

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0477

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153709). Claimant filed a timely request for hearing. On April 14, 2017, ALJ Amesbury conducted a hearing, and on April 17, 2017 issued Hearing Decision 17-UI-81130, reversing the Department's decision. On April 20, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a lengthy written argument which, in part, described additional alleged transgressions by claimant that it did not present during the hearing and which offered more detailed explanations of the incidents raised during the hearing. However, the employer did not explain why it was unable to offer this new information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information the employer sought to present by way of its written argument. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Bryan F. Williams, the successor in interest to Clare Gove, employed claimant as an administrative assistant from January 2, 2017 until February 17, 2017. Claimant worked in a similar capacity for approximately 14 years under the employer's predecessor in interest.

(2) The employer expected claimant to schedule appointments for clients as the clients requested. The employer also expected claimant to spend only a minimal amounts of work time engaged in personal activities and to refrain from removing equipment from the workplace without permission. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime before January 2, 2017, the employer's predecessor in interest gave claimant permission to take the workplace vacuum cleaner to her home to use there. The vacuum cleaner was listed as equipment that was transferred into the ownership of the successor in interest on January 2, 2017.

Sometime after January 2, 2017, the new owner asked claimant to return the vacuum to the workplace. Claimant did so.

(4) After January 2, 2017, the owner observed that claimant often accessed the Yahoo and Facebook websites during work hours. Claimant did so because the employer did not have a business email account and several clients sent business-related messages to the employer via claimant's Yahoo email account or her Facebook account.

(5) Sometime around approximately the end of January 2017, a prospective client called claimant about possibly arranging an appointment to consult with the employer, but before the client committed to an appointment, the client wanted to know what the employer would charge would for the consultation. Claimant transferred the call to the owner to supply that information because she did not know what the owner would charge. Subsequently, the client called back or emailed the owner three times inquiring about what the client would be charged for the consultation. The owner did not given the prospective client the information that he requested. Sometime approximately around the week beginning on February 5, 2017, the owner forwarded one of those emails sent by the prospective client to claimant expecting claimant to schedule an appointment for that client with him. However, claimant did not schedule that appointment since the owner still had not informed the client what the charge would be for the consultation and, without that information, the client did not want to have an appointment. Later, the client stopped by the office, and claimant arranged for the client to have "no fee" consultation with the owner at that time.

(6) On approximately February 7, 2017, the owner discovered two or three checks in the trash by claimant's desk that should have been mailed to certain of the employer's vendors. The evening before, claimant had placed the checks in a stack on her desk intending to place them in envelopes and mail them the next day. A person whom claimant was training had used claimant's desk after she left work that previous evening. It is not known how the checks ended up in the trash.

(7) On February 13, 2017, claimant was working alone in the office when a client arrived for a 3:00 p.m. appointment with the owner. As the client was waiting for the owner to return to the office, a second client came in without an appointment to drop off the information needed to prepare his tax returns. Claimant was required to take certain steps to ensure the tax preparation documents were safeguarded. As claimant was taking the tax preparation documents to a filing cabinet, the office phone rang and claimant answered it in the copy room. Claimant was pressed for time when she answered the phone. A client whom claimant had known for many years was on the phone to schedule an appointment with the owner. Claimant was away from her desk and could not readily access the information needed to make the requested appointment. Claimant told the client that her "hands were full" at that time and asked if the client would call back the next day when claimant was better able to schedule the appointment. Transcript at 18, 19. The client agreed to call the next day.

(8) On February 14, 2017, the client whom claimant had asked to call back did so. The owner answered the phone and learned what claimant had told the client the day before. On February 14, 2017, the owner discharged claimant for, among other things, "refusing" to make an appointment for the client on the previous day. Transcript at 5.

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 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. 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).

The employer's witness at hearing, the current owner, alleged claimant's discharge was for misconduct for several reasons. The incidents underlying the allegations are set out in the findings of fact. We address those incidents in turn.

With respect to taking the vacuum cleaner home from the workplace, the owner did not dispute that his predecessor in interest had given claimant permission to do so. The owner also did not dispute that claimant brought back the vacuum cleaner when he asked her to return it, apparently rescinding the permission that had previously be given to claimant. Transcript at 48, 49. Since claimant was initially given permission to take the vacuum cleaner and returned it when she was asked to bring it back, it cannot be concluded that claimant's behavior in having the vacuum cleaner violated the employer's standards or was misconduct. The owner also broadly contended that claimant accessed the Yahoo and Facebook websites for personal purposes while at work. However, he did not dispute claimant's explanation that she only accessed those accounts to retrieve business-related electronic messages that clients sent to her through her Yahoo and Facebook accounts because the employer did not have an email account to which such messages could have been sent. Transcript at 12, 13, 33, 34. As such, the employer did not establish that she accessed those accounts for other than business purposes, or that her doing so during so during work hours was misconduct.

With respect to the manner in which claimant handled the prospective client's request to make an appointment in January and February 2017, the record does not show that she disregarded that client's request. The owner did not dispute that the client did not want to commit to an appointment until the client knew the charge and that the owner failed to supply that information despite that client's attempts to contact him to obtain it. Transcript at 24, 25. Accordingly the employer did not demonstrate that claimant disregarded the employer's or the client's interests in not making the appointment until either the client had that information or claimant could arrange, as she did, for the client to have a "no fee" consultation. Transcript at 24. The employer did not show that the manner in which claimant dealt with the requested appointment constituted misconduct.

In connection with the two or three checks that were discovered in the trash near claimant's desk on approximately February 7, 2017, the employer did not demonstrate that it was claimant who caused those checks to end up in the trash and, if she did so, that it was with willfulness or wanton negligence. As well, the employer did not dispute that claimant was training another person who was used her desk during the time the checks were misplaced, and did not rule out that it was the trainee who caused the checks to be discarded in the trash. Transcript at 25-32. The employer did not demonstrate that claimant engaged in misconduct in connection with those checks.

As to claimant's February 13, 2017 request that the client call back the next day to make an appointment, the employer did not directly dispute claimant's explanation that she was busy that day, pressed for time, did not have ready access to the resources she needed to make an appointment at the time of the client's call and she had a longstanding, understanding relationship with that client. Transcript at 16-22. Assuming claimant had to balance simultaneously the needs of the two clients in the office and the one on the phone requesting an appointment, there is not sufficient information from which we can conclude that by asking the client to call back the next day to make the appointment, claimant did not strike an acceptable balance among competing demands or that she showed an indifference to the employer's interest in providing good client service. As regards this final incident, the employer also did not show that claimant violated the employer's standards willfully or with wanton negligence.

Having reviewed the incidents that caused the employer to discharge claimant, the employer did not show more likely than not, that claimant engaged in misconduct with respect to any of the incidents. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-81130 is affirmed.

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

DATE of Service: May 22, 2017

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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