

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1377

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85716). Claimant filed a timely request for hearing. On July 30, 2014, ALJ M. Davis conducted a hearing, and on August 1, 2014 issued Hearing Decision 14-UI-22655, reversing the Department's decision. On August 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument which contained a great deal of new information that was not part of the hearing record. The employer did not explain why it did not offer this information during the hearing and failed to show, as required under OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider that new information, and relied only on information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) PT Solutions employed claimant as a receptionist and an aide from October 30, 2014 until June 10, 2014. As one of her duties, claimant verified the eligibility of patients to receive coverage from health insurers for the services of the employer's physical therapists.

(2) The employer expected claimant to complete assigned tasks with reasonable promptness and, after a task was completed, to notify the physical therapist who had assigned it. Claimant was aware of the employer's expectations.

(3) In approximately mid-April 2014, the employer's owner, who was also one of the physical therapists, asked claimant to verify the insurance eligibility of a particular patient to receive physical therapy services. Claimant placed the patient's insurance paperwork in a box that she kept near her desk. That box also contained paperwork of other patients for whom claimant was verifying insurance eligibility.

(4) On June 10, 2014, the owner looked into the box in which claimant had placed patients' insurance paperwork. The owner saw the paperwork for the patient for whom she had asked claimant to verify insurance eligibility in mid-April 2014 and, from the paperwork, that task did not appear to the owner to have been completed. However, claimant had already either verified the insurance eligibility of the patients about whom she had placed paperwork in the box or was awaiting follow-up responses from insurance companies that she had already contacted about the remaining patients' insurance eligibility. The owner showed claimant the paperwork for the patient from mid-April 2014 and asked claimant if that particular patient's insurance eligibility had been verified. Claimant told the owner that she did not know. The owner concluded that claimant had not yet taken any actions to confirm the patient's eligibility. The owner also perceived that claimant was argumentative and defensive during this conversation.

(5) On June 10, 2014, the owner discharged claimant for not having completed the task of verifying the insurance eligibility of the patient about whom the owner had asked claimant in mid-April 2014.

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. The employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In this case, the employer's witness testified generally about her many dissatisfactions with claimant's work performance and claimant's "multiple chances to come around." Transcript at 6; *see also* Transcript at 5, 7, 9, 10, 11. However, the employer's witness also testified that she decided to discharge claimant when she did because of the allegedly "time sensitive," "overdue project" that she discovered on June 10, 2014 and that she thought claimant had not completed. Transcript at 7. Regardless of an employer's alleged accumulation of reasons for discharging a claimant, EAB customarily focuses its analysis on the final event that motivated the employer's decision to discharge claimant as the proximate cause of the discharge. *See Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). EAB has adopted this approach for the pragmatic reason that when, as here, the employer knew of its past dissatisfactions with claimant's performance at approximately the time of the events giving rise to them and did not discharge claimant for those alleged past inadequacies, the employer must necessarily have concluded that the past incidents did not merit discharge. Because the employer did not show any reason for departing from EAB's traditional approach, EAB has limited its evaluation to claimant's alleged failure to verify the

insurance eligibility of the patient about whom the employer's owner had first asked her to verify eligibility in mid-April 2014. Transcript at 8.

With respect to verifying the insurance eligibility of the particular patient, the owner contended that when she discovered that patient's insurance paperwork in claimant's box, she did not think claimant had done anything to verify that patient's eligibility for over approximately a month and a half. Transcript at 5, 8. However, although claimant could not recall the status of that particular patient's insurance eligibility, claimant contended that she had either already completed the task of verifying the eligibility of the patients for whom paperwork was in the box or had already taken preliminary steps and was waiting for necessary follow-up responses from insurance companies to complete the verification task for the remaining patients. Transcript at 15. The employer's witness did not present any rebuttal evidence to show that, in fact, the verification for the particular patient at issue had not been completed or that, if it was not completed, claimant had not had preliminary contact with the patient's insurance company and was not awaiting a follow-up response from that insurer. In light of claimant's rebuttal evidence and the failure of the employer's witness to dispute that evidence or to present specific evidence countering it, the employer did not show, more likely than not, that claimant did not take steps to perform the verification she was asked to undertake with reasonable promptness. The employer's witness also appeared to contend that it was misconduct for claimant not to have notified the witness if the task she had assigned to claimant, to verify the eligibility of the particular patient, had actually been completed. Transcript at 22. However, if that particular patient was one of the patients for whom claimant was awaiting a follow-up response from an insurance company, claimant would have had no obligation to report completion until the verification task was actually completed. Given that the employer did not rule out this ground, the employer did not present sufficient evidence to show, more likely than not, that claimant's failure to report that the task had been completed was misconduct.

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

DECISION: Hearing Decision 14-UI-22655 is affirmed.

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

DATE of Service: September 24, 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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