EO: 200
BYE: 201807

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

843
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0671

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 92351). The employer filed a timely request for hearing. On May 25, 2017, ALJ Wyatt conducted a hearing, and on June 2, 2017 issued Hearing Decision 17-UI-84830, affirming the Department's decision. On June 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, which offered as information that was not presented during the hearing. With respect to some of the new information, which was related to her worker's compensation claim, claimant asserted that she was "under the assumption the evidence [the employer submitted on that issue] was thrown out and won't be allowed." Claimant's Written Argument at 2. However, claimant did not explain why she thought information about that incident would not be inquired into at the hearing or considered in the hearing decision. With respect to the remainder of the new information that claimant sought to present as part of her written argument, she did not explain why she did not offer it into evidence at the hearing. OAR 471-041-0090 (October 29, 2006). Since OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information offered by a party only if the party shows that factors or circumstances beyond the party's reasonable control prevented the party from presenting it during the hearing, and claimant failed to make such a showing, EAB may not consider claimant's new information. EAB considered only information received into evidence during the hearing when reaching this decision.

Since the employer did not attempt to introduce new evidence through its written argument, EAB considered the employer's written argument when reaching this decision.

Although the ALJ admitted Exhibits 1, 2 and 3 into evidence during the hearing, he failed to mark Exhibit 2. As a clerical matter, EAB corrected the ALJ's oversight and marked the appropriate documents as Exhibit 2.

FINDINGS OF FACT: (1) Rock of Ages Mennonite Home employed claimant as a caregiver from September 15, 2012 until February 12, 2017.

(2) The employer expected that claimant would notify other staff if she needed to leave the floor and would not leave the floor until she received a reply from staff confirming that they had received that notification.

(3) On October 26, 2017, claimant had an accident while driving the employer's golf cart to travel from one independent living residence to another. The cart skidded on some leaves as claimant was driving it down a steep incline in a rain storm. As result of this incident, the employer warned claimant that she should not drive the golf cart at speeds that were unsafe under the existing outdoor conditions.

(4) On February 12, 2017, claimant was responsible for providing care to four residents on the floor to which she was assigned. Another caregiver was also on duty that day. Claimant's ten year old daughter had accompanied claimant to work that day. Sometime after breakfast was completed, a resident who had not showered or bathed in a week agreed that she would take a shower that day with claimant's assistance. Claimant wanted to get the shower completed before the resident changed her mind. Sometime before 10:20 a.m., claimant informed three of the four residents on her floor that she would be off the floor for a time while she was assisting the fourth resident in taking a shower. When claimant asked each of those residents if they needed any assistance from her at that time or thought they might when she was occupied with the other resident's shower, each stated they did not. At approximately 10:20 a.m., claimant sent a text message to the other caregiver notifying that caregiver that she would be away from the floor while she assisted a resident with a shower and asked the other caregiver to cover for her. The other caregiver had a phone with a number that the residents knew they could call if they needed help. Claimant did not wait to receive confirmation from the other caregiver that she had received claimant's text message because claimant did not want to allow a delay during which the resident might decide against taking the shower. Claimant also arranged for her daughter to sit at the front desk on the floor for which claimant was responsible while claimant was off the floor.

(5) Sometime after 10:20 a.m. on that day, claimant started to shower the resident. Sometime around 11:00 a.m., one of the other three residents on claimant's floor began repeatedly pushing a call button, which sent an alert to claimant's phone that the resident wanted some form of assistance. Claimant had her phone in her pocket and, when she became aware of the alerts, she could not safely leave the resident she was showering because the resident was experiencing shortness of breath, having difficulty standing and still needed to be washed. As well, claimant thought the other caregiver, whom she had notified that she was going to be off the floor, had likely assisted the resident, and that the repeated alerts the resident was sending replicated the resident's recent behaviors in continuing to send alerts even after another caregiver had responded to his needs. By sometime around 12:00 noon, claimant had finished the resident's shower, dried the resident, applied lotion to the resident, dressed the resident and brushed the resident's hair. When claimant left the resident's room, claimant went to the front desk and asked her daughter if the other caregiver had attended to the resident who had sent alerts to her using the call button. The daughter told claimant no one had entered the resident's room even though the resident

had been shouting for help in claimant's absence. Claimant immediately entered the resident's room, saw that the resident had experienced an involuntary bowel movement and, because the resident had limited mobility, had been sitting in his own excrement for some period of time.

(6) On February 12, 2017, the employer discharged claimant for the series of events that led to the resident not receiving assistance for approximately one and one-half hours that day.

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. 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).

Stripped to its essentials, the issue for purposes of this misconduct analysis is whether claimant's leaving the floor before she received a response from her coworker, confirming the coworker's receipt of claimant's notification text message, was a willful or wantonly negligent violation of the employer's standards. The employer did not contend that claimant's failure to wait for the coworker's confirmatory response constituted willful noncompliance with the employer's standards, and it is difficult to see how claimant's state of mind would support a conclusion that she intended to leave the floor without making that notification. Since claimant did send a text message to the coworker, intending to alert her that she was going to be off the floor, and claimant also told all of the other residents on her floor she was going to be gone and inquired if they had any need for assistance before she left the floor, her behavior did not show indifference to the resident's needs or the employer's standards and was not wantonly negligent behavior. At worst, claimant's failure to wait for a reply from the coworker to the text message stating that she was going to be off the floor tending to the needs of the fourth resident, was mere negligence or a failure to exercise care, with none of the aggravating factors needed to establish a wantonly negligent violation of the employer's standards. As well, that claimant failed to leave the fourth resident during the shower upon receiving an alert from another resident was not wantonly negligent behavior since under the circumstances that claimant described about the fourth resident's physical condition, it would have been wantonly negligent for claimant to leave that resident alone in the shower or before drying, performing various skin care tasks and dressing that resident. As well, claimant had reason to think that the coworker to whom she had sent the notification text would respond to the resident who was sending the alerts, and reason to think, based on the resident's past behavior, that his sending more than one alert was not necessarily due to his failure to receive assistance, but due to the resident's habit of excessive transmission of alerts. On this record, the employer did not meet its burden to show that claimant's failure to wait for a reply from her coworker before leaving the floor or claimant's failure to respond immediately to the alerts she received while showering the resident, was a willful or wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-84830 is affirmed.

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

DATE of Service: July 14, 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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