

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1136

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 121403). The employer filed a timely request for hearing. On August 30, 2017, ALJ L. Lee conducted a hearing, and on September 7, 2017, issued Hearing Decision 17-UI-92102, concluding that claimant's discharge was for misconduct. On September 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the parties' written arguments. However, both written arguments contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the party'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), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Community Access Services, an organization that assisted intellectually and developmentally disabled persons, employed claimant, last as a supported living manager, from January 12, 2010 to May 1, 2017.

(2) Some of the employer's clients lived in group homes and others lived in their own homes and received direct support from the employer. On November 1, 2016, the employer laterally transferred claimant from her position as group home manager to the position of supported living manager. On February 24, 2017, the employer provided claimant with training in the supported living program. On March 3, 2017, after demonstrating some difficulty in meeting payroll deadlines, the employer provided claimant with one-on-one re-training on payroll matters, specifically including related deadlines. Claimant also demonstrated difficulty meeting staff scheduling requirements and so, on March 10, 2017, was placed on a corrective action plan.

(3) Claimant lived with claimant's girlfriend who also worked for the employer as a group home nurse. Claimant's girlfriend previously worked as a member of the employer's "float staff," assisting other employees with client transfers or other activities when the need arose. Transcript at 60. As such,

claimant's girlfriend had developed relationships with clients, including an intellectually and physically disabled client (hereinafter referred to as "client L").

(4) After claimant began managing the supported living program, the employer received reports that claimant's girlfriend was showing up where and when claimant was working with clients, and although she was not on duty, claimant's girlfriend was assisting with direct support tasks for clients. Although the employer did not want to prevent clients from having social relationships with off-duty employees, the employer did not want claimant and claimant's girlfriend to work together with clients, while claimant was on duty and the girlfriend was off duty, which the employer considered distracting for claimant, a potential liability for the employer, and a potential source of ill will for other employees, who did not have their significant others with them while at work.

(5) On April 6, 2017, after the employer concluded that claimant's overall work performance was not showing consistent improvement, it placed claimant on a last chance agreement. In the agreement, among other things, the employer instructed claimant that going forward claimant was expected "to never involve" another employee, "who does not have a professional responsibility to a supported individual to engage in a personal relationship or social activities with the individual unless approved by his supervisor." Exhibit 1.

(6) On Easter Sunday, April 16, 2017, claimant, who was on-call, was required to cover a shift for another employee, who was scheduled to transport client (L) to church where she would meet her mother, whose health was failing. Previously, client (L) had asked claimant's girlfriend to meet the client at the church, to which claimant's girlfriend agreed, for emotional support only, as a friend. Claimant transported client (L), who normally required a two-person transfer because of her condition, to the church by himself because claimant believed claimant could handle it alone. However, when claimant and client (L) arrived, the "preacher" informed client (L) that her mother had just died that morning. Client (L) became extremely distraught, sobbing, and requested that she be allowed to travel to the group home where her mother had died to view her and attend a brief religious service with her family. Claimant's girlfriend, who ignored claimant's request to leave because she considered it an emergency and wanted to support client (L), tried to console client (L) at the church, and after client (L) left, traveled to the group home in her separate car for emotional support for the client. However, once she arrived at the group home, client (L) became increasingly distraught and disclosed "she felt like she was going to pee her pants." Transcript at 147. Claimant, whose back was bothering claimant at that point from the transfers of client (L), allowed claimant's girlfriend to assist in client (L)'s bathroom transfer, and later, transfers thereafter, because claimant also considered the situation an emergency and claimant's girlfriend wanted to see to it that client (L) "made it to the toilet safely instead of letting her pee herself after her mom had just died." Transcript at 147. Claimant did not notify claimant's supervisor of claimant's girlfriend's attendance or assistance until claimant reported to the employer that claimant had injured his back making the transfers that day and offered claimant's girlfriend as a witness to the events.

(7) On May 1, 2017, the employer discharged claimant, in part, for failing to "immediately notify claimant's supervisor or the administrative staff on call for guidance and direction" as [claimant] knew "including [claimant's] significant other in a work activity was not allowable." Exhibit 1.

CONCLUSIONS AND REASONS: We agree with the Department, and not 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. 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 had the right to expect of the employee. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case without reason to further investigate what the expectation was. *Accord Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006).

As a preliminary matter, the ALJ essentially found as fact, despite the employer's inclusion of other reasons for claimant's termination in the May 1 termination notice, that claimant was discharged for failing to notify the employer of claimant's girlfriend's assistance regarding the events of April 16, 2017. Hearing Decision 17-UI-92102. We agree. The prior violations occurred several weeks before claimant's discharge, and there was no evidence that the employer would have discharged claimant when it did without the April 16 incident. Accordingly, that event was the event that triggered the employer's decision to discharge claimant, and therefore was the proximate cause of claimant's discharge and the initial focus of the misconduct analysis.

In Hearing Decision 17-UI-92102, the ALJ concluded:

There was sufficient evidence to find that claimant was aware that the employer had concerns about claimant's girlfriend, a nurse working for the employer, socializing with clients while off duty while claimant was working, providing direct support to those same clients... There was also sufficient evidence to show that, when claimant's girlfriend visited clients while claimant was working, claimant was supposed to contact claimant's supervisor, so that it would be the employer, not claimant, who had to deal with claimant's girlfriend.

On Sunday, April 16, 2017, claimant was to cover a shift and take a client to church. That morning the client's mother had died. Claimant learned that claimant's girlfriend was also going to be at the church, at the client's earlier invitation. As soon as claimant learned that both claimant and claimant's girlfriend were going to be at the church for the client, claimant should have informed claimant's supervisor, to give her an opportunity to intervene if the employer felt it was necessary. Instead, without informing the employer, claimant allowed claimant's girlfriend, who was off-the-clock, to go to the church and then accompany the client out of town [to where her mother's body had been taken]. Claimant also allowed claimant's girlfriend to assist in transferring the client [to the restroom] more than two times that day... [C]laimant's failure to notify claimant's

supervisor as instructed, before going to church or while at the church or even before driving the client out of town, constituted at least a wantonly negligent disregard of the employer's interest...

Hearing Decision 17-UI-92102 at 4. However, the employer's April 6 written admonition "to never involve" another employee, "who does not have a professional responsibility to a supported individual to engage in a personal relationship or social activities with the individual unless approved by his supervisor" was vague, at least with regard to emergency situations, and arguably was not violated as claimant did not take steps to "involve" claimant's girlfriend in the event because, as the ALJ found, "unbeknownst to claimant, the client had asked claimant's girlfriend to go to church with her. Hearing Decision 17-UI-92102 at 2. Immediately upon arriving at the church, client (L) learned of her mother's unexpected death that morning, creating a "freak situation that [claimant] was not prepared for at all." Transcript at 65. Claimant considered the situation an "emergency" and thereafter allowed claimant's girlfriend to assist in the bathroom transfer and perhaps others thereafter because client (L) "had been so upset, I just wanted to get it done immediately, and in the past, yes it was approved in emergency situations that [claimant's girlfriend] was okay to help, and this I considered an emergency situation." *Id.*

In Hearing Decision 17-UI-92102, the ALJ did not make any findings concerning claimant's mental state at the time claimant failed to notify claimant's supervisor regarding the events of April 16 and thereby "disregarded the employer's interest." However, the record supports claimant's assertion that claimant's girlfriend had been approved in the past to assist client (L) in emergency situations. As claimant's supervisor testified, "there was a one-time approval that the Associate Director gave for [claimant's girlfriend] to support [client (L)] during a snowstorm because it was an emergency, in other words people could not get to [client (L)] and [claimant's girlfriend] could, and so she helped." Transcript at 108. Therefore, under the circumstances presented on April 16, claimant was faced with choosing between two employer expectations – one, to allow claimant's girlfriend to assist in providing immediate and necessary care for an intellectually and physically disabled client whose mother had just died, when such care had been allowed in the past, and two, to delay in allowing necessary assistance until formal supervisory permission to do so was obtained, however long that may have taken. Viewed objectively, choosing either at the expense of the other might be considered "disregarding the employer's interests."

Although claimant's choice to allow claimant's girlfriend to assist client (L) on April 16 may have violated the employer's April 6 directive, on this record, claimant made the choice claimant did because claimant sincerely believed claimant's conduct was permitted under the employer's past practice. Although claimant may have been mistaken, the record shows that claimant's choice was based on an honest belief that by making the choice claimant made, claimant was in compliance with the employer's expectation that claimant provide necessary, professional care to a needy client under the circumstances presented. Accordingly, claimant's conduct was no more than a good faith error, and good faith errors not misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-92102 is set aside, as outlined above.¹

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

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

DATE of Service: November 3, 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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