

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1034

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 80513). Claimant filed a timely request for hearing. On August 4 and 19, 2016, ALJ Wyatt conducted a hearing, and on August 26, 2016, issued Hearing Decision 16-UI-66403, affirming the administrative decision. On August 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the record.

Evidentiary matter: At the hearing, the ALJ admitted documents submitted by the employer into the record as Exhibits 1 and 2 (8/4/16 audio recording at 11:57 and 8/19/16 audio recording at 11:41). On this record, however, the exhibits admitted were not marked. Accordingly, we have marked Exhibits 1 and 2 based on the ALJ's descriptions. Exhibit 1 consists of the following 59 pages: a cover letter; an index describing all the documents included in the exhibit; a position description for claimant's job; a "Work Schedule Form" listing claimant's work hours; a "Trial Service Evaluation Form" for claimant; an 11/17/15 memorandum entitled "[Claimant] training observations"; "Google Chrome Website History" listing websites claimant visited on November 18, 2015, November 19, 2015, and December 7, 2015; a document entitled "15 questions to ask employees in their first 5 months"; handwritten notes of meetings claimant's supervisor conducted with claimant dated December 14, 2015 and January 20, 2016; "Google Chrome Website History" listing websites claimant visited on February 1, 2016; December 8, 2015 and February 1, 2016 emails coworkers sent claimant; notes of claimant's supervisor concerning meetings with claimant on February 24 and April 11, 2016; handwritten notes of an April 21, 2016 meeting claimant's supervisor conducted with two coworkers; May 5, 2016 emails from coworkers to claimant's supervisor; handwritten notes of a May 6, 2016 meeting claimant's supervisor conducted with claimant; a Department "Notice of Claim Filed – Request for Separation Information" filled out by the employer; and a fax transmission cover sheet. Exhibit 2 consists of an April 14, 2016 email claimant's coworker sent to claimant.

FINDINGS OF FACT: (1) From November 16, 2015 until May 13, 2016, claimant worked for the Oregon Board of Chiropractic Examiners as an office specialist 1. Claimant was assigned to work 30 hours per week for the employer, and was required to serve a trial service period of 1,040 work hours before attaining status as a permanent employee. During his trial service period, claimant's supervisor was expected to meet regularly with him to discuss and rate his work performance. At these meetings, claimant's supervisor used a form to rate different areas of his performance as "A," above average, "S," satisfactory, or "N," needs improvement. Claimant could be discharged at any time during trial service if his performance was found to be unsatisfactory.

(2) During claimant's first few weeks of work for the employer, he made extensive personal use of his work computer to access internet websites unrelated to his job and to play computer games. Claimant also kept his personal cell phone on the desk and often used it to engage in activities, such as playing games and sending text messages. The employer investigated and obtained a "Google Chrome Website History" listing websites visited on November 18, 19 and December 7, 2015. Exhibit 1 at 12-29. This history demonstrated that claimant made frequent personal use of his work computer. On December 14, 2015, when claimant's supervisor met with him to discuss his work performance, she rated his performance as "S" or "A" in all areas except in the area of personal cell phone and computer use; claimant was rated as "N" in that area. Exhibit 1 at 10. Claimant's supervisor instructed him to keep his personal use of his work computer and cell phone to a minimum. Exhibit 1 at 31.

(3) On January 20, 2016, when claimant's supervisor met with him to discuss his work performance, she rated him as "S" or "A" in all areas, except in the areas of quantity of work, where he was rated as "S/N" and quality of work, where he was rated as "N." Exhibit 1 at 10. There was no discussion regarding claimant's personal use of electronic devices during their meeting. Exhibit 1 at 33.

(4) On February 1, 2016, the employer obtained a "Google Chrome Website History" listing websites claimant visited on that date. The history showed that claimant made frequent personal use of his work computer. Exhibit 1 at 35-44. Claimant's supervisor talked with him and again instructed him to make minimal personal use of his cell phone and work computer. On February 4, 2016, claimant's supervisor rated him as "S" or "A" in most areas of work performance. In the areas of quality and quantity of work, and personal use of electronic devices, claimant's supervisor rated him as "N/S." Exhibit 1 at 10.

(5) On April 11, 2016, claimant's supervisor met with him to discuss his work performance. In regard to his personal use of electronic devices, claimant stated that he was not making any personal use of his work computer, and no longer kept his cell phone on his desk as he had done in the past. Claimant said he mainly used his cell phone during his lunch and rest breaks, but occasionally checked text messages on his phone during work hours. Claimant promised to make further efforts to reduce his personal cell phone use. Exhibit 1 at 47. Also on April 11, claimant's supervisor rated him as "S" or "A" in all areas of his work performance.

(6) On April 21, 2016, claimant's supervisor met with two of his coworkers to discuss claimant's work performance. The coworkers mentioned several deficiencies in claimant's work performance, including some personal use of cell phone during work hours. Exhibit 1 at 50.

(7) On May 5, 2016, claimant was directed to assist two coworkers in preparing packets of materials to be delivered to members of the Board of Chiropractic Examiners (Board) in advance of a May 19

meeting. (Claimant had previously assisted in preparation of two Board meeting packets). Claimant's coworkers became frustrated by claimant's inability to fully complete the tasks needed to assemble the packets without making mistakes. Claimant failed to complete three of the jobs he was assigned—printing labels for delivery of the packets to the Board members, completing a log recording the computer flash drives which were being sent to the Board members, and stuffing envelopes with the Board meeting agenda – and his coworkers had to finish these tasks. 8/19/16 Hearing Transcript at 48-19. Claimant's supervisor expected that the packets would be assembled and sent off for delivery by the close of business on May 5. As a result of claimant's errors and failure to complete assigned work, the packets were not assembled and ready for delivery on May 5. Claimant's coworkers reported the difficulties they had experienced with claimant's work performance to his supervisor. Exhibit 1 at 58 and 59.

(8) On May 6, 2016, claimant met with his supervisor to discuss his work on May 5. Claimant indicated that he was unaware of any deficiencies in his work performance on that date. Exhibit 1 at 53-54.

(9) On May 13, 2016, the employer discharged claimant for poor work performance on May 5.

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

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant for his poor work performance on May 5, 2016. On that date, claimant failed to complete tasks he was assigned and made a number of errors in the work he performed. At the hearing, claimant's supervisor asserted that claimant's poor performance on May 5 was the final incident in a history of poor work habits which included claimant's inappropriate use of electronic devices – personal use of his work computer and cell phone during work hours. The record fails to show, however, that claimant was continuing to violate the employer's expectations regarding use of electronic devices at the time he was discharged. Although claimant was told that he needed to curb his excessive personal use of his work computer and cell phone at meetings with his supervisor in December 2015 and January and February 2016, he told his supervisor that he had done so at their April 11, 2016 meeting and his performance in this area was rated as "satisfactory." We also note that in a

discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The employer did not discharge claimant until after it learned that he had failed to successfully complete the tasks he was assigned on May 5, 2016. Accordingly, claimant's May 5 conduct was the proximate cause of claimant's discharge and the appropriate focus of our misconduct analysis.

In regard to his conduct on May 5, claimant testified that

I completely understood the importance of the tasks we were doing. I had only done two of them [preparation of materials for a Board meeting]. I hadn't been doing – I had very little experience with them, but I did to the best of the ability what I had been told to do.
8/19/16 Hearing Transcript at 72.

Claimant also testified that he was unaware that his work on May 5 was considered incomplete or defective when he left at the end of his assigned shift on that date. He asserted that before he left work on May 5, he asked his coworkers if there were "any other issues" and was told that there were none. 8/19/16 Hearing Transcript at 71. He only learned about the problems with his performance when he met with his supervisor on May 6. The employer presented no evidence to rebut claimant's assertion that he did not consciously engage in conduct on May 5 that he knew or should have known violated the employer's expectations. The record therefore indicated that more likely than not, claimant's poor performance resulted from a lack of jobs skills and experience, and therefore did not constitute misconduct under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 16-UI-66403 is affirmed.

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

DATE of Service: October 4, 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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