

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0972

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84643). Claimant filed a timely request for hearing. On September 13, 2018, ALJ Murdock conducted a hearing, and on September 19, 2018 issued Order No. 18-UI-116900, concluding claimant's discharge was not for misconduct. On October 9, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Asante employed claimant as an outpatient access representative from December 15, 2014 to July 23, 2018.

(2) The employer required employees to treat each other and patients with respect. Claimant understood the expectation.

(3) Beginning in December 2017, the employer had concerns that claimant was treating others with disrespect. On February 9, 2018, the employer disciplined claimant because of four incidents of disrespect.

(4) On April 16, 2018, claimant and a phlebotomist who spoke heavily-accented English had difficulty communicating. On April 20, 2018, the employer issued claimant a corrective action based on her conduct in that incident.

(5) On July 20, 2018, claimant interacted with a patient and the patient's friend at the emergency room window. The patient's friend interrupted claimant when she tried to speak with the patient; claimant told the patient's friend that she wanted to speak with the patient. The patient's friend objected because of the patient's illness. Claimant perceived that the patient wanted to speak directly to claimant, and replied to the patient's friend that she understood the patient was ill but wanted to speak with the patient. The

patient's friend appeared upset and asked claimant for her name and badge; claimant gave the friend the information and gave her the lead worker's contact information while commenting about the patient's friend wanting to complain about claimant.

(6) The patient's friend "went home and wrote notes in her notebook and called [the employer's registration supervisor] with all the details." Transcript at 6. The patient's friend reported that claimant was "very argumentative" and "aggressive" with the patient and her friend. *Id.*

(7) On July 20, 2018, the employer discharged claimant because of the July 20th "behavioral incident." Transcript at 5.

CONCLUSIONS AND REASONS: We agree with the ALJ 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) (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. 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 has the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because of her behavior during a July 20th "incident" with a patient's friend. The parties did not generally dispute what happened during the incident: a patient and patient's friend approached, claimant wanted to speak with the patient, the patient's friend intervened, and claimant said she wanted to speak directly to the patient. The patient's friend became upset, asked for claimant's name and badge, and claimant remarked that the patient's friend wanted to complain about her as she provided her name, badge, and her supervisor's contact information. The employer concluded that claimant's behavior in that incident was inappropriate or disrespectful, because the patient's friend called to complain, alleging that she and the patient "were very turned off" and "felt so betrayed that they . . . wrote everything down in a notebook when they went home." Transcript at 7, 12.

The employer did not specify what it was about claimant's behavior in speaking with the patient or telling the patient's friend she wanted to speak directly to the patient that was disrespectful or otherwise violated the employer's expectations, much less that why it "turned [them] off" or why they reported feeling "betrayed." The employer did not state that it was against the employer's expectations for claimant to try to speak with directly with a patient, particularly when claimant perceived that the patient "very much wanted to talk to me and have a discourse." Transcript at 30. Nor did the employer specify what it was about claimant's words, tone, volume, demeanor or body language that demonstrated she was willfully or knowingly violating an employer expectation in that incident.

Additionally, while claimant and the employer largely agreed about what happened on July 20th, they disagreed as to whose behavior was inappropriate. The employer alleged that claimant behaved disrespectfully or inappropriately with the patient and patient's friend. Claimant testified that the patient's friend was "very volatile," "perceives things to be worse than they are" and as "attacks on her," that she "just kind of went off" on July 20th, "cut off" claimant, and "everything just kind of took a turn." Transcript at 30, 33-34. Claimant is the only person present at the time of the events that occurred on July 20th. Because the employer presented only hearsay about what happened, and did not substantiate the hearsay with, for example, eyewitness testimony or the patient's friend's written account of what happened, the employer has not established by a preponderance of the evidence that claimant acted inappropriately in the final incident, much less that she did so willfully or with wanton negligence. The employer has therefore not satisfied its burden of establishing that claimant engaged in misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-116900 is affirmed.

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

DATE of Service: November 13, 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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