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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0314

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 26, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111551). Claimant filed a timely request for hearing. On March 9, 2018, ALJ Shoemake conducted a hearing, and on March 16, 2018 issued Order No. 18-UI-105302, affirming the Department's decision. On March 30, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her 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) Oregon City Medical NW, Inc. employed claimant as a nurse practitioner from April 25, 2016 to December 13, 2017.

(2) The employer expected claimant to be professional while at work. Claimant understood.

(3) In approximately May 2016, claimant needed to refer a patient for specialist care and testing but was uncertain about his ability to pay and insurance status. With the intent of getting information she needed to provide services and formulate the referral, she asked the patient if he had a "green card." Audio recording at ~ 16:30. The patient was offended and complained to the employer. On May 31, 2016, the employer warned claimant about the incident and instructed her not to talk with patients about race and green cards.

(4) In approximately December 2016, while treating a trans woman patient, claimant called the patient "big boy." Audio recording at ~ 15:30. The patient and/or her partner felt offended, and complained to the employer. The employer warned claimant about the incident and told her that her behavior could be considered demeaning.

(5) Prior to September 7, 2017, the employer received a complaint that claimant had offended a different patient.[1] On September 7, 2017, the employer suspended claimant. Claimant served her suspension and the employer returned claimant to work without telling her what she had done wrong in that instance.

(6) In approximately December 2017, while conversing with a patient during treatment, claimant stated "if someone could afford a new Hummer that they probably didn't belong on the Oregon Health Plan." Audio recording at ~ 23:05. The patient did not tell claimant that her comment offended the patient, and claimant did not see any visual cues suggesting she had offended the patient or made the patient uncomfortable. On December 8, 2017, the patient later reported to the employer that claimant had been offensive by stating "I hate welfare mothers that drive Hummers." Audio recording at ~ 8:25.

(7) On December 13, 2017, the employer discharged claimant after concluding her December 2017 comment about "welfare mothers" was offensive and violated the expectation that she be professional at work.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude 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 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was for misconduct, because "claimant made an unprofessional comment about people seeking OHP [the Oregon Health Plan]" in the final incident, that doing so "was a wantonly negligent disregard of the employer's interests," and that her behavior was not excusable as an isolated instance of poor judgment "because she had prior warnings and a suspension for similar conduct" or as a good faith error because she "could not have held a sincere belief that the employer would condone her making an unprofessional conduct [*sic*] in the final incident." Order No. 18-UI-105302 at 3. Although we agree with the ALJ that claimant's comments were ill-advised and easily susceptible to being perceived as racist, transphobic and/or offensive, we disagree that the record in this case establishes it is more likely than not that claimant was willfully or wantonly negligent in making them under the circumstances described at the hearing.

In the final incident, the employer alleged that claimant said to a patient that she "hate[d] welfare mothers that drive Hummers." However, the allegation was based upon hearsay, and claimant denied

[1] During the hearing, the employer did not describe the behavior the patient identified as offensive. The record is therefore silent as to what claimant was alleged to have done or said to prompt the complaint.

having made that statement. Claimant alleged she merely said she thought people who drove Hummers "probably didn't belong on the Oregon Health Plan." The evidence about what claimant said to the patient is, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion in an unemployment case, the employer, has failed to satisfy its burden.[2] We therefore find it more likely than not that the events occurred as claimant alleged.

The next question is whether claimant's statement that she thought people who drove Hummers "probably didn't belong on the Oregon Health Plan" was unprofessional, such that it violated the employer's expectation that claimant be professional at work. The employer did not define "professionalism" for purposes of its employees, and we infer that a nurse practitioner responsible for providing medical treatment to patients would, due to the nature of her job, have a lot of flexibility as far as how she elected to interact with her patients depending on her relationship with the patients and how they interacted with and behaved toward her. The employer did not provide any evidence about the nature of claimant's visit with the patient or the context in which she uttered her statement; claimant's firsthand testimony was, therefore, unrefuted. Claimant testified that she was having a personal conversation with her patient about ethics when she uttered the statement, that in the context of the conversation she did not think it was offensive or unprofessional, and that the patient did not react in a way that suggested to her that the patient felt offended by the comment. In that context, we cannot say it is more likely than not that claimant acted unprofessionally with respect to making that comment, nor can we conclude that claimant knew or should have known the comment would cause offense.

Even if we had concluded that claimant's conduct in the final incident was willfully or wantonly negligently unprofessional, the outcome of this decision would remain the same because the incident was no worse than an isolated instance of poor judgment. The ALJ stated that claimant's "prior warnings and a suspension for similar conduct" meant that the conduct in the final incident could not be excused as an isolated instance of poor judgment. Order No. 18-UI-105302 at 3. However, that is not the correct standard. OAR 471-030-0038(1)(d)(A) defines an isolated instance of poor judgment, in pertinent part, as "a single or infrequent occurrence rather than a repeated act or pattern of *other willful or wantonly negligent behavior*." (Emphasis added.) In other words, it is not enough that claimant engaged in other violations of the employer's expectations, or that she was warned or suspended for having done so, the record must show that claimant's other violations were the result of her "willful or wantonly negligent behavior."

In this case, the employer alleged that claimant engaged in three prior violations of its expectations. In May 2016, claimant asked if a patient had a green card, which caused offense to the patient and resulted in her receipt of a warning against talking with patients about race and green cards. Claimant's intent in asking the question, however, was to ensure that she was properly referring the patient for additional treatment. The record fails to show that asking a question in aid of treating a patient is conduct claimant knew or should have known would be considered unprofessional. Therefore, the May 2016 incident, despite having offended a patient and resulted in a warning, was not a willful or wantonly negligent violation of the employer's expectations.

[2] *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In December 2016, claimant called a trans woman patient "big boy," thereby causing offense. It appears that claimant's behavior was unprofessional in that instance, but she testified that the comment "slipped out." Audio recording at ~ 25:20. Under that circumstance, it does not appear that claimant made the unprofessional comment willfully, nor does it appear that she was conscious of making an unprofessional comment in a manner that demonstrated her indifference to the consequences of making unprofessional comments. The unprofessional comment, although it was offensive and violated the employer's expectations, therefore was not the result of willful or wantonly negligent conduct.

Finally, the employer alleged that claimant offended a patient in September 2017. Because the employer did not provide any evidence about claimant's alleged conduct in that incident, however, the record fails to show that claimant was unprofessional, much less that she was unprofessional willfully or with wanton negligence. For those reasons, the record fails to show that claimant willfully or with wanton negligence engaged in unprofessional conduct prior to the final incident. Therefore, even if we had concluded that claimant willfully or with wanton negligence engaged in unprofessional behavior in the final incident, the discharge would not have been for misconduct because it was, at worst, still excusable as an isolated instance of poor judgment.[3]

For the foregoing 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: Order No. 18-UI-105302 is set aside, as outlined above.[4]

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

DATE of Service: <u>April 27, 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.

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[3] Some conduct, even though isolated, exceeds mere poor judgment because it is unlawful, tantamount to unlawful, causes an irreparable breach of trust, or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Making a single offensive comment such as the one claimant made in December 2017 is not unlawful or tantamount to unlawful, nor is it the type of thing that any reasonable employer would consider so egregious as to breach its trust or make a future employment relationship impossible.

[4] 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.