: The ALJ wrote in Hearing Decision 17-UI-77748 that she admitted Exhibit 1 into the hearing record. Hearing Decision 17-UI-77748 at 1. During the February 24, 2017 hearing, however, she also admitted a document marked as Exhibit 2 into the record. *See* February 24, 2017 hearing, Transcript at 36, 87. EAB considered both Exhibit 1 and Exhibit 2 when reaching this decision.

FINDINGS OF FACT: (1) Columbiacare Services Inc. employed claimant at the Hourglass Community Crisis Center from April 22, 2016 to September 19th, 2016.

(2) The employer operated a mental health crisis stabilization center that provided aid to clients in crisis. Clients' crises could be short-lived or last several days at a time. Claimant held an advanced degree and was certified as a qualified mental health professional. He was responsible for helping clients through their crises until their crises had ended. Claimant was responsible for communicating to clients when the provider-client relationship ended; the employer expected claimant to avoid interacting with former

clients after they were discharged from the employer's program, and to maintain professional boundaries and appropriate business relationships with his coworkers and clients.

(3) On August 19, 2016, claimant provided transportation to a client. The employer considered the client to have been discharged; claimant believed the client was actively receiving service for a crisis at the time he provided transportation and had not yet been discharged. On August 23, 2016, the employer disciplined claimant and warned him against contacting or interacting with former clients.

(4) On August 28, 2016, claimant spoke to a coworker in an "excited" tone, but did not raise his voice and remained seated. February 24, 2017 hearing, Transcript at 76. The coworker reported to the employer that claimant had "accosted" her "verbally," raised his voice to her and made her feel "unsafe and threatened," forcing her "to leave the building at the time and [she] didn't – feel safe to – come back in." February 21, 2017 hearing, Transcript at 19. On August 29, 2016, the employer issued a disciplinary warning to claimant in which the employer instructed claimant, among other things, to interact with coworkers "in a calm, respectful and professional manner." Exhibit 1 at E7.

(5) On September 13, 2016, claimant provided transportation to two interdependent clients experiencing three-day crisis episodes. At the time, claimant understood the transportation to be a part of the clients' crisis resolution and discharge plans and claimant had not yet had the "good-bye" conversation with the clients in which he explained that the services he provided had ended. February 24, 2017 hearing, Transcript at 86. The employer considered at least one client to have been discharged at the time; claimant believed both were active clients and transporting them was appropriate.

(6) On September 15, 2016, claimant referred to a coworker's suggestion during a staff meeting as "fascistic." February 24, 2017 hearing, Transcript at 64. Claimant used a "passionate" tone, but did not raise his voice or engage in name-calling. February 24, 2017 hearing, Transcript at 64, 77. Claimant later approached his coworker to clarify that he respected the coworker a great deal. Claimant's coworker reported to the employer that claimant "appeared high during a staff meeting," had called him a "fascist" and was "loud and aggressive." February 21, 2017 hearing, Transcript at 21-22, 41.

(7) On September 16, 2016, the operations manager reported the September 13th and September 15th incidents to the employer's human resources director. The employer concluded without interviewing claimant that he had acted as alleged, and, effective September 19, 2016, discharged him.

CONCLUSIONS AND REASONS: We agree with the ALJ 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. In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must produce evidence sufficient to show that claimant not only engaged in the conduct alleged, but also that he did so with a willful or wantonly negligent mental state.

We first address the reliability of the employer's evidence because it is dispositive. Testimony of the employer's witnesses was inconsistent. For instance, one witness testified that the final incident that caused the employer to discharge claimant occurred on August 28th. February 21, 2017 hearing, Transcript at 19. Others said that the final incident was the September 13th incident, the September 15th incident, all of the incidents in Exhibit 1, or just the September 13th and September 15th incidents. *See e.g.* February 21, 2017 hearing, Transcript at 35, 42, 46, 50; February 24, 2017 hearing, Transcript at 38. One witness alleged that the September 13th incident prompted the discharge, alluded to some possible disagreement among the employer's witnesses about that, but said that he would "go with the August 28th" incident as the final incident. February 21, 2017 hearing, Transcript at 35.

The employer's witnesses provided internally inconsistent testimony. For example, when asked about the delay in discharging claimant the human resources director initially said that the reason the employer delayed from February 16th to February 19th to discharge claimant was that he was off work during those days; when asked to clarify the reason for the delay, she then changed her testimony to state that the "only reason" for the delay was the time it took to coordinate with claimant's manager and prepare a termination letter. February 24, 2017 hearing, Transcript at 46. Another witness stated that the employer did not discharge claimant sooner to "give him a chance," to "[t]ry more training, more supervision" between incidents and to allow him to improve; when asked how much training or supervision the employer gave him testified that there was no additional training and supervision time consisted of one or "perhaps two" meetings. February 21, 2017 hearing, Transcript at 26.

Finally, the employer's evidence of claimant's conduct in each of the incidents at issue was based entirely upon hearsay, and the hearsay was not reliable. For instance, the employer alleged it had statements and complaints from claimant's coworkers but provided only vague second-hand narratives as exhibits for the hearing even though it had better evidence available. The employer had its dual relationship policy in hand during the hearing, but chose not to read its relevant contents into the hearing record. With respect to the August 28th complaint that claimant had verbally accosted a coworker, the employer alleged at one point that claimant had backed the coworker into a corner during the incident; the employer's exhibit relating what happened, however, omitted any reference to claimant having done so. *Compare* February 21, 2017 hearing, Transcript at 35; Exhibit 1 at E7. In other instances, witnesses asserted that transporting clients after they were discharged was "completely – prohibited" and "completely unprofessional." February 21, 2017 hearing, Transcript at 46. Those same witnesses contradicted that claim, however, also testifying that transporting clients immediately after they were discharged was sometimes permissible, and none of them refuted claimant's testimony that "every single" client the employer discharged as part of a discharge plan was, in fact, being transported after discharge. *See* February 24, 2017 hearing, Transcript at 13, 51, 53, 55. The employer also alleged *that* claimant was, for example, aggressive because of his tone, but could not specify *how* claimant's tone that conveyed aggression; *that* claimant made his coworker feel so unsafe she was not comfortable returning to the building with him in it, but not *how* claimant's demeanor conveyed danger to that coworker; and *that* claimant was so aggressive and "spitting angry" that he backed a coworker into a corner but also that he moved away from the coworker, apparently immediately, when she allegedly

asked him to do so. It is, therefore, unclear what specifically claimant did to cause the coworker to feel how she did.

In sum, the evidence the employer provided does not clearly illustrate the employer's policies or expectations, does not establish that claimant understood them or had reason to understand them, and does not illustrate with sufficient specificity what happened, what claimant actually did, or that he did any of the alleged acts with a willful or wantonly negligent mental state. Conclusory statements characterizing claimant's alleged conduct without specifying what, exactly, he did is an insufficient basis upon which to find that he committed misconduct. Because the employer's evidence was primarily based upon vague and somewhat incomplete or inconsistent hearsay and, even where it was based upon firsthand testimony was inconsistent both among the witnesses and internally within witness's testimony, we cannot rely upon the employer's evidence as a credible narrative of what happened in the incidents at hand. Where the facts were in dispute, we therefore relied upon claimant's evidence.

The reliable evidence in the record establishes that notwithstanding a series of concerns claimant's employer and coworkers had about his behavior, he did not willfully or consciously behave in an unprofessional manner toward his coworkers, and only transported clients he believed were actively receiving crisis services and had not yet been discharged. As such, he did not violate the employer's prohibitions against unprofessional behavior or transporting discharged clients, much less that he did so willfully or with wanton negligence. Therefore, claimant's discharge was not for misconduct and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-77748 is affirmed.

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

DATE of Service: April 4, 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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