

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1214

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 19, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 92224). The employer filed a timely request for hearing. On July 5, 2017, ALJ Seideman conducted a hearing, and on July 7, 2017 issued Hearing Decision 17-UI-87463, affirming the Department's decision. On July 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On August 18, 2017, EAB issued Appeals Board Decision 2017-EAB-0897, reversing the hearing decision and remanding for additional proceedings. On September 21, 2017, ALJ M. Davis conducted a hearing at which claimant failed to appear, and on September 29, 2017 issued Hearing Decision 17-UI-93531 concluding claimant's discharge was for misconduct. On October 17, 2017, claimant filed an application for review with EAB.

In her written argument, claimant complained that she did not receive notice of the hearing, and so was unable to offer evidence into the hearing record at the remand hearing. Claimant's complaint is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090(2)(b) allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant offered no circumstantial evidence to support her implied assertion that the notice of hearing, though mailed to claimant at her address of record, was not delivered. Documents sent through the U.S. Postal service are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(9). Claimant's bare assertion of non-receipt is insufficient to overcome the presumption of receipt. Her request to have EAB to consider new information under OAR 471-041-0090 therefore is denied.

FINDINGS OF FACT: (1) S&M Transactions Incorporated employed claimant as office manager from June 26, 2016 to February 27, 2017.

(2) Claimant's job duties included managing payroll and accrued leave accounts, invoices, bank accounts, accounts payable, and accounts receivable. The employer contracted with an accountant to assist claimant with her duties. Claimant had approximately 20 years of accounting experience,

including for a similar business, and the employer expected claimant to be proficient at her duties with little supervision.

(3) When claimant began work, the employer's books were disorganized. She had difficulty making sense of the employer's payables, so she deleted them from an electronic system with the intent of reentering them at a later time. She had difficulty multitasking and had insufficient time to complete her work, and never reentered the payables into the employer's systems.

(4) The employer expected claimant to code employees' time to particular jobs within its electronic systems. Claimant either did not understand the employer's job code system, or did not understand how to apply that system within the employer's electronic systems, and did not properly code employees' time.

(5) Claimant also had difficulty with her duties because she thought the employer lacked sufficient funds to meet its financial obligations. Claimant struggled to prioritize what to pay and on several occasions the employer almost lapsed on important payments. While claimant was handling accounts payable several bills became past due and the employer almost lapsed on an important bond payment.

(6) The employer issued claimant a company debit card to use solely for business expenses. The company debit card was nearly identical to claimant's personal debit card, and claimant sometimes inadvertently used the company debit card when she intended to use her personal debit card. When claimant was aware that happened she reimbursed the employer for her expenditure or deducted the amount she had used as a payroll draw. She did not inform the owner about her errors or how she had corrected them using payroll draws.

(7) Over time, the employer's owner grew increasingly concerned about claimant's job performance. He thought she did not perform her work quickly or efficiently enough, and that the work claimant did perform was not accurate enough. He frequently addressed those concerns to claimant. Claimant told the owner that she was overwhelmed and overworked. Claimant told the owner she would complete certain tasks and then did not complete them because she had other tasks arise that needed to be completed leaving her without enough time to complete the tasks she had discussed with the owner.

(8) The owner began emailing weekly to-do lists to claimant with the expectation that she would complete the tasks on his lists. For example, on February 7, 2017, the owner gave claimant six tasks to complete that week; by February 14, 2017, claimant had completed only one task. Although claimant tried to complete the assigned tasks, other tasks arose that she thought were of a higher priority and she did not have time to do those and complete all of the assigned tasks.

(9) By February 27, 2017, the owner had lost all confidence in claimant's abilities and discharged her for being unable to perform her job duties to the owner's satisfaction. After discharging claimant, the owner discovered past due accounts, accounting errors and claimant's misuse of the company debit card.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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.

As a preliminary note, the employer alleged claimant's discharge was, in part, related to misuse of the company debit card. However, the employer did not discover claimant's alleged misuse until after the discharge occurred. Therefore, that discovery was not a factor in claimant's discharge. The proximate cause of the discharge, the reason without which claimant likely would not have been discharged when she was, was her failure to perform her job duties, and that allegation is therefore the initial focus of the misconduct analysis in this case. Only if we determine that claimant's failure to perform her job duties was the result of claimant's willful or wantonly negligent conduct would we then turn to the alleged misuse of the company debit card. The employer has the burden to prove that it is more likely than not that claimant's discharge was the result of willful or wantonly negligent acts attributable to her as misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ in Hearing Decision 17-UI-93531 concluded that claimant's discharge was for misconduct, based upon her repeated failure to complete her job duties. The ALJ reasoned that although the employer acknowledged claimant reported feeling overworked and overwhelmed, because claimant was assigned tasks and had assistance yet still failed to complete the duties, and "no evidence was presented to establish why claimant was not meeting the employer's expectations and completing her job duties in a timely manner," claimant "[a]t the very least" "demonstrated an indifference to the standards of behavior the employer had a right to expect of her." Hearing Decision 17-UI-93531 at 4. We disagree.

Although claimant did not testify during the second hearing to rebut the employer's allegations about her conduct, she did appear at the first hearing and provided a number of reasons why she was unable to complete her job duties in a timely manner despite her efforts to do so, including, among other things, that the books were disorganized when she arrived, she could not make sense of the payables, she was overworked and overwhelmed, she was pulled away from assigned tasks she intended to complete to deal with other matters, she lacked the ability to enter job codes the way the employer wanted her to using the employer's electronic system, the employer lacked funds to meet all of its financial obligations, and she made some errors despite her attempts not to err. While there is no real dispute in this case that claimant repeatedly failed to complete her job duties, and that her performance was ultimately so substandard that the employer felt it necessary to discharge her, claimant's efforts to perform her duties demonstrate that while she was unable to meet the employer's expectations with respect to her performance of assigned tasks, it is more likely than not that she was not indifferent to the employer's expectations, and did not willfully or purposely fail to meet them. She might have been careless or negligent with respect to her performance of assigned tasks, but carelessness and ordinary negligence are not enough under the applicable rules to establish misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-93531 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle.

DATE of Service: November 16, 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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