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BYE: 201518

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-1318

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95648). Claimant filed a timely request for hearing. On July 8, 2014, ALJ S. Lee conducted a hearing, and on July 16, 2014 issued Hearing Decision 14-UI-21630, concluding the employer discharged claimant but not for misconduct. On August 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB. However, the employer did not certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained new information that was not part of the hearing record, and the employer failed to explain how or show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) GMC Properties employed claimant as the manager of an apartment complex from January 1, 2014 until May 1, 2014. Claimant had worked as an assistant manager at the complex for some time before the employer purchased the complex on January 1, 2014. As part of her compensation, claimant and her family lived rent-free in an apartment in the complex

(2) The employer expected claimant to behave honestly and not to forge or fraudulently alter documents that exempted some tenants from certain policies of the apartment complex. The employer also expected claimant to maintain reasonable contact when she was away from work due to an illness. Claimant understood the employer's expectations as a matter of common sense.

(3) Claimant was diagnosed with epilepsy in 2005 when she started experiencing grand mal seizures. Claimant received treatment from a neurologist and took medication to control the seizures. Stress and anxiety provoked claimant's seizures. Claimant had six grand mal seizures after January 1, 2014, when she had experienced only two in the preceding eighteen months. Claimant thought that the stress of assuming the manager position triggered the increased frequency of her seizures.

(4) Sometime before April 2014, claimant talked with the portfolio manager about possibly transferring back to the assistant manager position or to a position as a leasing agent to decrease the stress that she experienced from work. The portfolio manager and claimant's coworkers knew of her epilepsy. Claimant had made statements to her coworkers that discouraged them from calling emergency services if she had a grand mal seizure in the workplace. The coworkers understood that claimant wanted them to call her husband unless the seizure appeared to affect her breathing.

(5) Sometime in February 2014, a resident who had a therapy dog spoke to claimant about obtaining a puppy as a second therapy dog. Claimant gave the resident a form for a "reasonable accommodation" that would allow the tenant to have a puppy through an exemption from the employer's policies based on a healthcare provider's certification. Exhibit 1 at 17. The form claimant gave the resident was completely blank. At some point, the tenant turned in the reasonable accommodation form.

(6) On approximately April 10, 2014, the portfolio manager visited the apartment complex and, while walking outside with claimant, saw that tenant with a puppy. In response to the portfolio manager's questions, claimant stated that there was paperwork in the tenant's file allowing the tenant to have the puppy. Claimant also told the manager that she had visited the tenant's apartment and had not seen any visible damage from the puppy. Claimant did not inspect the tenant's apartment using the tool of an ultraviolet light that the employer had recently introduced to detect apartment damage from animal urine.

(7) On Friday, April 11, 2014, while at work, claimant experienced a serious grand mal seizure of some duration. The assistant manager and the leasing agent were present at the time and called claimant's husband. Claimant's husband was in the apartment complex and came to the office. He took claimant to a hospital emergency room for treatment. On Monday, April 14, 2014, claimant took a letter to the workplace intended for the portfolio manager. In the letter claimant expressed concern that her coworkers had not called emergency services for medical assistance during her April 11, 2014 seizure and stated that she feared for her safety if she had another seizure at work. Claimant continued the letter by stating that she had wanted to address the medical issues caused by her epilepsy and that if "it is the opinion of [the employer] that I am no longer able to complete the tasks required of my position … please respond in writing no later than Friday, April 18, 2014." Exhibit 1 at 6. When claimant gave the letter to the assistant manager, claimant mentioned that she was having problems with her memory due to her epileptic seizures and she thought that she might unable to continue to perform her job. The assistant manager understood claimant to state to her that she was "going to be turning in her two week notice." Transcript at 59. Claimant turned in some, but not all, of her office keys to the assistant manager along with the letter. On that day, claimant travelled from her apartment in Independence, Oregon to Portland, Oregon to stay with her parents in Portland.

(8) On Tuesday, April 15, 2014, the portfolio manager sent a letter to claimant attached to an email. The letter stated that the employer had construed claimant's April 14, 2014 letter as a "request for reasonable

accommodation under state and federal disability law" and that the employer wanted to respond to the limitations that claimant's medical condition placed on her ability to work. Exhibit 1 at 6. The letter stated that the employer was placing claimant on a seven day paid administrative leave while it obtained more information about claimant's medical condition and its impacts on her work performance. The letter also stated that the property manager wanted to discuss "certain job performance issues involving resident file documents" with claimant. Exhibit 1 at 7. The letter asked claimant to turn in her "property master key fob and any other property key fobs in your household immediately." Exhibit 1 at 7.

(9) Also on April 15, 2014, after spending the night in the hospital, claimant saw her doctor in Portland, Oregon. Claimant's doctor told her that the stress of her job appeared to have exacerbated her condition and to have caused the increased frequency and severity of her seizures. Claimant's doctor gave her a note excusing her from work for two weeks and further stating "no call or contact [to or from the employer] for 2 weeks." Exhibit 1 at 14.

(10) On Friday, April 18, 2014, claimant's husband sent an email to the portfolio manager attaching the doctor's note of April 15, 2014. In that email, claimant's husband stated that claimant was in Portland and that he would obtain the master key fob from claimant over the upcoming weekend and would deliver it to the portfolio manager. Sometime around April 21, 2014, claimant's husband delivered the key fob to the employer's office.

(11) On approximately April 29, 2014, claimant had another doctor's appointment. Claimant's doctor gave her a note excusing her from work until May 16, 2014. Exhibit 1 at 11. Claimant's doctor recommended that she arrange for a protected leave from work under the Family Medical Leave Act (FMLA). On April 30, 2014, claimant's husband sent an email to the portfolio manager attaching the doctor's most recent note. In that email, claimant's husband stated that claimant needed to remain away from work for at least two more weeks. He requested that the portfolio manager provide the paperwork that would allow claimant to apply for a leave from work through FMLA. The email also inquired if claimant and her husband needed to pay rent for the apartment at the complex and if staying at the complex was "a possibility with [claimant] going on leave." Exhibit 1 at 13. On May 1, 2014, claimant's husband called the employer's office and left a voicemail message requesting the same information and paperwork.

(12) Also on May 1, 2014, the portfolio manager sent an email to claimant stating that, in response to her husband's inquiries, since she was on unpaid leave and not scheduled to work, she needed to pay rent for her apartment like any other tenant. Transcript at 16, 17; *see also* Transcript at 36. The email also stated that the portfolio manager was going to forward the paperwork necessary for a leave under the Oregon Family Leave Act (OFLA) "in the next day or two." *Id.* The email mentioned that the employer was investigating claimant's management of the apartment complex and stated that "until further notice, communicate with me [the portfolio manager] via email or letter." Transcript at 17; *see also* Transcript at 36.

(13) After May 1, 2014, the portfolio manager did not send any paperwork to claimant or her husband that would allow claimant to apply for a leave under FMLA or OFLA. Neither the portfolio manager nor any representative of the employer provided any explanation for the failure to send this paperwork to claimant or her husband.

(14) On May 7, 2014, claimant had an appointment with her neurologist as further treatment for her epilepsy. At that visit, the neurologist's staff told claimant that her insurance company had denied coverage for the visit. That same day, claimant called the administrator of the employer's benefit plans and was told that she did not have health insurance coverage. The administrator's representative would not tell claimant why she no longer had insurance and told claimant to speak with her supervisor. Claimant then tried to reach the portfolio manager on that manager's cell phone to discuss whether she had health insurance and to further request the FMLA and OFLA paperwork. When claimant called the portfolio manager's cell phone, claimant reached only an automated recording that stated "this subscriber is no longer accepting phone calls from you." Transcript at 8, 23, 39. Sometime thereafter, claimant received a letter dated May 1, 2014 from the benefits administrator notifying her that her health insurance had been canceled due to the "disqualifying event" of a "termination." Transcript at 22. The letter stated that if claimant wanted coverage she could continue to it if she paid a premium for that insurance under COBRA. Claimant sent the premium payment to the plan administrator. Shortly after receiving the letter, claimant called the employer's office to reach the portfolio manager since she had already learned that the manager's cell phone was blocking calls from her, but was only able to speak with the assistant manager. Claimant told the assistant manager of the recent events with her health insurance coverage and asked if she had been discharged. Transcript at 63. The assistant manager told claimant she could not answer her questions but would let the portfolio manager know of her concerns and questions. Neither the portfolio manager nor any other representative of the employer ever contacted claimant to tell her that she was not discharged, that the cancelation of her health insurance was in error or that her health insurance coverage had been reinstated. Transcript at 40, 41.

(15) On May 9, 2014, claimant's husband submitted a required notice that he and claimant were vacating their apartment in the complex due to insufficient income to pay rent as well as medical bills. Exhibit 1 at 14. The move-out date was set as June 10, 2014.

(16) On May 19, 2014, claimant's husband sent an email to the portfolio manager stating, since he and claimant had not received FMLA or OFLA paperwork and had received the letter cancelling claimant's health insurance, he was requesting clarification of claimant's current employment status. The email stated that, without clarification, claimant would assume her employment was terminated on May 1, 2014, the date of the letter cancelling claimant's insurance coverage. Transcript at 23, 43; Exhibit 1 at 12. Neither the portfolio manager nor any representative of the employer responded to this email from claimant's husband.

(17) Sometime in May 2014, the employer concluded that the request for accommodation submitted by the tenant who had the puppy was a forged document. The tenant denied signing the request and the tenant's health care provider denied signing her name to the certification or the prescription for a therapy puppy that supported the accommodation request. Transcript at 49, 51; Exhibit 1 at 16, 18. The employer determined that, although several other employees had access to the files and could have forged the documents, claimant had done the actual forgery based on allegedly "suspicious" behavior when using her laptop and the fact that she had assured the portfolio manager in April 2014 that all the necessary paperwork to allow the tenant to have the puppy had been completed and turned in. Transcript at 47, 48.

(18) On June 2, 2014, claimant filed a claim for unemployment benefits based on her discharge. Exhibit 1 at 9. On June 26, 2014, the portfolio manager sent claimant a letter notifying her that she was

discharged for forging the tenant's documents in connection with the request for accommodation to allow the tenant to have a puppy.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although claimant contended that she was discharged, the employer contended that claimant voluntarily left work either because of her failure to make direct, personal contact with the employer after April 14, 2014 or because of certain statements that she and her husband made on and after April 14, 2014. Transcript at 5, 43, 44, 45, 59, 69. Based on the portfolio manager's April 15, 2014 written response to claimant's April 14, 2014 letter, it is abundantly clear that the manager neither viewed claimant's letter nor any past comments that she had made as evidencing an unambiguous intention to leave work. After the portfolio manager's letter, that claimant's husband sent to that manager the doctor's notes excusing claimant from work and several follow-up communications requesting FMLA and OFLA paperwork from the employer plainly indicated claimant's willingness to continue working for the employer, regardless of any sporadic comments that he might have made about the seriousness of claimant's condition. *See e.g.,* Transcript at 43. The employer's stated belief that claimant had quit based her failure to directly contact the employer is both weak and belied by the undisputed evidence in the record. The employer agreed that claimant actually tried to contact the portfolio manager by phone after April 14, 2014, but claimant's calls were blocked, and it agreed that claimant tried to reach the portfolio manager by a phone call to the employer's office during early May 2014, and left messages for the portfolio manager with the leasing agent, the assistant manager or both. Transcript at 8, 23, 39, 40, 41; Exhibit 1 at 9. The portfolio manager admitted that she did not return the messages that claimant had left for her after April 14, 2014. Transcript at 8, 23, 39. As well, the portfolio manager's hands were not tied during this time. If she was uncertain whether a medical prohibition prohibiting contact with claimant was still in place, the portfolio manager could have communicated with claimant's husband about claimant's willingness to continue to work through the simple expedient of sending to the husband an authorization for claimant to sign allowing such an exchange of information with him. Transcript at 44, 45. Based on the undisputed evidence in the record, it does not appear that claimant or her husband manifested any objective intentions from which the employer could reliably infer that claimant had quit work. However, the portfolio manager's failure, without any explanation, to provide the FMLA or OFLA paperwork needed to continue claimant's employment, the cancellation of claimant's health insurance and the employer's failure to inform claimant that the cancellation was in error (if it was, in fact, an error), and the employer's failure to respond both to claimant and her husband's inquiries in early May 2014 about whether claimant remained employed, all make it more likely than not, that the employer was not willing to continue claimant's employment. On this record, claimant's work separation was a discharge on May 1, 2014, the date of the letter, which was never apparently `formally retracted, informing claimant that her health insurance was no longer in effect due to a "termination." Transcript at 22.

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. The employer has 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).

The employer appeared to contend at hearing that, if it discharged claimant, it was justified in doing so by her failure to contact the employer directly after April 14, 2014 and due to alleged forgeries on the request for accommodation supposedly submitted by one tenant. The principal weakness in the employer's position that claimant did not directly contact it was that, as discussed above, claimant did try to contact the portfolio manager by phone in early May and her messages went unanswered. Moreover, claimant never prohibited the employer from obtaining information about her status from her husband during the time she was ill, and the employer never notified claimant or her husband that it did not consider the husband an acceptable proxy for claimant or that it needed a formal authorization to communicate with claimant through her husband. Directly and through her husband, it appears that claimant maintained reasonable contact with the employer until the time that she concluded she had been discharged, which was in early May 2014. On this record, the employer did not meet its burden to show that claimant willfully or with wanton negligence failed to maintain adequate contact with the employer after April 14, 2014.

With respect to the employer's contention that claimant forged certain tenant documents, the employer also did not show claimant engaged in that misconduct. The employer candidly conceded that employees other than claimant had access to the tenant files and documents and, presumably, could have forged the documents at issue. Transcript at 47. Claimant denied that she forged the tenant documents and this direct evidence is entitled to more weight than the "suspicious behavior" that the employer relied on in concluding that claimant, rather than some other employee or the tenant, had actually forged the documents. Transcript at 47. In light of claimant's rebuttal and the weak evidence underpinning the employer's conclusions, the employer did not meet its burden to show that claimant forged any client documents or otherwise engaged in misconduct based on those documents.

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

DECISION: Hearing Decision 14-UI-21630 is affirmed.

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

DATE of Service: <u>September 10, 2014</u>

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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