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BYE: 201426

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

2014-EAB-0797

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2014, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding that the employer discharged claimant for misconduct (decision # 74626) and the second concluding that claimant was able to work during the week of December 29, 2013 through January 4, 2014 (decision # 85816). The employer filed timely requests for hearing on both decisions. On March 14, 2014, ALJ Holmes-Swanson conducted a consolidated hearing on both decisions and in the hearing on decision #74626 held the record open until March 17, 2014 to allow both parties to submit documentary exhibits on claimant's discharge. Both parties timely submitted documents. On March 20, 2014, the ALJ issued Hearing Decision 14-UI-13052, affirming decision #85816, and Hearing Decision 14-UI-13032, affirming decision #74626. Hearing Decision 14-UI-13032 also admitted into evidence as Exhibits 1 and 2, respectively, the documents that claimant and the employer had submitted, subject to either party filing objections to the admission of the exhibits into the hearing record. On March 24, 2014, claimant filed with the Office of Administrative Hearings (OAH) an objection to the scope of the March 14, 2014 hearing, the process by which the ALJ had received the parties' exhibits and to the admission of the employer's Exhibit 2. On March 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

On April 7, 2014, the ALJ issued a letter order, reference no. 2014-UI-11659, overruling claimant's objections to the scope of the March 14, 2014 hearing and to Exhibit 2, but reopening the hearing record until April 9, 2014 to allow claimant to submit additional documents and to allow both parties an opportunity to file written responses to the exhibits submitted. On April 9, 2014, Hearing Decision 14-UI-13052 became final without an application for review having been filed. On April 10, 2014, EAB issued Appeals Board Decision 2014-EAB-0504, dismissing without prejudice claimant's application for review to allow the completion of the ongoing proceedings at OAH. On April 12, 2014, claimant submitted to OAH additional evidentiary documents and a narrative response to the employer's Exhibit

2, and requested an extension of the April 9, 2014 deadline for submissions. On April 22, 2014, the ALJ issued Amended Hearing Decision 14-UI-15704, superseding Hearing Decision 14-UI-13023. Amended Hearing Decision 14-UI-15704 retained the admission of Exhibits 1 and 2 into evidence, admitted into evidence as Exhibit 3 the additional documents that claimant submitted on April 12, 2014 and concluded that the employer discharged claimant for misconduct. On May 8, 2014, claimant filed an application for review of Hearing Decision 14-UI-15074 with EAB.

Claimant submitted a written argument in which she contended she did not receive adequate advance notice that the March 14, 2014 consolidated hearing would include the issue of her discharge in addition to issues about her ability to work and that, as a result, she was unable to adequately represent herself. EAB construes claimant's argument as an objection to the fairness of the hearing. The notice of hearing that was mailed to claimant stated on its first page in bold-faced font that the issues at the scheduled hearing included, in addition to claimant's ability to work, **"Shall claimant be disqualified from the receipt of benefits because of a separation, discharge, suspension or voluntary leaving from work? (ORS 657.176, ORS 657.190 and OAR 471-030-0038.)"** Record Document, February 24, 2014 Notice of Hearing, at 1 (emphasis in original). Had claimant reviewed that notice with reasonable care she would have known that her discharge was a hearing issue. Moreover, although claimant contended she was "caught off guard" and "ill-prepared" when the issue of her discharge came up at hearing, the hearing transcript does not show that claimant experienced any inability to recall the relevant events leading to her discharge or that claimant was hampered in presenting any information during her testimony. Written Argument at 1. In addition, to the extent claimant was actually not prepared to address her discharge, the ALJ twice reopened the hearing record to allow claimant to submit documents and a narrative response to the employer's allegations that claimant was discharged for misconduct. After reviewing the entire hearing record, it appears that the ALJ gave all parties, including claimant, an opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (April 1, 2004).

In her written argument, claimant also requested that Exhibit 2 be stricken from the hearing record because the employer did not serve a copy of it on her. Written Argument at 1. Although claimant contends otherwise, a review of the hearing transcript does not show that the ALJ required either party to send copies of their exhibits to the other party "in order for the evidence to be considered." Written Argument at 1. Because claimant received the employer's documents from OAH, and the ALJ allowed claimant to submit a narrative rebuttal to the documents after claimant received them, and entered claimant's rebuttal into evidence as Exhibit 3, claimant was not prejudiced when she did not receive a copy of Exhibit 3 directly from the employer. Claimant's request that EAB strike Exhibit 2 from the record is denied. EAB considered claimant's remaining arguments to the extent they were based on evidence in the hearing record.

The employer submitted a written argument but did not certify that it provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For that reason, EAB did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Drake Peridontics & Implantology, PC employed claimant working at the front desk in its dental practice from July 15, 2013 until January 7, 2014. Claimant's duties were varied and included dealing with phone calls from referring doctors, patients and insurance companies,

scheduling patients, obtaining and inputting patient and insurance information into the employer's electronic recordkeeping system and collecting payments.

(2) When she was hired, claimant had no experience working in a dental office. Claimant did not know dental procedures or how to perform the tasks that were assigned to her to support the dentist. Claimant had only a very basic knowledge of computer systems.

(3) The employer had a comprehensive hard-copy manual of its procedures that described how it expected employees to perform their tasks. The employer expected claimant to follow its manual and instructions from the dentist in performing her work and to perform that work competently. Claimant was aware of the employer's expectations.

(4) The employer had the goal of achieving a "paperless" office in which all information was, from inception, created and entered in its electronic system in preference to using pens and paper. Transcript at 29, 48, 69. Although the reason for the "paperless" policy was to protect patient confidentiality, the employer discouraged employees from writing anything on paper at any time. Transcript at 29, 69. At the beginning of her employment, claimant used post-it notes and paper to record some patient information before entering it in the employer's electronic records as well as made notes on paper about the employer's procedures and used post-it notes to annotate the employer's manual of procedures. On approximately August 5, 2013, the employer sent claimant an email in which claimant was advised to use her computer to take notes of telephone conversations because "it will help you get out of the STICKY NOTE habit [for making notes]. Exhibit 2 at 4 (emphasis in original). On September 7, 2013, the employer sent claimant an email advising claimant that "I do not want to see the pen/paper routine for patient information this week" and "[p]lease consider this a written warning to stop using note pads/sticky notes for patient information." Exhibit 2 at 28. Sometime after September 7, 2013, the employer observed that employees in addition to claimant were using post-it notes for the purpose of recording information, and removed all post-it notes from the office. After the employer removed the post-it notes, claimant brought in her own post-it notes and continued to use them to annotate her copy of the employer's manual of procedures and to make other notes relating to those procedures or the location of information in the employer's electronic records. Claimant did not thereafter use post-it notes for recording any confidential patient or insurance information. The employer was aware that claimant was using paper post-it notes as tabs to highlight or explain to herself certain of the procedures in the employer's manual, and did not tell claimant it disapproved of this type of hard-copy writing on paper. Transcript at 38, 81, 82. Claimant thought that the employer allowed the use of paper notes that did not include patient information.

(5) Throughout claimant's employment, the employer was dissatisfied with claimant's work performance and often pointed to claimant perceived deficiencies in her work. . The employer's relationship with claimant became "strained." Transcript at 33, 43. The employer thought that claimant was not learning office procedures as rapidly as expected and not performing her work at the expected level. Transcript at 35, 40-42. Claimant "struggled" to perform her job. Transcript at 65-66. The employer had numerous meetings with claimant to improve her work performance during her employment. At those meetings, when the employer tried to tell claimant that she had not completed a task correctly, the employer perceived that claimant did not take "ownership" of her mistakes but rationalized them. Transcript at 42. During most of claimant's employment, the employer completed claimant's time card

for her and claimant often objected to the time that the employer had entered. The employer perceived that claimant was "argumentative and belligerent." Transcript at 27.

(6) On October 15, 2013, the employer gave claimant her first performance evaluation. The evaluation noted that claimant did not multi-task effectively, did not prioritize according to the employer's policies and made excuses when she was unable to correctly complete tasks. Exhibit 2 at 19. The review did not mention claimant's use of post-it notes or other types of paper as being a concern.

(7) On December 18, 2013, the employer closed its office for approximately two weeks for the Christmas holiday. On January 7, 2014 claimant's first day back at work after the holiday, claimant picked up her paycheck and discovered that the employer had stapled to the back of it a performance evaluation dated December 18, 2013. The employer had not discussed the evaluation face-to-face with claimant. The evaluation indicated numerous deficiencies in claimant's performance, including that claimant took too long to finish tasks, was not efficient, failed to establish proper work priorities, did not enter accurate information in patient records, chatted too much with patients and interrupted the dentist during surgeries and examinations. It concluded "[i]f these negatives are not improved in a two week work period we will need to part ways and I will have to let you go for cause." Exhibit 2 at 24. The evaluation did not mention claimant's use of post-it notes or other paper as perceived deficiency in claimant's work performance. On January 7, 2014, claimant's first day back at work after the Christmas holiday, claimant sent an email to the employer responding to the December 18, 2013 performance evaluation. This email pointed out inaccuracies that claimant perceived in the employer's performance evaluation. Exhibit 1 at 15-16. It concluded that "[w] are clearly hitting a point of irreconcilable differences due to different work styles and ethics, and I'm not sure how to proceed at this point." Exhibit 1 at 16.

(8) On January 7, 2014, in an email reply to claimant the employer discharged claimant.

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. 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. Mere inefficiencies resulting from lack of job skills or experience 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).

In Amended Hearing Decision 14-UI-15704, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that the employer had demonstrated that on several occasions it informed claimant of its prohibitions against writing patient information on post-it notes and that, after those warnings, claimant's continued use of post-it notes to record patient information was a wantonly negligent violation of the employer's expectations. Amended Hearing Decision 14-UI-15704 at 4, 5. The ALJ did not accept claimant's testimony denying that she wrote patient information on post-it notes because it was contradicted by the testimony of the employer's dental assistant, which the ALJ found

"more persuasive than the claimant's self-serving testimony." Amended Hearing Decision 14-UI-15704 at 4. We disagree.

The testimony of any claimant in a discharge case which disputes the testimony of an employer's witness can be characterized as self-serving when, if accepted, it will defeat a charge of misconduct . For that reason, it is an insufficient ground, alone, to disregard claimant's testimony. Although the employer's dental assistant contended that she saw claimant "all the time" writing down patient information on post-it notes and paper after the dental office was warned against that practice, there was no reason in the record to find the dental assistant's testimony more persuasive than claimant's testimony that she wrote only information about office procedures on post-it notes to append to the employer's manual and did not write any patient information on paper or post-it notes. Transcript at 76. Moreover, from the numerous documents that the employer submitted into evidence, it would appear that the employer was attempting to document every deficiency it perceived in claimant's performance. *See* Exhibit 2. After September 7, 2013, however, the employer's documents do not refer to any impermissible uses of post-it notes by claimant when, if claimant was so extensively and openly using them for an unauthorized purpose, a reprimand would have been expected. At best, the conflicting testimonies of the dental assistant and claimant about the purposes for which claimant wrote notes on paper are of equal evidentiary weight. When the evidence is evenly balanced, the uncertainty is resolved against the employer, which is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, claimant did not record patient information on post-it notes or other paper products after the warning on September 7, 2013.

Claimant did not dispute that she made notes about office procedures and the location of certain types of information in the employer's electronic system on post-it notes or other types of paper. Transcript at 80-81. From the testimony of the employer's dentist, it was apparent that the dentist knew claimant continued to use post-it notes or paper for this purpose and it does not appear that the employer ever told claimant it disapproved of *all* uses post-it notes or paper or claimant's specific uses of them. *See* Transcript at 38, 79, 80-81. In addition, the dentist did not dispute claimant's testimony that the use of post-it notes or other paper to record information about office procedures or the location of items in the employer's electronic system was permitted by the employer. Although, the dentist contended that the use of "sticky notes" for any purpose was prohibited in the employer's office manual, we question whether the prohibition was so absolute since the employer submitted all manner of documents to show that claimant was warned against the use of post-it notes, but did not apparently include a copy of the relevant part of its manual. Transcript at 29; *see* Exhibit 2. In the employer's documents that were submitted, although there are general descriptions of the goal of a "paperless office" and an indication that a previous employee had been let go for her "sticky note flaw," which apparently led to the employee not entering information into the electronic records, the only specific prohibition that the employer stated was in reference to using post-it notes or other paper to record *patient information*. *See* Exhibit 2 at 5, 28, 32, 33; *see also* Transcript at 29, 32, 71. Viewing the record as a whole, it is more likely than not that that the employer did not prohibit the use of post-it notes or other paper to record information relating to office practices and procedures and that, while the employer strongly aspired to an absolutely paper-free office, claimant's understanding of the scope of the employer's actual prohibition was not unreasonable. The preponderance of the evidence does not show that claimant's use of post-it notes or other paper to record information about the employer's office procedures and practices was a willful or a wantonly negligent violation of the employer's expectations.

Aside from claimant's use of post-it notes and paper, the other purported grounds on which the employer discharged claimant are best summarized as dissatisfaction with the level of claimant's performance after approximately six months of training. Transcript at 26, 34, 43, 64, 65, 65, 66, 68. However, deficient work performance, alone, is insufficient to demonstrate the type of willful or wantonly negligent behavior that disqualifies a claimant from benefits under OAR 471-030-0038(3)(a), and the controlling regulation specifically provides that inefficient work performance resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). The only example of claimant's alleged violation of an employer standard that the employer provided was claimant's continued use of post-it notes, which is discussed above. Transcript at 34. Absent specific evidence that claimant consciously violated other objectively ascertainable employer expectations, we cannot conclude that claimant engaged in willful or wantonly negligent misconduct. *See* OAR 471-030-0038(1)(c). Moreover, the record most strongly supports the conclusion that the deficiencies in claimant's work that the employer cited were not the result of misconduct. It appears, more likely than not, that claimant's difficulties or inefficiencies were due to her "struggling" to learn a job for which she had no prior experience and to perform that job in a "paperless" environment when she had only a limited knowledge of computers. Transcript at 48, 49, 50, 51, 52, 64, 65, 66. On this record, the employer did not meet its burden to show that it discharged claimant for behavior that was a willful or wantonly negligent violation of its expectations.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: <u>June 23, 2014</u>

NOTE: This decision reverses a hearing decision 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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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