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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

# EMPLOYMENT APPEALS BOARD DECISION
# 2017-EAB-0762

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On April 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81412). Claimant filed a timely request for hearing. On May 23, 2017, ALJ Amesbury conducted a hearing, and on June 9, 2017 issued Hearing Decision 17-UI-85407, reversing the Department's decision. On June 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Precision Eye Doctors employed claimant as front desk receptionist in its optometry office from February 13, 2017 until March 16, 2017.

(2) As receptionist, the employer expected claimant to greet and check in patients. The employer also expected claimant to perform insurance verifications no later than the day before patients' scheduled appointments. In addition, the employer expected claimant to wear appropriate attire while at work.

(3) During claimant's employment, the employer was displeased with what it perceived as claimant's slow progress in learning how to perform insurance verifications and errors that she made in the verifications. The employer thought claimant was not making an adequate effort to learn the verification process. The employer told claimant she needed to improve the accuracy of the insurance verifications she performed. Claimant tried to better her performance on the insurance verifications, but she had no previous experience and she was not fully trained on the employer's system of verification. Also during claimant's employment, the employer noticed that claimant did not greet patients with as friendly a demeanor as it would have liked, and claimant did not smile enough. After the employer spoke to claimant about how she greeted patients, claimant tried to smile more when she interacted with patients and to converse with them as much as she was able. However, claimant also had other tasks to perform and sometimes was too busy to focus on her demeanor in her patient interactions. Further, the employer disliked it when claimant wore leggings to work because it thought they were too revealing and told claimant to avoid wearing leggings. Claimant continued to wear leggings because she did not have

alternate attire and did not have the money needed to purchase new clothes. However, claimant began wearing knee length cardigans and long shirts that covered the leggings, which she though would satisfy the employer's objections to them.

(4) On March 7, 2017, the employer issued a written warning to claimant stating the she needed to make "some improvement" in greeting, smiling and interacting with patients. Audio at ~16:56. The warning also stated that claimant needed to improve the accuracy with which she performed insurance verifications and needed to pay more "attention to detail" in her job duties. Audio at ~17:18.

(5) On March 14, 2017, the employer's manager and the employer's optometrist asked claimant before claimant left work that day if she had completed that day's insurance verifications. Claimant stated she had since she had completed the verifications that had been assigned to her. However, on that day, as on most other days, claimant and a coworker had both been asked to perform the verifications; they had divided up the verifications and each was responsible for performing her share of them. The coworker had not completed her share of the verifications when claimant left work on March 14, 2017.

(6) On March 15, 2017, the employer discovered that approximately one-half of the insurance verifications had not been completed on March 14, 2017.

(7) On March 16, 2017, the employer discharged claimant because she was not making sufficient progress in performing insurance verifications, she was not greeting patients in a manner the employer deemed appropriate and was not wearing appropriate attire to work.

**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. 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. 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. Inefficiencies resulting from a lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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).

While the employer's witnesses testified that claimant was not making adequate progress in learning the employer's system for performing insurance verifications or performing them accurately as of March 14, 2017, claimant had only been working for the employer for one month. The employer's optometrist also testified that the task of insurance verification was "difficult" and she did not expect claimant to have become an "immediate expert" in it. Audio at ~23:50. Although the employer's witnesses testified that claimant did not appear to them to have been making sufficient efforts to learn how to adequately and capably perform the verifications, claimant testified that the employer only gave her a "brief" overview of the verification process, the person who was training her was often too busy to help her and she was expected to learn on the job and by consulting a manual, which she did to the best of her ability. Audio at ~39:12, ~40:08, ~40:46. Nothing in the employer's evidence suggested that claimant's allegedly inadequate efforts to learn or to perform accurate insurance verifications was attributable to willful or wantonly negligent behavior. As well, on this evidence, it appears that claimant's inaccuracies in performing verifications were likely due to a lack of training and experience, which is not considered misconduct. *See* OAR 471-030-0038(3)(b). Further, it appears that claimant did not intend to misrepresent to the employer that all the insurance verifications were completed on March 14, 2017, but only to state that she had completed the half that had been assigned to her before she left work that day. That she did not comprehend that the employer's inquiry was directed to whether *all* the verifications were done, including those that were her coworker's responsibility, was not a willful or a wantonly negligent violation of the employer's standards.

The employer's second contention, that claimant did not smile or interact with patients with the demeanor that the employer would have liked, also was not a willful or wantonly negligent violation of the employers' standards. Claimant testified that, after the employer counseled her to be more visibly friendly and amiable with patients, she consciously made an effort to smile more and to engage in social chatter with patients and did her "best," but her other duties often interfered with her efforts to be more visibly cordial. Audio at ~43:05, ~44;48. Significantly, the employer's witnesses did not contend that claimant was rude or impolite to patients, but only that they thought she did not exhibit a sufficiently warm and friendly demeanor to patients. On this record, the employer did not demonstrate that the manner in which claimant interacted with patients constituted a willful or wantonly negligent violation of the employer's expectations.

The employer's third contention, that claimant violated its dress code by wearing leggings to work, was also not attributable to claimant's willful or wantonly negligent violation of the employer's standards. While, in the absence of any written dress code, the employer appeared to have orally advised claimant not to wear leggings to work, claimant was unable to comply since she did not have alternate apparel and did not have the funds to purchase new clothes so early in her employment. Subsequently, claimant tried to comply with the employer's principal objection, that leggings were too revealing, by wearing long cardigans, shirts and other long over-layers of clothing that hid the leggings. On this record, given her practical inability to comply with the employer's prohibition and the reasonable steps she took to conceal the leggings, the employer did not show that her continued wearing of leggings was a willful or wantonly negligent violation of the employer's expectations.

While the employer discharged claimant, it did not meet its burden to show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-85407 is affirmed.

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

**DATE of Service: July 21, 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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