EO: 700
BYE: 201815

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0839

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134532). Claimant filed a timely request for hearing. On June 22, 2017, ALJ Holmes-Swanson conducted a hearing, and on June 23, 2017 issued Hearing Decision 17-UI-86496, concluding claimant's discharge was not for misconduct. On July 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained documents and information that the employer chose not to offer into evidence at the hearing. The employer's decision not to offer the new information into evidence did not amount to a factor or circumstance beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), therefore, the employer's new information is not admissible, and we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Touchmark at Mount Bachelor Village, LLC employed claimant as a memory care neighborhood care partner from approximately April 2016 until January 16, 2017. The employer operated an assisted living facility for residents with dementia; claimant's job duties included assisting those residents with their activities of daily living and other support.

(2) The employer had a variety of ongoing concerns about claimant's work performance. In addition to concerns about claimant's adherence to infection control protocols and residents' interim service plans, the employer received complaints that claimant was rude, a "my-way-or-the-highway type of person," and made coworkers cry. Transcript at 11. The employer counseled claimant and she made efforts to improve, but she was not able to sufficiently alter her behavior and performance.

(3) On January 10, 2017, the employer's executive director and health service director met with claimant to give her a personnel action record. Claimant refused to sign the personnel action form, and wrote on it, "There are no deficiencies. I am the best caregiver…" Transcript at 18. During the meeting claimant referred to her job as "blue-collar" and said that the job "pays shit." Transcript at 24. The comments

"didn't sit well" with the executive director, and he considered claimant's contributions to the conversation "quite demeaning and disrespectful, and . . . kind of a – a conclusion on character." *Id.*

(4) At the January 10th meeting, the directors orally told claimant that going forward they expected claimant: not to alter residents' interim service plans; not to exchange phone numbers with family members; not to forward work emails to her personal computer; to communicate requests for changes in residents' care plans directly to the registered nurse; to avoid behavior that undermined others, was insubordinate or that was outside her scope of practice; to adhere to the employer's policies and state regulations; and, when in question, to ask a registered nurse rather than expressing her own opinions to residents' families and other staff. Claimant orally agreed to comply with those expectations.

(5) On January 11, 2017, claimant said something about having "dirt about a lot of people" while speaking with the floor supervisor. Transcript at 20. The floor supervisor took claimant's comment as "threatening." *Id.* On January 12, 2017, claimant said during a discussion about a resident's health condition that she thought the resident needed to see a dermatologist. The health service director considered claimant's statement inappropriate because the resident was being treated by the employer's nurse practitioner, who was over time able to resolve the resident's problem.

(6) On January 12, 2017, claimant's coworkers perceived that claimant was spending extra time with a couple of residents instead of sharing the workload evenly, which left them an unfair share of work to perform. The coworkers complained, and when the employer confronted claimant about it she responded in way the employer considered confrontational, and another example of claimant not getting along with her coworkers.

(7) On approximately January 12, 2017, a resident's daughter gave claimant a copy of a letter her husband, who was also the resident's physician, had prepared regarding the resident's care. Claimant made notations on the letter and discussed its contents with other staff. Shortly thereafter, the employer learned that claimant had a copy of the letter. Although the resident's daughter had given a copy of the letter to claimant, the employer considered it inappropriate for claimant to have it because it was addressed to the nurse, claimant had seen the letter before the nurse saw it, and claimant had shared the letter with others which the employer considered a violation of the chain of command.

(8) Between approximately January 13, 2017 and January 15, 2017, claimant was absent from work. Claimant properly notified the employer of her absences, and the absences were all excused. The employer did not consider the absences a "big deal," but had to cover claimant's shifts and considered it one more factor showing "that [claimant's] last week was not a good week…" Transcript at 14-15.

(9) Because of the events that occurred after claimant's January 10, 2017 warning, and the ongoing belief that claimant was not a good fit for the employer's team, the employer decided to discharge claimant. Transcript at 6, 9, 25. On January 16, 2017, the employer discharged claimant for those reasons.

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.

The employer discharged claimant because of events that occurred after the January 10th meeting, including making a "threatening" comment, suggesting that a resident needed to see a dermatologist, not getting along with her coworkers, possessing a resident's physician's letter, and being absent from work. The employer must prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must show not only that it is more likely than not that the event occurred as the employer alleged, but also that claimant engaged in the specified conduct with a willful or wantonly negligent mental state. The employer did not meet its burden for the reasons that follow.

The employer construed claimant's statement to a floor supervisor about having "dirt about a lot of people" as threatening. However, such a comment is susceptible to many interpretations. The employer did not provide the context of that statement or claimant's body language or demeanor when she said it. In the absence of additional information establishing that claimant made a threat, or that she uttered it intentionally or with conscious indifference to the employer's expectations, the statement was not misconduct.

The employer construed claimant's suggestion that a resident with a skin condition see a dermatologist after some efforts to treat the condition failed as having violated the employer's chain of command, as well as the employer's January 10th instruction to claimant to communicate such things directly to the registered nurse. The health service director testified that "we" were having a conversation about the resident without identifying who was present, so the record fails to establish whether or not a nurse was present at the time of the conversation. Nor is it clear why claimant discussing a resident's care with another individual was tantamount to requesting a change to a resident's care plan or other behavior prohibited by the employer in the January 10th meeting.

With respect to claimant spending extra time with residents on January 12th, claimant's job was to attend to residents' activities of daily living and support them "emotionally and spiritually," as well. Transcript at 5. The record fails to show that claimant was not fulfilling her job duties with respect to those residents when she spent extra time with them. The employer's witness testified that claimant's response when confronted about her coworkers' complaints, which the employer considered an example of claimant "not getting along with her counterparts," was to say, ""Why would you ask me to cover the floor when no one is up . . . if I'm helping someone and nobody's up there when I don't need to be out here why would you ask me to come out and watch the floor?" Transcript at 22. Objectively considered, however, asking why she was being complained about under the circumstances described does not appear to have violated the expectations given to claimant on January 10th, nor does it appear

likely that claimant's conduct, either in assisting the residents or asking why she was being asked to "watch the floor" instead, was done willfully or with wanton negligence.

With respect to the letter, regardless whether the resident's son-in-law/physician intended it for the nurse, the resident's daughter gave it to claimant. The record fails to show that it was inappropriate for the resident's daughter to have done so, nor for claimant to have accepted it. It did not represent an unauthorized alteration of, or request to change, residents' care or service plans, did not involve the exchange of phone numbers or emails to her personal computer, and did not appear to violate policies and state regulations. It appears likely that the employer thought claimant's possession of the letter would undermine the nurse or that having it was outside her scope of practice since it was addressed to a nurse; however, it was given to claimant personally by the resident's daughter, it did not appear confidential, and it appeared to claimant that that the letter was intended for all of the resident's care providers. Under the circumstances, while claimant's possession of the letter might have violated the employer's expectations, the violation was not done intentionally or with conscious disregard for the employer's expectations.

Finally, the employer discharged claimant, in part, because she was absent three days in her final week of work. The employer stated, however, that claimant's absences were all excused and she properly notified the employer of all of them. Her absences, therefore, were not violations of the employer's policies or reasonable expectations.

The employer's witness testified that generally, with respect to claimant's employment, "it's – it's just never good enough [for claimant]. It's not fast enough. It's – it's – it – it's – and it makes –makes people in a team setting where everyone's advocating for this one person, so it's still very small and that doesn't foster teamwork and it doesn't foster the – the outcomes that can be productive for a change," that claimant "had made efforts to improve that, but it just was not a fit for us. It was – she would align strictly with family members at the exclusion of her coworkers. And I think, you know, it – I – we would have needed more – more unity amongst all parties." Transcript at 21, 24. Not being "a fit for" the employer does not amount to disqualifying misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-86496 is affirmed.

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

DATE of Service: <u>August 9, 2017</u>

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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