EO: 700
BYE: 201823

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

853
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1184

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84350). Claimant filed a timely request for hearing. On September 13, 2017, ALJ Scott conducted a hearing, and on September 20, 2017 issued Hearing Decision 17-UI-92867, concluding the employer discharged claimant, but not for misconduct. On October 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it contended that, because the ALJ pointed out certain time constraints during the hearing and as a result it did not call two witnesses that it had planned would testify on its behalf, the ALJ denied it an opportunity for a fair hearing. The employer requested either that EAB reverse Hearing Decision 17-UI-92867 based on the alleged denial of its due process rights or, in the alternative, that EAB remand this matter for the purpose of obtaining testimony from those two witnesses. Employer's Written Argument at 6. However, the employer did not show what prejudice it sustained by the ALJ supposedly inhibiting it from calling one witness, Lieutenant L, when an investigative report that he had prepared for the employer was admitted into evidence as a hearing exhibit and claimant did not dispute the facts set out in it. Exhibit 1 at 22-34. The employer did not contend that Lieutenant L would have testified to any facts in addition to those contained in the investigative materials.

With respect to the second witness the employer did not call, Captain M, the employer contended that if he had testified he would have provided sufficient evidence to establish that claimant was aware of the employer's policies and standards that she allegedly violated, and that her alleged failure to comply with them was, as a result, a willful or wantonly negligent violation of the employer's expectations. Employer's Written Argument at 4-6. However, upon questioning by the employer's attorney, claimant testified during the hearing that, while she did not think her behavior at issue was reasonably construed as constituting a violation of the employer's policies and standards, she was aware of the standards and policies that she allegedly violated. Transcript at 29, 56. It is difficult to see what additional information that Captain M could have provided on the issue of claimant's knowledge and awareness of the employer's policies and standards in light of claimant's admissions on that matter. To the extent that

claimant thought her behavior at issue was not reasonably construed as a violation of those standards and policies, it does not appear as a matter of common sense or from the contents of Captain M's declaration, which the employer submitted along with its argument, that he would have any additional information that was not speculative about claimant's state of mind when she allegedly violated the employer's policies and standards, or about whether those violations resulted from willful or wantonly negligent behavior. Employer's Written Argument at 36-39. While cross-examination of claimant on the reasons underlying her belief that her behavior did not reasonably violate the employer's policies and standards would have been relevant to these issues, the employer's attorney chose not pursue that inquiry at the hearing when he had the opportunity to do so. Transcript at 40-41. The employer did not show that it sustained cognizable prejudice from the failure of Captain M to testify as a witness at hearing.

In addition, although the employer is correct that the ALJ cited time constraints during the hearing and expressed reluctance to allow the testimony of witnesses who would present only information that was duplicative of what was contained in other witnesses' testimony or in documentary exhibits, it is not a fair characterization to contend, as the employer did, that the ALJ ultimately thwarted the employer's attorney from "retak[ing] control of the presentation of the employer's case." Employer's Written Argument at 4. Rather, the ALJ confirmed with the employer's attorney that the substance of what would have been contained in Lieutenant L's testimony was also contained in the investigative materials included in the Exhibit 1 and further stated that, upon a later request of the employer's attorney, she would consider taking rebuttal testimony from other employer witnesses if it was necessary after claimant had testified. Transcript at 24-25. However, after the testimony of claimant and the employer's last witness was concluded, the ALJ asked the employer's attorney if he wished to present any additional evidence on the employer's behalf, presumably including rebuttal evidence, and the employer's attorney stated that he did not have any further witnesses. Transcript at 56. On this record, it does not appear that the ALJ unreasonably or inappropriately deprived the employer of a fair opportunity to call witnesses during the hearing who were reasonably necessary to the presentation of its case.

EAB has reviewed the hearing record in its entirety. As this review shows, and for the reasons addressed above, the ALJ inquired fully into the matters at issue during the hearing and gave all parties a reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Deschutes County employed claimant as a corrections deputy in its jail from December 24, 2004 until May 1, 2017.

(2) The employer expected claimant to comply with all lawful orders and instructions that were issued to her by supervisors. The employer also expected claimant to refrain insubordinate behavior. The employer further expected claimant to avoid unprofessional or disrespectful behavior as well as other behavior that was unbecoming to a deputy sheriff. Claimant understood the employer's expectations as she reasonably construed them.

(3) On February 17, 2017, claimant arrived to work at the corrections facility before her starting time of 6:00 a.m. Claimant decided to clean the booking area because it had not been cleaned by staff on the previous shift. Around 6:00 a.m., a sergeant told claimant he would help her in booking since she was

the only deputy assigned to booking. At 6:10 a.m., a different sergeant asked claimant to prepare the paperwork necessary to release an arrested person to the responsible person who had arrived to pick up the arrestee. That sergeant left booking and claimant continued to clean. When the sergeant returned, he told claimant to not to worry about cleaning and to process the arrestee's release. The first sergeant did not help claimant as he had earlier stated he would. Claimant told that sergeant and the first sergeant, who had returned to the booking area, that if she was going to work unassisted in booking she needed to "get the cleaning out of the way," Exhibit 1 at 14. One of the sergeants told claimant, "Okay, but do it [the cleaning] quickly." *Id.* Claimant stated that she had a number of tasks to complete, and she also needed to book an individual into the facility. The second sergeant told claimant that she needed to stop cleaning and process the release of the arrestee to the responsible person. Claimant had been in the process of sweeping the floor of the booking area and told that sergeant that she was almost done with "this little patch" of sweeping. Exhibit 1 at 14. The sergeant told claimant, "We're not going through this, you got work to do, get it [processing the release] done" and that cleaning was "not a priority" that she needed to complete immediately. Exhibit 1 at 14. Claimant finished sweeping up the a small area of the booking room floor on which she had been working and placed the collected debris into a dust pan which she then deposited in a trash receptacle.. At that time, claimant stopped cleaning and began processing the release of the arrestee at 6:15 a.m. Exhibit 1 at 15. Five minutes had elapsed since the first sergeant had initially asked claimant to work on the arrestee's release to the responsible person.

(4) Also on February 17, 2017, two medical emergencies arose when claimant was still the only deputy assigned to booking. One of the emergencies involved a female having a seizure. A deputy other than claimant was tending to the female until emergency medical technicians (EMTs) arrived at the correctional facility. A sergeant who was in the area observed claimant taking steps that he interpreted as claimant readying herself to provide security during the EMTs transport of the female to the hospital. When a lieutenant arrived in the booking area he inquired of the sergeant who was present as to which deputy would be accompanying and providing security for the EMTs during their transport of the female. The sergeant pointed to claimant and said, "I think it's going to be her." Exhibit 1 at 15. Claimant overheard the conversation between the sergeant and the lieutenant, and told them that the other deputy, the one who was tending to the female should be the one providing security during the transport because claimant was the only person assigned to booking and because the other deputy she knew more about the female and her condition than did claimant. The lieutenant then asked claimant what her intention was and if she was going to provide security during the transport. Claimant replied to the lieutenant, "Don't go there with me." Exhibit 1 at 22. The lieutenant replied, "I'm serious, are you not?", to which claimant responded "Apparently I am [going to provide the security]." Exhibit 1 at 22. Shortly after this exchange, claimant accompanied the EMTs in transporting the female to the hospital. Exhibit 1 at 16.

(5) On March 8, 2017, claimant was again assigned to booking and was in the process of booking an inmate into the correctional facility when two sergeants entered the booking room in preparation for performing a restraint check on an inmate in a holding room. One of the sergeants asked claimant if she was going to assist them in the restraint check. Claimant responded, "Oh my god. Can't I finish booking the person in?" Exhibit 1 at 22. The sergeant commented to claimant, "[T]his is what happens when we have someone in [restraint]." Exhibit 1 at 22. Claimant pointed to another booking deputy who was unoccupied at the time and told the sergeant, "[H]ave her help you with it [the restraint check]. **** She is not booking somebody in." Exhibit 1 at 22-23. Claimant then turned back to what she had

been working on before the interruption, which was assembling an inmate file. The sergeant did not reply to claimant's comment, other than to place a box of gloves next to her since it was necessary to wear gloves while performing a restraint check. Recognizing that by placing the gloves next to her, the sergeant still wanted her to assist in the restraint check, claimant commented, "The three of you [the two sergeants and the unoccupied booking deputy] cannot do it?" Exhibit 1 at 23. The sergeant did not respond. Claimant put on a pair of gloves and walked to the holding room to assist in the restraint check, which was being performed by one of the sergeants and the other booking deputy.

(6) On March 27, 2017, the employer placed claimant on administrative leave to investigate her recent behavior.

(7) On May 1, 2017, the employer discharged claimant for her behavior on February 17, 2017 and March 8, 2017.

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 preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to the three incidents that formed the basis for the employer's discharge of claimant, the employer's witnesses did not dispute that, very shortly after having been requested to perform particular activities during those incidents, claimant did, in fact, perform them relatively quickly after expressing that they were better performed by different staff members since she was busy performing other work-related duties. The employer did not contend that during those incidents, claimant yelled at supervisory officers or other staff, used foul language, was belligerent or openly rude or ever actually refused to perform what she was asked or did or said anything that, viewed objectively, was in defiance of the authority of the employer or the supervisory officers. The employer also did not dispute that claimant and the personnel who supervised her had developed a relationship of collegiality that was not rigidly hierarchical under all circumstances and, under certain circumstances, allowed a limited type of give and take. Transcript at 29-30. Although claimant's behavior during the three incidents may not have exemplified immediate, absolute and unquestioning submission to the requests of her supervisors, the employer did not rule out that the relationship that had been developed between claimant and the supervisory officers over time was such that she was allowed to point out that responding to certain requests would disrupt her from performing other job duties, and that other staff were better able to respond to the request without a similar disruption. The employer presented no evidence showing that claimant was ever put on notice that the type of behavior that supervisory personnel apparently had historically condoned was, in fact, prohibited by the employer or that the prior approach of supervisory

personnel that led her to respond in the manner that she did to requests they made on February 17, 2017 and March 8, 2017 was not, in fact, condoned by the employer. On this record, the employer did not meet its burden to show that claimant knew or should have known the type of responses she made on February 17, 2017 and March 8, 2017 when requested to perform work-related tasks that conflicted with her other work duties probably violated the employer's expectations as she reasonably understood them, based on common sense and the prior practice of her supervisors.

The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-92867 is affirmed.

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

DATE of Service: November 16, 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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