

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0939

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95305). Claimant filed a timely request for hearing. On May 12, 2017, ALJ Snyder conducted a hearing at which the employer did not appear, and on May 17, 2017 issued Hearing Decision 17-UI-83656, reversing the Department's decision. On June 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On June 29, 2017, EAB issued EAB Decision 2017-EAB-0674, reversing Hearing Decision 17-UI-83656 and remanding this matter for further development of the record. On July 18, 2017, ALJ M. Davis conducted a hearing, and on July 21, 2017 issued Hearing Decision 17-UI-88600, again reversing the Department's decision. On August 7, 2017, the employer filed an application for review.

The employer submitted a written argument that contained information not offered into evidence during the hearing. EAB may consider such new information if it is relevant and material to EAB's determination and the party offering it shows that factors or circumstances beyond its reasonable control prevented it from presenting that information during the hearing. OAR 471-041-0090(2) (October 29, 2006). Although the employer contended that it was effectively precluded from offering the information it now seeks to present during the hearing since it "could not know ahead of time what claims [claimant] would make at the hearing," it is generally within a party's reasonable control to prepare its case in advance of the hearing and to gather together its evidence and witnesses on the reasonably foreseeable issues. Employer's Written Argument at 3. The employer was well aware, based on the undisputed reasons it discharged claimant and the conclusions of decision # 95305, that a central issue at hearing would be whether claimant made a reasonably full disclosure of the alleged facts underlying a criminal conviction at the time she was hired, or whether she had been deceptive. The employer should reasonably have anticipated that claimant might dispute what the employer contended she said during the meeting between claimant and employer representatives on claimant's first day at work when she allegedly concealed the true nature of the crime. However, the new information the employer offered in its written argument principally addressed what was said and who was present at that meeting, when it was within the employer's reasonable control to have anticipated a need to present information about the substance of that meeting at the hearing. As such, the employer did not show that it was prevented by

factors or circumstances beyond its reasonable control from presenting the information during the hearing that it now seeks to present. For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument.

While EAB considered those parts of the employer's argument that were based on the record developed during the hearing, EAB has nonetheless decided this matter in claimant's favor for the reasons set forth below. EAB's conclusions are principally predicated on burden of proof principles, which apply when, as here, the evidence on issues in dispute is evenly balanced and there is no reason in the record to doubt the credibility of either party's witnesses.

FINDINGS OF FACT: (1) Hurty Med Info Service, LLC employed claimant to work at its front desk from approximately October 21, 2015 until March 6, 2017.

(2) The employer expected that claimant would provide honest information about any crimes of which she had been convicted. Claimant understood the employer's expectation as a matter of common sense.

(3) Around 2014, claimant was working at Oregon State Hospital (OSH), a public mental health facility. Claimant became romantically involved with an inmate who was assigned to work at OSH and whom she supervised. OSH personnel discovered claimant's relationship with the inmate. In October 2014, OSH placed claimant on administrative leave pending investigation of claimant's behavior vis-à-vis the inmate. Subsequently, claimant's employment with OSH ended and criminal charges were brought against her as a result of her involvement with the inmate. At that time and after, claimant denied ever having a sexual relationship with the inmate. On July 22, 2015, claimant entered a guilty plea to the crime of custodial sexual misconduct in the first degree, a class C felony. Claimant pleaded guilty both to avoid incurring attorney fees and to avoid incarceration if she was convicted.

(4) When the employer hired claimant, it performed a background check. That background check revealed that claimant had been convicted of a crime, but it did not specify the nature of the crime. On the first day claimant reported for work, some employer representatives asked claimant for an explanation of the conviction. At the time, claimant was stationed at the employer's front desk and patients were coming and going from the desk. In a conversation lasting about five minutes, claimant told the representatives that she had pleaded guilty to a sexual misconduct charge that was a felony. Claimant told the representatives that she had been accused of having sexual intercourse with an inmate worker from a correctional facility when both were working at OSH, but denied that her relationship with the inmate had, in fact, been sexual. Claimant also told the representatives that she had pleaded guilty to the charge when she was not guilty of it because she wanted a guarantee that she would not be sentenced to a period of incarceration and wanted to avoid incurring exorbitant attorney fees in defending against the charge. One of the employer representatives told claimant that her explanation was satisfactory and that the employer would continue her employment despite her conviction if claimant's name did not appear in a website registry that the employer used to determine whether individuals were prohibited from working with patients in a medical setting. Claimant's name was not listed on that site and the employer continued claimant's employment.

(5) In late December, claimant's sister, who worked for the employer as an administrator, obtained some detailed information from a family member about the crime to which claimant had pleaded guilty. On December 23, 2016, the sister informed employer representatives of that information. The employer

consulted with an attorney about continuing claimant's employment. Sometime later, the employer concluded its exposure to liability by employing claimant was too great to continue employing her.

(6) On March 6, 2017, the employer discharged claimant. In a letter given to claimant that day, the employer justified discharging claimant on the ground she had not previously given honest information to the employer about the crime of which she was convicted.

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. 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).

The employer's business manager did not dispute that the employer was aware that claimant had a criminal conviction when she was hired and that the employer decided to hire her based on her description of the crime, the facts underlying the crime and because her name had not appeared on a website listing individuals who were prohibited from working in medical settings. Transcript of July 18, 2017 Hearing (Transcript) at 6-8. The business manager contended that the employer discharged claimant when it learned that she had minimized the nature of crime to which she had pleaded guilty and that she had failed to disclose the full facts surrounding that crime, including that it was a "sexual abuse situation" with an inmate worker she had supervised. Transcript at 8. While the business manager testified that claimant did not inform the employer when she was hired of the name of the crime with which she had been convicted and left the manager with the impression it was a "technical violation" that arose from claimant having dated the inmate, the employer's administrator testified that claimant had at that time disclosed that crime involved some form of alleged "misconduct" against a patient, volunteer or inmate of OSH that arose in the context of claimant's employment at OSH. Transcript at 8, 9, 16, 17, 18, 20. Both agreed that claimant had at that time denied that she was actually guilty of the crime to which she pleaded guilty, but had for various reasons decided to plead guilty. In contrast, claimant testified that she told the employer during the conversation at the front desk on her first day of work that the crime with to which she had pleaded guilty was for "sexual misconduct in the first degree," and it was based on the accusation that she had been involved in a sexual relationship with an inmate worker assigned to work at OSH. Transcript at 28. Claimant agreed that she told the employer she had not had such a sexual relationship with the inmate worker at OSH, whom it reasonably could be inferred she had some authority over in the workplace by the nature of their respective positions. Transcript at 28.

From what the employer's witnesses recalled claimant having stated when she was hired, the employer was on reasonable notice that the facts underlying the crime to which claimant pleaded guilty were potentially serious and, despite her protestations of innocence, it might have been prudent to conduct a further investigation before concluding that it was merely a "technical violation." Moreover, there was no reason in the record to doubt claimant's testimony about what she disclosed to the employer during the brief conversation with some representatives on her first day, which was that she was substantially

forthcoming about the nature of the crime to which she had pleaded guilty and the allegations underlying that crime. Since there is no reason in the record to prefer the testimony of either party's witnesses on the information claimant provided, or whether that information was honest and reasonably complete about the crime and its alleged facts, the evidence on that issue is equally balanced. When the weight of the evidence on an issue is evenly balanced, the uncertainty must be resolved against the employer in a discharge case such as this. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not meet its burden to show claimant knowingly minimized or provided dishonest information to the employer, when hired, about the crime to which she had pleaded guilty based on her behavior at OSH.

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

DECISION: Hearing Decision 17-UI-88600 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 12, 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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