

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0925

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 101949). The employer filed a timely request for hearing. On July 1, 8, and 26, 2016, ALJ Vincent conducted a hearing, and on August 3, 2016, issued Hearing Decision 16-UI-64939, affirming the administrative decision. On August 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Trial Guides, a legal publishing company, employed claimant as an intern or junior developer from February 8, 2015 until March 3, 2016. When the employer hired claimant, she had recently completed a course in computer coding. Claimant was assigned to develop and maintain the employer's website and was paid \$20 per hour for her work.

(2) Claimant worked Monday through Friday for the employer, and worked half-time in the employer's office, and half-time at home. 7/1/16 Transcript at 4, 34. Claimant did not maintain a separate home office, however. 7/1/16 Transcript at 34. Her oral contract with the employer was specific to her services, and she was not authorized to hire anyone else to perform her work. 7/1/16 Transcript at 37. Claimant performed the majority of her work on a laptop provided by the employer. 7/8/16 Transcript at 32.

(3) Claimant's work was supervised by the employer's chief technical officer, who assigned her projects and was available if claimant had questions about her assignments or needed assistance. 7/1/16 Transcript at 4.

(4) During the time she worked for the employer, claimant took significant amounts of time off from work for personal reasons. She sought and obtained permission from the chief technical officer for all time taken off from work. 7/8/16 Transcript at 27-28.

(5) In March 2016, the employer determined that claimant was making little progress on the work she had been assigned. On March 17, 2016, the employer discharged her for poor performance. 7/26/16 Transcript at 7.

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

Independent Contractor. As a preliminary matter, the employer asserted that claimant performed services for it as an independent contractor and that she should be disqualified from receiving benefits because she was terminated for billing hours for which she did not work and for poor performance. 7/1/16 Transcript at 4; 7/26/16 Transcript at 10. There can be no disqualifying work separation, however, if there is no employer-employee relationship and there is no employer-employee relationship if an individual is performing services as an independent contractor. OAR 471-030-0038(1)(a) (August 3, 2011). *See also Brian J. Newrones* (Employment Appeals Board, 10-AB-0666, March 18, 2010).

To be considered an “independent contractor”, an individual must be “customarily engaged in an independently established business.” ORS 670.600(2)(b). ORS 670.600(3) provides that a person is customarily engaged in an “independently established business” if any three of the following requirements are met: the person maintains a business location that is separate from the business or work location of the person for whom the services are provided, or that is in a portion of the person’s residence and that portion is used primarily for the business; the person bears the risk of loss related to the business or the provision of services as shown by factors such as, the person enters into fixed-price contracts, is required to correct defective work, warrants the services provided, or negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance; the person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services; the person makes a significant investment in the business, through means such as purchasing tools or equipment necessary to provide the services, paying for the premises or facilities where the services are provided, or paying for licenses, certificates or specialized training required to provide the services; the person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

The record shows that claimant did not maintain a “business location separate from the business or work location” of the employer, did not perform work for any employer other than Trial Guides during a 12 month period, and did not have the authority to hire to hire anyone to provide the services she was assigned to perform for the employer. In addition, the record fails to show that claimant made a significant investment in the tools needed to perform her job, since the majority of her work was done on a lap top supplied by the employer. Because the record demonstrated that at least four of the above requirements were not met, the employer failed to demonstrate that claimant was engaged in an independently established business while she performed services for the employer, and we therefore conclude that claimant was not an independent contractor when she performed services for the employer. Claimant’s work separation is therefore disqualifying if the employer discharged her for misconduct.

Work separation. 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer asserted that it discharged claimant because of her poor performance and because she fraudulently billed the employer for work she did not actually perform. However, the only incidents of alleged "overbilling" the employer was able to cite allegedly occurred on February 26, 2015 and during the week of October 12, 2015. 7/26/15 Transcript at 20-22. Claimant's discharge did not occur until March 2016, however, when the employer became dissatisfied with the quality and efficiency of claimant's work. We therefore conclude that the proximate cause of claimant's discharge was her poor work performance

Claimant's conduct can only be considered misconduct that disqualifies her from receiving unemployment benefits if the record shows that her inadequate work performance resulted from willful or wantonly negligent conduct. The record failed to show that claimant's inability to perform the work she was assigned was due to her conscious indifference or her deliberate disregard of the employer's expectations. Instead, the record indicated that more likely than not, claimant's poor performance resulted from a lack of jobs skills and experience, and therefore does not constitute misconduct under OAR 471-030-0038(3)(b). .

The employer failed to meet its burden to demonstrate that it discharged claimant for misconduct. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-64939 is affirmed.

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

DATE of Service: August 31, 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. 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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