

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0627

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101232). Claimant filed a timely request for hearing. On April 27, 2017, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for May 11, 2017 at 1:30 p.m. On May 11, 2017, ALJ S. Lee conducted a hearing, at which the employer failed to appear, and on May 12, 2017, issued Hearing Decision 17-UI-83312, concluding the employer discharged claimant, but not for misconduct. On May 18, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In its application for review, apparently in reference to its failure to appear at hearing, the employer explained, "Required to be in Portland, OR working on large Pension Plan Audit Field work on 5/11 & 5/12/17 – the only days client could do it and meet filing deadlines. JRW, CPA." The employer's request is construed as a request for EAB to reopen the hearing to consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. The employer asserted it was unable to attend the hearing due to a conflict in its schedule. However, the employer did not show what attempt, if any, it made to participate in the hearing despite the conflict, or to have the hearing postponed. Absent such a showing, the employer failed to establish factors or circumstances beyond its reasonable control prevented it from offering its information into the hearing record. The employer's request to have EAB consider new information therefore is denied. EAB considered only information received into evidence at the hearing when reaching this decision.

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

FINDINGS OF FACT: (1) Wall & Wall PC employed claimant as an accountant from July 2014 to January 3, 2017. The employer was owned by two accountants who were husband and wife.

(2) The employer expected its job applicants to be accurate and truthful in describing their prior work experience during the employment application process. Claimant understood the employer's expectation as a matter of common sense.

(3) During claimant's job application process with the employer, claimant reported that she had experience performing auditing work. Claimant had in fact performed auditing work in her prior employment, and that employer had no issues with her job performance.

(4) On one occasion during 2016, the employer criticized claimant's job performance regarding an audit because claimant had not used up-to-date forms. Claimant had prepared the audit using past employer audits as a guide and the employer had not equipped her computer with up-to-date software that included current forms.

(5) Although claimant requested up-to-date software, it was not provided to her. When she asked for assistance on a project, she was refused, explaining that she was a licensed accountant and needed to find the answers herself.

(6) On January 3, 2017, the employer discharged claimant because it was "displeased" with her auditing work and believed she had misrepresented her experience when applying for the job.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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. 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 had the right to expect claimant to be accurate and truthful in describing her prior work experience during the employment application process. Claimant understood the employer's expectation as a matter of common sense. The record suggests that the employer discharged claimant because it believed she misrepresented her auditing experience during the job application process. However, the record fails to show that claimant misrepresented her work experience.

At hearing, claimant testified that she had performed auditing work in her previous employment and truthfully reported her auditing experience when she applied for work with the employer. Audio Record ~ 8:15 to 9:15. She also asserted that any difficulty she had with auditing work for the employer was based largely on the lack of or conflicting instructions from the two owners and outdated computer

software, rather than on a lack of auditing experience. Audio Record ~ 12:30 to 15:25. The fact that claimant was employed for almost three years before she was discharged lends credence to her testimony. More likely than not, the employer discharged claimant because it was dissatisfied with her overall work performance rather than because she consciously violated a reasonable employer expectation that she be truthful during the job application process.

The employer discharged claimant, but not for misconduct and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-83312 is affirmed.

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

DATE of Service: June 13, 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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