

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1291

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93139). Claimant filed a timely request for hearing. On October 26, 2017, ALJ Scott conducted a hearing, and on October 27, 2017 issued Hearing Decision 17-UI-95560, affirming the Department's decision. On November 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Providence Health & Services Oregon employed claimant from January 2002 until September 5, 2017.

(2) Claimant worked as a cleaning attendant in a hospital intensive care unit (ICU) and short stay unit. The hospital purchased and paid deposits on cans of soda for each unit. The hospital considered the cans to be hospital property even after the soda was consumed. Each unit had its own recycling container for soda cans. The employer collected the cans and recouped the deposits it originally paid for the cans. The employer expected employees to return all soda cans that were originally purchased by the employer to the employer's recycling containers.

(3) In July 2017, claimant's manager and supervisor found a large bag of empty soda cans in the ICU housekeeping closet. The manager asked claimant about the cans and told claimant that she could not take cans that belonged to the hospital. Claimant told the manager that she took the cans from garbage cans, and not from the short stay unit or ICU recycling containers and that she would remove the cans from the housekeeping closet and take them home. The manager told claimant that was "fine." Transcript at 47. Based on what the manager said to claimant, claimant believed the manager was not prohibiting her from taking cans from the garbage.

(4) Claimant occasionally collected empty soda cans from the garbage receptacles in the offices, staff lounge, basement, waiting areas and bathrooms when she cleaned those areas of the hospital. Claimant put the cans she collected in the ICU housekeeping closet. Claimant had seen other staff collect cans

from the garbage to keep for the deposits. Although the employer had noticed fewer cans than usual accumulating in the short stay unit recycling container, claimant did not take cans from the hospital's recycling containers. Claimant had seen other staff take cans from the recycling containers.

(5) On August 23, 2017, claimant's coworker found a bag of soda cans in the ICU cleaning closet that she thought were of the same type of soda used in the short stay unit. The coworker reported what she found to a supervisor.

(6) On August 27 and 29, 2017, the supervisor reported the results of her investigation to the manager and hospital security. The manager investigated the matter further and was told by other employees that they had seen claimant "with cans." Transcript at 10. The manager, supervisor and security employee viewed surveillance videos showing claimant removing bags of cans from the hospital.

(7) The employer's representatives met with claimant and asked her about the soda cans. Claimant replied that she "thought it was okay to take the cans," and that the manager had told her it was "okay." Transcript at 10.

(8) On September 5, 2017, the employer discharged claimant because it considered her conduct to be theft of hospital property.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

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 has the right to expect of an employee. A claimant's good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for theft based on her taking empty soda cans from the hospital. The employer expected employees to refrain from taking empty soda cans if they were cans that the employer had originally purchased with deposits. In Hearing Decision 17-UI-95560, the ALJ concluded that claimant had been warned to place all cans other than ones she herself brought to work in the employer's recycling bins, and that claimant's failure to do so on a repeated basis was misconduct. Hearing Decision 17-UI-95560 at 4. We disagree.

Claimant understood she was not permitted to take cans from the employer's recycling containers, and denied having done so. However, she admitted that she took empty soda cans from hospital garbage receptacles to redeem the deposits for herself. The employer attempted to show that the cans claimant took were the same cans the employer had purchased. The record does not establish by a preponderance of the evidence that the cans claimant took were the same cans purchased by the employer. However,

even if they had been the same cans, the record fails to show that claimant knew or should have known from training, prior warnings or otherwise that the employer expected her to refrain from taking cans that had been thrown away, regardless of who purchased the cans, nor that she knew to transfer cans purchased by the employer she found in the garbage to a recycling container. Rather, claimant sincerely believed based on the manager's statements that she had permission to take cans from the garbage.

The ALJ found as fact that the employer's manager and supervisor had warned claimant in July 2017 that she was permitted to take her own cans home, but that "any other bottles and cans were the property of the hospital and should be placed in the recycling bins." Hearing Decision 17-UI-95560 at 2. The preponderance of the evidence does not show that the employer gave claimant such instructions. The manager did not testify at the hearing, and we find claimant's testimony regarding what the manager told her in July 2017 to be more reliable than the testimony from the employer's witness, who was present at the time, but repeatedly stated during the hearing that she did not recall the details of the conversation between the manager and claimant. Transcript at 17, 40. Claimant also testified that the employer's witness told claimant on August 25 that she did not recall the details of claimant's conversation with the manager in July 2017. Transcript at 46-47. Moreover, claimant affirmatively testified that she believed she was permitted to keep cans she found in the garbage because the cleaning attendants would throw away the garbage, including the cans, and claimant did not think the cans belonged to the hospital if they were in the garbage. Transcript at 29. We find claimant's assertions reasonable and persuasive. The preponderance of the evidence in the record shows that claimant understood from the manager's statements in July 2017 that she was permitted to take home cans from the garbage. That she continued to do so in such an open manner after July 2017 tends to corroborate her testimony. Even though claimant was mistaken in her understanding of the employer's policy, her actions were at worst a good faith error as to the policy, and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Moreover, although the employer had noted a decrease in the number of cans in its recycling containers, claimant denied having taken cans from the recycling containers, and the record does not show by a preponderance of evidence that claimant took cans from the recycling containers. The record merely shows that witnesses had seen claimant "with cans" and leaving the hospital with bags of cans, which claimant did not deny. Claimant also attempted to testify about other staff taking cans from the hospital, including from recycling containers. Transcript at 29-30. The ALJ did not permit claimant to testify about what other staff did and told claimant she was "only concerned about [claimant's] behavior" and "[did] not care about what other people did." Transcript at 30-32. Claimant's testimony was relevant to why the employer had noticed a decrease in cans in the recycling containers, however, and to whether claimant had a good faith basis for her belief that she was permitted to take cans. Normally, denying a claimant the opportunity to testify about relevant matters would require remand, but remand is not necessary in this case because there is sufficient other evidence to show that claimant had a good faith basis for her belief that she was permitted to take cans from the garbage.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-95560 is set aside, as outlined above.

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

DATE of Service: December 8, 2017

NOTE: 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.

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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