

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0891

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130628). Claimant filed a timely request for hearing. On May 14, 2014, ALJ Dorr conducted a hearing, and on May 15, 2014, issued Hearing Decision 14-UI-17661, concluding the employer discharged claimant, but not for misconduct. On May 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Andrea V. Gray, M.D., P.C. employed claimant as a receptionist from January 2, 2004 to March 3, 2014. Claimant's job duties included taking payments from patients, issuing receipts, placing the payments in the employer's cash drawer and posting the payments to the patients' accounts.

(2) The employer expected its employees to refrain from committing theft of employer property. Claimant was aware of the employer's expectation as a matter of common sense.

(3) Between February 18 and March 3, 2014, while claimant was on vacation, three patients complained to the employer that payments they previously made and had receipts for had not been credited to their accounts. The employer investigated and determined that the employer's copies of the receipts issued had been removed from their receipt book and the patients' accounts had been altered under claimant's login to eliminate the payments, balance the employer's daily receipts with its accounting system and cover-up a cash shortage. The employer "suspected [claimant] of theft" of cash, and despite her denials and the fact that other employees had access to the cash drawer and the employer's receipt book and

could have made the account changes under claimant's login when claimant was away from her desk on breaks, discharged her for that reason when she returned from vacation on March 3.

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. In a discharge case, the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, the employer admitted it discharged claimant because it "suspected her of theft" and although it believed she had committed other policy violations previously, she "had not been let go" for those reasons. Transcript at 7, 18-19. Therefore, its suspicion that she had committed theft was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer discharged claimant for theft of cash from its cash drawer that it believed occurred between October 31, 2013 and February 18, 2014 as demonstrated by the cash receipts from the complaining patients in conjunction with an "audit trail" in its accounting system that suggested that claimant had altered the accounts in question as well as others since October 2013. Transcript at 6, 10. However, the employer did not have first-hand evidence of claimant committing acts of theft and claimant consistently denied any theft or alteration of the employer's patient accounts asserting that other employees could have been responsible for and made account alterations under her initials while she was on breaks or using the employer's restroom. Transcript at 24-25, 32. The employer did not dispute that claimant's explanation was feasible although it asserted that it was unlikely. Transcript at 36-37. Given the inconclusive nature of the employer's evidence and the absence of a basis for concluding claimant was not credible, we find the evidence as to whether claimant committed theft no more than equally balanced. Consequently, the employer failed to show by a preponderance of the evidence that claimant engaged in the conduct for which she was discharged. Absent such a showing, we cannot find misconduct under ORS 657.176(2)(a).

The employer discharged claimant, but not for misconduct. She is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-17661 is affirmed.

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

DATE of Service: July 2, 2014

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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