

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0272**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91312). Claimant filed a timely request for hearing. On March 2, 2016, ALJ Murdock conducted a hearing, and on March 4, 2016 issued Hearing Decision 16-UI-54432, reversing the Department's decision and concluding the employer discharged claimant, but not for misconduct. On March 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it disputed the accuracy of some statements claimant made at hearing, and offered documents and affidavits from two employees and the employer's owner in support of its allegations. The employer contended that it was permitted to present this new information to EAB under OAR 471-041-0090 (October 6, 2006) because it was not aware in advance of the hearing that claimant would give false testimony at the hearing. Employer's Written Argument at 21, 25, and 28. However, the employer's accountant, who submitted one of the affidavits, and the employer's in-house counsel, who prepared its lengthy written argument, were witnesses at the hearing and did not dispute much of the hearing testimony that they now do, although the ALJ asked both witnesses several times if the employer wanted to offer additional evidence at the hearing. Audio at ~4:00, ~10:44, ~32:46, ~33:29, ~36:37. It was reasonably foreseeable that factual disputes about claimant's job duties and work performance would arise during a hearing about whether her discharge was for misconduct, and the employer did not explain why it was not able to offer the information it now seeks to present during the hearing, why its witnesses who appeared at the hearing did not challenge the relevant parts of claimant's testimony during the hearing or how factors or circumstances beyond its reasonable control prevented it from offering this new information during the hearing as required by

OAR 471-041-0090 (October 29, 2006). For those reasons, EAB did not consider the new information the employer sought to present. EAB considered only information and documents received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Seneca Direct LLC employed claimant as an accounting clerk from November 24, 2014 until January 8, 2016.

(2) Throughout her employment, claimant had many job duties, including handling the employer's accounts receivable, reconciling payments on accounts receivable with the employer's bank deposits, creating reports showing accounts receivable for which payment was not made within 120 days of billing, doing banking, preparing banking reports, handling the employer's accounts payable and paying them, posting all goods received, and handling various aspects of the state licensing needed for the goods the employer sold or distributed.

(3) The employer expected claimant to perform her assigned job duties reasonably promptly and to keep the employer's owner reasonably informed of any business concerns she discovered in the course of performing her duties. Claimant understood the employer's expectations as a matter of common sense.

(4) When claimant began working for the employer, the employer had approximately \$200,000 in outstanding accounts receivable that were over 120 days old. The employer's owner told claimant to work "cleaning up" the accounts receivable and collecting the moneys owed to the employer on the aging receivables. Audio at ~10:00. Claimant understood she was to work on the accounts receivable "as time allowed" given her other duties. Audio at ~18:37. Neither the employer's owner nor any other employer representative gave claimant a deadline by which her project with the aging accounts receivable needed to be completed. Audio at ~9:08, ~22:42.

(5) By August 2015, claimant observed from records created by the employer's sales representatives that certain payments from customers shown to have been collected by the representatives in July 2015 and deposited in safes at the employer's warehouses throughout Oregon had not been received for bank deposit at the employer's main office. Claimant determined that payments collected by four sales representatives, three of whom were no longer working for the employer, appeared to be missing. Sometime before August 13, 2015, claimant met with the employer's owner to discuss the missing payments. The owner told claimant to send an email to the one sales representative still working for the employer to inquire if he knew what had happened to the missing payments he supposedly collected. Claimant sent that email on August 13, 2015, and copied the employer's payroll person, as the owner had instructed, since the owner intended to reduce or eliminate the representative's commissions if he did not locate the missing payments. Exhibit 1 at 4. In response the email, the sales representative told claimant he had deposited all the payments he had received in the safe at the employer's Oregon City warehouse, and, since he did not have access to the safe after making a deposit, he was not responsible for any missing payments. By the end of August 2015, the owner decided that sales representatives would be responsible for depositing all payments they received directly into the employer's bank account to ensure the accountability of each representative for their handling and depositing of payments. Thereafter, claimant was responsible for reconciling each representative's bank deposits with the dollar amount of sales invoices the representative generated.

(6) After August 2015, claimant and the owner continued to discuss the problems of aging accounts receivable. Claimant told the owner and the employer's accountant that she did not have the time to focus on accounts receivable because of her other job duties.

(7) Sometime before October 14, 2015, claimant observed that the sales representative whom she had emailed about missing payments on August 13, 2015, had not deposited in a bank cash or checks sufficient to account for the invoices he had generated between June 7 and September 30, 2015. That representative had a large volume of business and often experienced delays of some weeks between when he generated an invoice and when he collected payment on it. On October 14, 2015, claimant sent an email to this sales representative specifying the invoices on which payments had not been deposited and inquiring whether he had collected payment on any of them or whether he had forgotten to attempt collection. Exhibit 1 at 1-3. Because it was not unusual for this representative to have delays between when he issued an invoice and when he collected payment on it, claimant did not suspect he was mishandling or embezzling funds from the employer.

(8) Sometime before December 16, 2015, claimant spoke with the employer's owner about the delays of some sales representatives in depositing payments after collecting them. On December 16, 2015, claimant sent an email to the same sales representative she had previously emailed on August 13, 2015 and October 14, 2015, and informed him the owner wanted sales representatives to make weekly bank deposits of payments they collected, and wanted that representative to collect payment on all invoices he had outstanding from November 1, 2015 through December 15, 2015. Exhibit 1 at 7-10. Within approximately two days, the sales representative deposited approximately \$45,000 or \$46,000 in the employer's bank account. Audio at ~29:14.

(9) Sometime around December 16, 2015, claimant again told the owner and the accountant that she was not able to devote the attention that was needed to collecting the employer's aging accounts receivable. Audio at ~8:48, ~8:58. In response, the employer gave some of claimant's existing job duties to other employees, with the goal of allowing claimant more time to attend to the accounts receivable. However, claimant was not relieved of her responsibilities for the December 31, 2015 year-end closing of the employer's books. The employer also assigned to claimant a large project for which she was expected to prepare and gather all documents in support of the employer's application for licensing in Washington State. These responsibilities did not allow claimant much time to address the employer's uncollected accounts receivable before January 8, 2016.

(10) Sometime before January 7, 2016, the employer's owner came to believe that the sales representative whom claimant had contacted about payment collections in August, October and December 2015 had not merely experienced delays in depositing payments but had embezzled them from the employer. On January 7, 2016, the employer terminated the sales representative's employment.

(11) On January 8, 2016, the employer discharged claimant for failing to adequately perform her job duties. As one example, the employer thought claimant should have copied the owner on the August 13, 2015 email she sent to the sales representative. Audio at ~30:47, ~34:58. As another example, the employer thought that if claimant had more promptly focused on the employer's accounts receivable she would have notified the owner of problems with the sales representative's deposits of payments that

would have alerted the owner to the possibility that the sales representative was embezzling payments from the employer. Audio at ~6:35, ~32:46, ~33:21.

**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 carries 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).

Had claimant been able to focus her attention on the employer's accounts receivable, it is speculative at best to assert, as the employer did, that she would have been alerted to the likelihood that a particular sales representative was embezzling funds, and the employer did not present sufficient evidence from which it can reliably be inferred that the sales representative was indeed misappropriating funds. As well, the employer did not dispute at hearing that claimant contacted the sales representative on three occasions between August and December 16, 2015 about his delays in collecting payments after he issued invoices to customers, and at least in response to the last email, the sales representative made a very substantial bank deposit representing collected payments he had delayed in depositing. The employer also did not dispute claimant's testimony that, because of the volume of business that the sales representative generated, it was normal for him to have such delays. Audio at ~28:33. On this record, the employer did not present evidence suggesting or tending to suggest that there was anything in claimant's monitoring of the sales representative's collection activities that was inadequate, let alone willful or wantonly negligent. As such, the focus here must be on whether claimant was willful or wantonly negligent in the general manner in which she approached performing the task of handling the employer's accounts receivable.

The employer did not dispute that claimant was not given a date certain by which she needed to complete the task of bringing the employer's accounts receivable up to date, or that claimant had many other assigned tasks competing with her ability to focus on the accounts receivable. Audio at ~9:08, ~31:32. The employer did not dispute that claimant told the employer's owner and its accountant on many occasions that she did not have the time needed to attend to the accounts receivable while discharging her other work responsibilities, and that she was not able to concentrate on the accounts receivable from mid-December 2015 through the time she was discharged on January 8, 2016 because of working on the year-end closing of the employer's books and a special licensing task she was asked to perform. Audio at ~ 8:18, ~21:40, ~22:52. Given that the employer was on notice that claimant did not have adequate time to focus on the accounts receivable and, rather than taking the steps necessary to allow her to do so, assigned additional work to her, it was not willful or wantonly negligent of claimant to have failed to complete collecting the outstanding accounts receivable by January 8, 2016. On this record, the employer did not show claimant engaged in misconduct by failing to adequately focus on the employer's accounts receivable.

Nor has the employer demonstrated that claimant willfully or with wanton negligence violated the employer's standards by not copying the August 13, 2015 email she sent to the sales representative to

the employer's owner. The employer did not dispute claimant's testimony that the owner instructed her to send that email to the sales representative and did not mention that she wanted to be copied on the email. Since the owner discussed with claimant sending the email to the sales representative before it was sent and the email covered invoices from the previous month, July 1, 2015 through July 30, 2015, the contention of the employer's witness that claimant should have known that the owner would want to be copied on the email because of "how old" the receivables were (at most 34 days and substantially less than the 120 days that the employer defined as "aging") does not make sense. Audio at ~35:59. Absent evidence that claimant was informed that the owner wanted to receive a copy of that email, or that some other policy of the employer of which claimant was reasonably aware required her to copy that email to the owner, the employer did not meet its burden to demonstrate that claimant's failure to copy that email to the owner was a willful or wantonly negligent violation of the employer's standards. The employer failed to demonstrate that claimant engaged in misconduct in connection with the August 13, 2015 email.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-54432 is affirmed.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** April 14, 2016

**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](http://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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