EO: 200
BYE: 201927

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

435
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1009

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144024). Claimant filed a timely request for hearing. On September 20, 2018, ALJ Shoemake conducted a hearing, and on October 1, 2018 issued Order No. 18-UI-117429, affirming the Department's decision. On October 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments when reaching this decision.

FINDINGS OF FACT: (1) City of Salem employed claimant as a clerk dispatcher from January 8, 2007 to June 29, 2018.

(2) Claimant's job entailed receiving phone calls from and relaying information to the public. The employer expected claimant to accurately relay information to the public. Claimant understood the employer's expectation.

(3) The employer had concerns about claimant's work performance and interactions with coworkers. On January 24, 2018, the employer reprimanded claimant for failing to follow directives with respect to her arrival time, leaving time, and seating assignments. She had also made a comment in which she alluded to a coworker as being a "bitch." Transcript at 10. The employer imposed a disciplinary salary reduction to sanction claimant.

(4) On January 25, 2018, the employer placed claimant on a plan of assistance, with weekly meetings about conforming to dispatching protocols, and accurately documenting and relaying information to ensure that the employer's messaging was consistent.

(5) In late May 2018, City of Salem was operating under a drinking water advisory. On May 30th, the water advisory in effect stated that small children, people with compromised immune systems, people on dialysis, and people with kidney or liver disease should not drink the City's water. The water advisory stated that the water was safe for the majority of the population, including healthy adults.

(6) Claimant was given a notice about the water advisory that included a section titled, "What should I do?" Transcript at 18. The first bulleted point under that heading stated, "Do not drink the water." Transcript at 19. The notice went on to state on the third line of the advisory that it applied to "Infants, young children, and other vulnerable individuals." *Id.*

(7) On May 30, 2018, a member of the public spoke to claimant to ask whether the city's water was drinkable. Claimant had scanned the water advisory, but had not fully read it. She told the individual, "the latest update is do not drink the water. I am not drinking it." Transcript at 6. She then told the individual that the advisory "only applies to the [] vulnerable population." Transcript at 24, 28. The individual stated that claimant's statements, and the advisory, were ambiguous. Claimant told the caller that she would talk to a supervisor and let them know the advisory was ambiguous. She thought that information she gave accurately reflected her understanding of the water advisory at the time. The individual later called the city manager's office and stated that the information he received through dispatch and the information available on the employer's website were inconsistent.

(8) Claimant's manager subsequently came into the dispatch center to have a discussion with the dispatchers. As the manager waited for all the dispatchers to get off the phone so they could hear her, claimant tried to use humor to lighten the moment and stated, "dun, dun, dun." Transcript at 9. The manager said, "this isn't funny. None of this is funny." *Id*. Claimant responded, "we're waiting to hear what you have to say." Transcript at 29. The manager considered claimant's remark insubordinate, and the employer thought using humor in that context showed poor judgment.

(9) On May 30 or May 31, 2018, the employer placed claimant on administrative leave. The employer determined that claimant had failed to successfully complete the plan of assistance. On June 13, 2018, the employer held a due process hearing, during which the employer told her she had failed the plan of assistance.

(10) On June 29, 2018, the employer sent claimant a letter informing her that she was discharged.

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) (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 final incidents that caused the employer to discharge claimant when it did occurred on May 30th when claimant spoke to an individual on the phone about the city's water advisory and made a remark as she waited to hear what her supervisor was going to say to the dispatchers. Those incidents were therefore the proximate cause of the employer's discharge decision, and the appropriate focus of the misconduct analysis.

The ALJ concluded that claimant's discharge was for misconduct, reasoning that despite having "been placed on a plan of assistance, given a reduction in pay and spoken to several times about her failure to follow the employer's policy/expectations" that "[c]laimant continued to do what she wanted." Order No. 18-UI-117429 at 3. The ALJ concluded that because claimant "continued to do what she wanted," her "failure to give the appropriate information to the caller in the final incident was a wantonly negligent disregard of the employer's interests," "telling the caller she wasn't drinking the water was an inappropriate and unnecessary comment to make," and her "continued disregard of the employer's expectations was misconduct." *Id.* We disagree.

The employer had the right to expect claimant to give accurate information to individuals who called dispatch for information. Claimant understood that expectation, and, on this record, she adhered to it. The water safety advisory stated, "Do not drink the water." Claimant advised the individual who called her on May 30th not to drink the water. The water safety advisory stated that the advisory applied to vulnerable populations. Claimant advised the individual on May 30th that the advisory "only applies to the [] vulnerable population." Claimant's comment that she was not drinking the water, while perhaps gratuitous, was not inaccurate on this record, as this record does not show whether or not claimant was a member of the vulnerable population groups that had been advised not to drink the water, nor does the record show that the employer had instructed claimant not to share such information with callers when she felt it appropriate to do so. The record therefore fails to show that claimant failed to give the individual with whom she spoke on May 30th accurate information, or that what she said to the individual amounted to a willful or wantonly negligent disregard of the employer's interests. Claimant did not engage in misconduct with respect to that May 30th conversation.

It is unclear from the employer's termination letter to claimant what extent claimant's May 30th "dun, dun, dun" remark had upon the employer's decision to discharge claimant. To any extent it did, although the remark was not well-received, it does not appear on this record that claimant made the statement with the intent to violate the employer's policies or expectations, nor does it appear that when she made it she was consciously indifferent to the employer's expectations or aware that the remark was likely to violate the standards of behavior the employer had the right to expect of her. Claimant therefore did not engage in misconduct with respect to her May 30th "dun, dun, dun" remark.

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-117429 is set aside, as outlined above.

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

DATE of Service: November 20, 2018

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.