EO: 200
BYE: 201913

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

433
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0751

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 130951). The employer filed a timely request for hearing. On June 20 and July 3, 2018, ALJ Monroe conducted a hearing, and on July 11, 2018 issued Order No. 18-UI-112888, reversing the Department's decision. On July 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that she provided a copy of the argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). Claimant's argument also contained a great deal of information not offered during the hearing and claimant neither explained why she did not present the information at hearing nor otherwise showed as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For these reasons, EAB did not consider claimant's argument or the new information presented in it when reaching this decision.

FINDINGS OF FACT: (1) Good Samaritan Hospital employed claimant as a pharmacy technician from June 1, 2015 until April 6, 2018.

(2) The employer expected that claimant would exhibit professionalism and helpfulness in all communications within the scope of her employment. The employer also expected claimant to comply with the instructions of supervisors. Claimant understood the employer's expectations.

(3) A few days before April 3, 2018, claimant took a phone call from an employee of a local pain clinic about a prescription that was ordered. In that call, claimant asked the employee several questions and did not think the employee's answers were responsive. Claimant thought the employee was irritated by the questions she was asking.

(4) On April 3, 2018, claimant was processing a prescription for a hospital patient and asked a coworker to go to the patient's room to obtain information about insurance coverage for the prescription. Before the coworker had returned with information from the patient, the pharmacy supervisor asked claimant if she had entered information about workers compensation insurance coverage for the patient's prescription. Claimant responded that she had not and that she thought the patient's workers compensation claim was too old to provide coverage for the prescription. Claimant did not hear the pharmacy supervisor say anything further to her. Around that time, claimant left the pharmacy to take a break since it was twenty minutes past the scheduled time for her break. Claimant intended to work on the patient's prescription later in the day after the coworker reported back with the insurance coverage information from the patient. After claimant left on break, the pharmacy supervisor asked one of the other pharmacy technicians to process a test claim through the workers compensation insurance provider to determine if the insurance carrier would provide coverage for the patient's prescription.

(5) Also occurring sometime on April 3, 2018, a representative from a local pain clinic called the pharmacy supervisor to complain about how claimant had handled the phone call from a clinic employee a few days earlier. The representative told the pharmacy supervisor that claimant was the rudest person that any pain clinic employee had ever spoken to.

(6) On April 6, 2018, the employer discharged claimant for exhibiting unprofessionalism in the phone call from the pain clinic employee a few days before April 3, 2013 and for refusing the follow the instructions from the pharmacy supervisor on April 3, 2018.

CONCLUSIONS AND REASONS: 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) (January 11, 2018) 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. The employer carries the burden of proving claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-112888, the ALJ concluded that the employer had met its burden to show that it discharged claimant for misconduct. The ALJ found as fact that claimant had understood on April 3, 2018 that the pharmacy supervisor wanted her to perform a test claim on a prescription for a patient but had refused to do so. Order No. 18-UI-112888 at 2, 4. The ALJ concluded that by her refusal and "argumentative" behavior, claimant violated the employer's standards with at least wanton negligence. Order No. 18-UI-112888 at 4. Although it was not completely clear, the ALJ may have also have intended to conclude in Order No. 18-UI-112888 that, in light of prior warnings the employer had issued to her about "unprofessional and uncooperative behavior," claimant's behavior during the phone conversation with the pain clinic employee shortly before April 3, 2018 was a wantonly negligent violation of the employer's expectations. Order No. 18-UI-112888 at 4. We disagree with both conclusions.

With respect to claimant's alleged refusal to perform a test claim on the patient's prescription, claimant testified consistently that she had not understood or heard the pharmacy supervisor direct her to run a test claim. Transcript of June 20, 2018 Hearing (Transcript 1) at 36, 38, 50, 52; Transcript of July 3, 2018 Hearing (Transcript 2) at 19, 22-23. Instead, claimant testified that she understood the supervisor to have asked her only if she had entered information about the patient's workers compensation claim or if she had already run or billed a test claim, to which she responded that she had not before immediately leaving for break. Transcript 1 at 36, 38; Transcript 2 at 14. While the testimony of employer's witness, the pharmacy supervisor, contradicted that of claimant, there is no reason in the record to doubt the accuracy of either party's testimony. Absent a reason to prefer the testimony of one over the other, the evidence on whether the pharmacy supervisor issued a clear directive to claimant which she refused to obey is evenly balanced. Where the weight of the evidence on a disputed issue is equal, the uncertainty must be resolved against the employer since it is the party with the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the employer did not show by a preponderance of the evidence that claimant consciously refused to follow an instruction that she received from the pharmacy supervisor on April 3, 2018. Claimant therefore did not violate the employer's standards willfully or with wanton negligence.

With respect to claimant's alleged unprofessionalism or rudeness in the phone call with the employee of the pain clinic shortly before April 3, 2018, the pharmacy supervisor, who received the complaint about claimant, did not have specific information about what claimant said or did in the call that gave rise to the complaint. Transcript 1 at 22-23. Although the pain clinic representative characterized claimant's behavior as having been extraordinarily rude when speaking to the pharmacy supervisor, that is a conclusion rather than specific evidence and is insufficient to support a finding of rudeness or a lack of professionalism that violated the employer's standards. Without evidence about what claimant said or did that led the pain clinic representative to conclude claimant was rude, this record does not support a finding that claimant was, in fact, rude to the pain clinic person with whom she spoke. On this record, therefore, the employer did not show by a preponderance of the evidence that claimant willfully or with wanton negligent violated the employer's standards by engaging in rude behavior during the call with the paid clinic employee. For the same reason, while the ALJ referred generally to the claimant's "frequently adopted discourteous demeanor during work related interactions," insufficient specific evidence was presented at hearing to establish that claimant consciously violated the employer's standards in connection with any such alleged interactions. *See* Order No. 18-UI-112888 at 4.

The employer did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-112888 is set aside, as outlined above.

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

DATE of Service: <u>August 31, 2018</u>

NOTE: 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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