

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0558

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73746). Claimant filed a timely request for hearing. On May 10, 2018, ALJ Snyder conducted a hearing, and on May 18, 2018 issued Order No. 18-UI-109733, affirming the Department's decision. On June 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument to the extent that it was relevant to the issue in this case, which is confined to the question of whether or not claimant's discharge was for misconduct.

FINDINGS OF FACT: (1) Multnomah County employed claimant as a finance specialist senior from June 30, 2015 to April 2, 2018.

(2) The employer expected claimant to produce certain monthly reports using an application called "Tableau." Claimant had used Tableau before and, although she produced some reports in that application on at least one occasion, she had difficulty using the program and considered it emotionally taxing and risky to her well-being. She did not believe it was mandatory to use Tableau.

(3) On March 2, 2018, claimant's supervisor orally instructed her to complete the reports using Tableau by March 9th. The supervisor sent claimant an email summarizing the instruction. Claimant replied by email stating that she would not use Tableau, and produced the reports using Excel.

(4) On March 6, 2018, claimant's supervisor sent an email to claimant instructing her not to use Excel to produce the reports, and to use Tableau as instructed. Claimant complained that the employer was applying a double standard by requiring her to use Tableau when others did not have to do so. She indicated that she was refusing "[t]o protect myself from going in to this emotionally taxing situation again." Exhibit 1.

(5) On March 8, 2018, claimant's supervisor replied that there was not a double standard, asked that claimant continue using Tableau, and offered claimant resources and assistance using Tableau. Claimant responded that she was doing what she was capable of, in compliance with the employer's standards. The supervisor asked claimant to clarify if she was unwilling or unable to use Tableau. Claimant replied that she was unable.

(6) On March 9, 2018, claimant's supervisor emailed claimant that it was unclear why claimant was unable to produce reports in Tableau and asked claimant to be specific in her reply, whether it was technical issues, a lack of understanding, a need for more training, or some other reason. The supervisor offered to provide more assistance to claimant, and indicated that she wanted to "resolve the issues related to using Tableau so that reports continue to be produced using that tool." *Id.* Claimant replied that she had already informed the supervisor she was unable to use Tableau and did not know how she could be clearer, that she had been struggling to do the reports but was "not obliged to share with specific personal matter." *Id.* Claimant indicated that the deadline to produce the reports was not reasonable but she had been trying her best. Claimant provided the supervisor with a report she had produced using Excel, stating that she had "decided to continue finishing what I have started [in Excel, despite the instruction to stop using Excel] because I think it would be better to have something than nothing." *Id.*

(7) On March 19, 2018, claimant's supervisor and another employer representative met with claimant about her failure to use Tableau to produce reports. Claimant told the employer that using Tableau was affecting her well-being. The employer again instructed claimant to use Tableau and gave her a new deadline for the reports.

(8) On March 22, 2018, the employer asked claimant if the issue was training, and offered to coordinate additional training for her. Claimant replied, "No, the issue is not training. But [the union steward] insisted that training might help. * * * I know no amount of training would turn me into a data analyst. Because I know my limitations and I going to training [*sic*] means putting my well-being at more risk. Knowing that, if you are willing to also take the risk I could try." *Id.* She did not produce the reports in Tableau by the deadline the employer had provided.

(9) The employer considered claimant's refusal to use Tableau insubordinate, and did not consider her reasons for failing to use Tableau reasonable. On April 2, 2018, the employer discharged claimant for insubordination.

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.

It appears more likely than not that claimant's ongoing failure to use the Tableau application violated the employer's expectations. In order to determine whether the violation was misconduct for purposes of unemployment insurance benefits, however, the question is whether claimant's violation was done willfully or with wanton negligence. The ALJ concluded that claimant's failure to use Tableau was "a willful disregard of her Employer's expectation, and amounts to misconduct," noting that "[a]lthough Claimant was extremely stressed about the difficulty of using Tableau," she "had successfully used Tableau for work assignments on at least one occasion in the past" and "refused additional training offered by the Employer." Order No. 18-UI-109733 at 3. We disagree.

It appears based upon claimant's statements at the hearing that her motivation in deciding not to use Tableau was not a desire to violate the standards of behavior the employer had the right to expect of her or a desire to disregard the employer's interest, but rather was to protect herself from what the ALJ characterized as extreme stress, and what claimant testified was an "emotionally taxing" "struggle" that risked her "well being." It is therefore more likely than not that claimant did not act with the motivation of willfully disregarding the employer's expectation that she use Tableau. Nor does the record show that claimant's conduct was wantonly negligent. Claimant's conduct did not display indifference to the employer's expectations or the consequences of her conduct. Rather, her pre-March attempts to produce the reports in Tableau before realizing the negative effect doing so would have on her, producing reports in Excel so the employer had "something" instead of "nothing," and her stated willingness on March 22nd to "try" attending more training despite the risk she perceived would result from doing so, all demonstrate that she was not indifferent to the employer's expectations or the consequences of her conduct.

For those reasons, while it is clear that claimant's ongoing failure to produce Tableau reports violated the employer's expectations, the record does not establish that the failure was the result of her insubordinate refusal to cooperate with the employer's instructions rather than attempts to explain to the best of her ability that she was incapable of cooperating with those instructions, and why. On this record, the employer did not prove that it was more likely than not that claimant's violation of its expectation was the result of insubordination, and therefore did not prove that claimant's discharge for the alleged insubordination amounted to misconduct. Claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-109733 is set aside, as outlined above.¹

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

DATE of Service: July 6, 2018

¹ This decision reverses an order 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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