

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0308

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151521). Claimant filed a timely request for hearing. On March 12, 2018, ALJ Snyder conducted a hearing, and on March 13, 2018 issued Order No. 18-UI-105112, concluding the employer discharged claimant but not for misconduct. On March 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Kilchis House Nehalem Bay House/Car employed claimant from December 2015 until January 12, 2018 as a caregiver in its assisted living house.

(2) The employer expected claimant to follow the residents' Bill of Rights, including treating each resident with dignity and respect and refraining from neglecting or abusing residents. Claimant understood the employer's general expectations based on training and warnings he had received from the employer.

(3) On January 4, 2018, the employer's director received complaints from two residents. One resident alleged that claimant "gets aggressive and acts like it's a big deal just when he's asking for help to bed," and that claimant did not help him leave the bathroom on one occasion and left him in the bathroom. Audio Record at 16:24 to 16:43. A second resident alleged that claimant was "very rude and became very agitated" when he asked claimant for help, such that the resident was afraid to ask claimant for help anymore, and would ask a different staff person for assistance. Audio Record at 16:50 to 17:12.

(4) The director investigated the complaints. On January 12, 2018, the employer discharged claimant because it concluded claimant violated the Bill of Rights of the residents who complained on January 4.

DECISION: We agree with the ALJ and conclude the employer discharged claimant, 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 reasonably required claimant to treat the assisted living facility's residents with respect and dignity, and to refrain from neglecting or abusing them. Claimant understood those expectations. The employer concluded that claimant violated its expectations by communicating or acting in a rude, "aggressive," and "agitated" manner toward two residents in early January 2018, and by failing to help one resident leave the bathroom. However, claimant testified that he had followed the residents' Bill of Rights and that he did not know of any occasion during the time period alleged when he had mistreated a resident or behaved in an aggressive or rude manner toward a resident. Audio Record at 23:12 to 23:33. Claimant also implied that one of the residents who complained might have provided unreliable information because he was displeased with claimant because claimant used a lift to transfer the resident due to claimant's physical limitations, and the resident did not like caregivers using the lift. Audio Record at 21:46 to 22:36. It is understandable that the employer would not have residents testify at hearing. However, in a discharge case, the employer bears the burden of establishing a charge of misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The hearsay complaints alleged by the employer are not sufficiently detailed regarding the circumstances of each incident or what claimant said, did or failed to do that was construed by the residents as rude, aggressive, agitated, or neglectful to show by a preponderance of the evidence that claimant willfully or wantonly engaged in conduct he knew or should have known was a violation of the employer's expectations. On this record, the employer did not meet its burden to show it discharged claimant for misconduct.

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

DECISION: Order No. 18-UI-105112 is affirmed.

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

DATE of Service: April 24, 2018

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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