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BYE: 201849

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
2018-EAB-0189

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102129). Claimant filed a timely request for hearing. On January 30, 2018, ALJ Scott conducted a hearing, and on February 2, 2018 issued Hearing Decision 18-UI-102351, affirming the Department's decision. On February 22, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Mental Health Association of Oregon employed claimant as a peer support specialist from February 13, 2017 to December 11, 2017.

(2) The employer had a code of conduct policy that required employees to refrain from dishonest or unethical conduct, and provided that insubordination or other disrespectful conduct, and providing false or misleading information, could result in corrective action including termination. The employer notified claimant of its policy upon hire.

(3) The employer's February 13, 2017 offer letter to claimant stated that claimant's supervisors were Cee and Janie. The offer letter also stated that claimant's schedule was to be determined by individuals including Janie and Stephanie. Although Stephanie worked for the employer's funding entity and was not on the employer's organizational chart, Stephanie was closely involved in matters related to claimant's work. For example, on September 29, 2017, claimant's supervision summary stated that

claimant would keep Stephanie apprised of a matter involving a recent referral. Exhibit 1. On October 23, 2017, Cee communicated to claimant in an email that they would be consulting Stephanie about a problem with one of claimant's referrals since Stephanie gave claimant the referral. *Id.* Claimant's November 2017 performance improvement plan mentioned that meetings required by Stephanie were excluded from the employer's directive that claimant not spend work hours attending trainings and other meetings. Exhibit 2.

(4) During claimant's employment the employer developed a number of concerns about claimant's work. She repeatedly failed to document her work in a timely manner despite repeated warnings. Claimant spent more work time at meetings or other engagements than the employer thought appropriate, and was directed to spend more time engaging with clients. The employer also wanted claimant to ensure that she did not work more than her allotted 20 hours per week, and warned her that if a non-required meeting would put her over 20 hours in a week that she was not to claim work time for attending the meeting. Claimant's supervisor sent a number of emails to claimant regarding those matters, and placed her on a personal improvement plan when she did not comply over time.

(5) Claimant also developed concerns after a coworker's extended outburst toward her. Claimant thought the employer did not adequately discipline the coworker, punished claimant by keeping her from the workplace after the incident, and inadequately following through with regard to mediation and paying for claimant's counseling. Although the employer had warned her that she would not be paid for time attending non-mandatory trainings if they resulted in her working over 20 hours in a week, claimant was upset that the employer withheld three hours of pay after she chose to attend a non-mandatory training that resulted in her reporting that she worked more than her maximum allotted hours. Over time, claimant continued to feel upset about those matters, but did not discuss her concerns with her supervisors.

(6) On November 29, 2017, claimant asked Stephanie to meet with her and Stephanie agreed. Claimant considered it appropriate to meet with Stephanie because she considered Stephanie a supervisor. During the meeting, claimant talked about her coworker's outburst, that she felt her interests had been discounted in the wake of the outburst, the employer's stationing her at home after the outburst, her perception that the employer failed to do anything about the coworker, and that the employer took hours away from her time sheet, among other things. After meeting with claimant, Stephanie told the employer's director about her meeting with claimant.

(7) On December 4, 2017, Stephanie met with the director about her meeting with claimant. The director told Stephanie the employer's perspective on claimant's complaints. Stephanie and the director thought claimant's complaints had mischaracterized what had happened, for example, by minimizing the employer's response to the coworker's outburst, omitting from her statements to Stephanie that she had not followed through with her complaint about the coworker despite having the opportunity to do so, and that she had been warned about exceeding 20 hours on her time sheets prior to the employer withholding three hours of pay from her. Stephanie told the employer that she would understand if the employer discharged claimant for the mischaracterizations, some of which, if founded, might have been illegal or could have affected the employer's contract with Clackamas County.

(8) The director was not prepared to discharge claimant based upon her November 29th conversation with Stephanie, but wanted to talk about it with claimant instead and "wanted really for this to work

out." Transcript at 8. On December 7, 2017, however, an employee told claimant's supervisor that she had a conversation with claimant during which claimant continued to express that she was upset because of her coworker's outburst and the employer's response to it. The coworker told the supervisor that claimant "felt that she was going to have no choice but to go to Stephanie [] about it." Exhibit 1. Claimant gave the coworker permission to tell the supervisor about their conversation; the supervisor reported the coworker's statement to the director and another individual.

(9) The director concluded that claimant was "going to go to our funder [Stephanie] again." Transcript at 8. At that point, the director decided to discharge claimant out of concern that speaking with Stephanie again was insubordinate and that claimant was going to provided misleading information again, which the director concluded violated the employer's code of conduct. Effective December 11, 2017, the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that 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 ALJ concluded that the employer discharged claimant for misconduct, finding as fact that the discharge was for "insubordination and disseminating false information," which violated the code of conduct and created a breach of trust. Hearing Decision 18-UI-102351 at 4. The ALJ reasoned that claimant was not credible about the events at issue because she "testified five times that she had not prepared the complaint against [her coworker] and that she had never seen the complaint form" prior to the hearing, testimony that was directly contradicted by the documents the employer placed into evidence and the employer's witness's testimony that claimant had in fact completed a complaint form. *Id.* at 5-6. The ALJ's determination that claimant was not credible failed to mention, however, that claimant ultimately testified that she might well have completed and turned in the complaint form, that reviewing the document during the hearing it "sounds exactly like something I would have written and maybe I did," but that she was "so hurt . . . by the devastation of all this" and it was "just overwhelming to me," by way of explaining why she did not recall her actions with respect to the form. *See* Transcript at 87. Given that claimant ultimately admitted that she likely did complete the form, her testimony was not in direct contradiction to other evidence in the record, and, contrary to the ALJ's finding, her testimony about the form did not conclusively establish that claimant was not credible in her recount of the other events at issue. *See* Hearing Decision 18-UI-102351 at 6. We therefore did not find a basis in this record to either disregard claimant's testimony as entirely lacking credibility, nor did we find a basis in this record to consider claimant's testimony more credible than that offered by the employer.

The ALJ based her decision that claimant's discharge was for misconduct, in part, upon her determination that claimant was insubordinate for speaking to Stephanie. *Id.* at 6. The ALJ reasoned that Stephanie was not claimant's supervisor, which claimant should have known based upon the offer letter she received at hire and the employer's organizational chart. *Id.* We agree that Stephanie was not listed as a supervisor on the employer's offer letter to claimant. However, Stephanie's name was in fact included on the offer letter as one of the individuals who would be establishing claimant's schedule. Stephanie also provided claimant with referrals, was listed on claimant's supervision summary as being involved in claimant's day-to-day workload, and was specifically named as someone with whom claimant was allowed to meet. Notably, neither Stephanie nor anyone else told claimant that it was inappropriate to communicate with Stephanie. Given those factors, we cannot conclude it was made clear to claimant that Stephanie was not within claimant's chain-of-command, that she was not permitted to discuss her concerns about her working conditions with Stephanie, or that it would be considered insubordinate for her to do so.

The ALJ also based her decision that claimant's discharge was for misconduct, in part, upon her determination that claimant provided Stephanie with objectively false, misleading or disparaging information during the November 29th meeting. *Id.* We disagree with the ALJ that the record shows claimant's description of events led to the "inescapable inference" that claimant "wanted to have full control over the information that [Stephanie] would receive," provided Stephanie with information that was either objectively false or "at best, a gross mischaracterization of what had occurred," and did so "surreptitiously." *Id.* Even assuming arguendo that we agreed with the ALJ's characterization of claimant's complaints to Stephanie, however, we disagree with the ALJ that those events formed the basis of the employer's decision to discharge claimant.

Upon hearing from Stephanie that claimant had complained to her on November 29th, the employer's director did not decide to discharge claimant. Rather, the director wanted to discuss matters with claimant and "wanted really for this to work out." Therefore, neither claimant's actions in meeting with Stephanie about her workplace concerns nor the content of claimant's remarks to Stephanie were the reason the employer decided to discharge claimant. The director did not decide that claimant's conduct warranted discharge until, on December 7th, the director heard from claimant's supervisor that an employee told the supervisor that claimant was going to speak with Stephanie again. It was that information that prompted the employer to discharge claimant, and, therefore, it is that information that is the proper focus of the misconduct analysis.

The preponderance of the evidence fails to show that it is more likely than not that claimant intended to speak with Stephanie again. The employer's evidence that she did consists entirely of hearsay twice removed, and, when asked, claimant denied that she had asked Stephanie to meet a second time. Transcript at 65. Even assuming that claimant's denial cannot be believed, we cannot say on this record that it was insubordinate or otherwise a willful or wantonly negligent act on claimant's part to meet with Stephanie, since, although Stephanie was not a named supervisor or in claimant's chain-of-command, the evidence in this record demonstrates that Stephanie did have some authority over claimant's work and the employer's business, making claimant's belief that she could speak with Stephanie about other work-related matters reasonable. Therefore, to the extent the employer decided to discharge claimant because she was going to meet with Stephanie a second time, the discharge was not for misconduct.

To the extent the employer discharged claimant because the director believed claimant had previously provided Stephanie with misleading information and the director anticipated that claimant would do so again, the record also fails to show that the discharge was for misconduct. The employer did not, at any relevant time, tell claimant that she was not permitted to discuss her workplace concerns with Stephanie, nor did the employer confront claimant with the director's belief that claimant had provided Stephanie with misleading information in the past. Under those circumstances, the fact that the employer suspected claimant was going to speak with Stephanie again is not attributable to claimant as misconduct.

Moreover, although the information claimant provided to Stephanie certainly favored claimant's perception that the employer was not being fair to her, the differences appear to come down to a matter of perception, claimant's hurt feelings, and misunderstandings resulting from a lack of communication between claimant and the employer about matters of concern to claimant. For example, it appears claimant's failure to tell Stephanie that the employer had not provided her with counseling stemmed from her belief that the employer was not going to do so, not out of a desire to mislead Stephanie into believing something that was not true. While claimant's might have taken steps to clarify that matter with the employer instead of communicating about her misconception with Stephanie, the fact that she chose to speak with Stephanie does not make what she told Stephanie objectively false, or amount to a willful or wantonly negligent violation of the employer's code of conduct.

For the described reasons, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 18-UI-102351 is set aside, as outlined above.[1]

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

DATE of Service: <u>March 23, 2018</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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

[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.