

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0987

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 2, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94121). Claimant filed a timely request for hearing. On July 30, 2015, ALJ Seideman conducted a hearing, and on July 31, 2015 issued Hearing Decision 15-UI-42392, concluding the employer discharged claimant, but not for misconduct. On August 18, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Dr. Zavari Dental PC employed claimant from January 20, 2014 to June 11, 2015 as its office manager. Claimant was also one of the employer's patients.

(2) The employer expected employees to refrain from deleting patient information, including email addresses, from its records. If a patient did not want to receive information via email, the employer expected employees to mark that preference in the patient's file without deleting the patient's email address from the employer's records.

(3) The employer told claimant in the past that patients were not required to provide an email address. Claimant understood it to be standard office practice to delete a patient's email address from the patient's records if the patient indicated he or she did not want to receive email communications from the employer.

(4) On June 11, 2015, the owner asked claimant to apologize to a patient because the patient had to wait for service. Claimant refused to apologize. The owner told claimant, "I'd like you to leave right now," and planned to discuss the incident with claimant the next day. Audio Record at 6:35 to 6:50. Before she left the office, claimant deleted her email address from the employer's records. The owner saw claimant deleting information from the computer before she left. The owner was unable to verify herself what information claimant had deleted from the computer.

(5) Later on June 11, 2015, claimant sent the manager a text message asking when claimant would receive her final paycheck. The manager replied that claimant had not been discharged, but had quit. Claimant texted the manager that she did not quit and said, "If I'm not fired, I'll be back to work on Monday." Audio Record at 15:50 to 16:00. The manager replied, "Well, let me check." 16:01 to 16:04. The manager then called claimant and told her, "No, we feel it's best that you don't come back." Audio Record at 16:06 to 16:09.

(6) The employer refused to allow claimant to return to work because claimant deleted patient information from the employer's computer records.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The employer asserted at hearing that claimant quit work because she inquired about her final paycheck after the employer sent her home from work. Audio Record at 7:27 to 8:33. However, when the manager told claimant the employer had not discharged her when it sent her home from work, claimant said she "would be back to work on Monday." The record thus shows claimant was willing to continue working for the employer. The employer, however, would not allow claimant to continue working because claimant deleted information from the employer's records. Because the employer would not allow claimant to continue working after June 11, 2015, the work separation was a discharge.

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. 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 employer discharged claimant because she deleted patient information from the employer's records. The employer had a right to expect employees to refrain from deleting patient records, and we infer that claimant understood that expectation from training and experience, and as a matter of common sense.

The owner testified that she could no longer trust claimant because she did not know what claimant deleted and why she deleted it. Audio Record at 8:10 to 8:16; 31:37 to 32:39. Claimant, however, testified that she deleted only her own email address because she no longer wished to receive emails such as marketing emails, appointment confirmations and birthday greetings, from the employer. Audio Record at 14:46 to 15:20; 24:15 to 24:50; 33:07 to 33:53. The employer's suspicions that claimant may have deleted other information does not outweigh claimant's firsthand testimony that she deleted only her own email address. In regard to deleting her email address, claimant testified that the owner knew she regularly deleted patients' email addresses when patients requested to be exempt from receiving emails from the employer. *Id.* Claimant's witness also testified that employees deleted patients' email addresses if they did not want them attached to their personal information (Audio Record at 26:01 to 26:34), and that the owner the employer directed employees to refrain from collecting email addresses from patients who did not wish to receive email communications (Audio Record at 29:15 to 29:30). We therefore conclude that the employer failed to meet its burden to show that claimant knew or should have known that deleting her own email address to avoid receiving future email communications from the employer probably violated the employer's expectations. As a result, the employer did not prove that claimant's action of deleting her email address was at least wantonly negligent.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-42392 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: September 22, 2015

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.

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