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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-0323

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112249). Claimant filed a timely request for hearing. On March 7, 2018, ALJ C. Smith conducted a hearing, and on March 15, 2018 issued Order No. 18-UI-105219, concluding the employer discharged claimant but not for misconduct. On April 3, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written argument to EAB. We did not consider claimant's written argument because she 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). Each party's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond that party's reasonable control prevented that party from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For that reason, EAB did not consider the parties' new information that was not received into evidence at the hearing. EAB considered the employer's argument only to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Yamhill Valley Treatment employed claimant from March 2015 to January 21, 2018 as a certified recovery mentor.

(2) On October 17, 2017, claimant signed a final compliance contract with the employer requiring, in part, that claimant attend mandatory meetings and trainings provided by the employer.

(3) Because claimant did not meet the employer's expectations as provided in the final compliance contract during October and November 2017, the employer gave claimant an additional last chance agreement beginning on November 27, 2017. The November 27 last chance agreement also required claimant to attend the employer's mandatory trainings and meetings. The employer expected claimant to turn in evidence of her attendance at all meetings to her lead. Claimant understood the employer's expectations in general, and as included in the last chance agreement.

(4) The employer expected claimant to attend one of two mandatory trainings on either December 6 or 13, 2017. Exhibit 1 at 5. Claimant told her lead that her school class schedule conflicted with both the trainings because she attended three school classes on Wednesdays. Claimant's lead gave claimant permission to miss the in-person trainings and, instead, reviewed informational packets with claimant on December 8 regarding what the employer taught at the trainings.

(5) The employer expected claimant to attend mandatory "supervisions," which were meetings when claimant met with the employer's director or her supervisor for training. Transcript at 8. The employer scheduled supervisions for claimant with the employer's director on December 7 and 21, 2017. Claimant attended the December 7 supervision, which was actually a holiday party, but the director canceled the December 21 supervision because the director was on vacation that day. Claimant attended another mandatory meeting with the clinical supervisor on December 9, 2017, and met with her supervisor on December 15, 2017.

(6) The employer originally scheduled claimant to meet with her lead for supervisions on December 13 and 27, 2017. Exhibit 1. Claimant's lead met with claimant on December 15 instead of December 13, and canceled the second supervision. On December 30, 2017, claimant met with her lead to make up the canceled supervision.

(7) Claimant gave her lead the evidence that she attended all her mandatory meetings and trainings during December 2017.

(8) On December 31, 2017, the employer discharged claimant for allegedly failing to comply with the last chance agreement by failing to attend all her mandatory meetings and trainings during December 2017.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, the employer argued in its written argument that it disagreed with the ALJ's order because the ALJ's analysis focused on claimant's conduct during December 2017, and "it was not only the month of December when this occurred . . . [but] an ongoing issue back to 2016 . . . [and] there

were many other behavioral issues that we did not go into [at hearing]." Employer's Argument. However, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. The employer's operations coordinator testified that the "last straw" before the employer decided to discharge claimant was claimant's alleged failure to attend mandatory meetings and trainings during December 2017, after the employer gave her a last chance agreement. Transcript at 7, 15. Therefore, it is that conduct that was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer reasonably required claimant to attend its mandatory trainings and meetings, absent illness or other exigent circumstances. Claimant understood those expectations. The employer asserted at hearing that claimant did not attend mandatory meetings or supervisions on December 6, 7, 13, 21 and 27, 2017. Transcript at 6-11. However, claimant testified that two of the meetings were canceled and that she had attended the other meetings and supervisions on the original scheduled dates or on alternate dates approved by her lead. Transcript at 19-30. Claimant's information about the meetings she attended and cancelations was detailed and plausible given her school schedule and the time of year. Moreover, the employer's operations coordinator acknowledged at hearing that she did not have records of some of the trainings and meetings claimant attended even though claimant provided the information to her lead. Transcript at 35. We thus found claimant's account of her attendance during December 2017 more reliable than the employer's hearsay evidence. Because the record fails to show that claimant did not attend her required meetings and trainings during December 2017, the employer failed to meet its burden to show that claimant violated the employer's standards of behavior, and thus that the employer 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-105219 is affirmed.

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

DATE of Service: <u>April 30, 2018</u>

NOTE: You may appeal this order 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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