

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0021-R

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 28, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct (decision # 82215). Claimant filed a timely request for hearing. On December 17, 2013, ALJ Logan conducted a hearing, and on December 20, 2013, issued Hearing Decision 13-UI-06966, concluding that claimant was discharged but not for misconduct. On January 3, 2013, the employer filed an application for review with the Employment Appeals Board (EAB). On January 24, 2014, EAB issued Appeals Board Decision 2014-EAB-0021, reversing Hearing Decision 13-UI-06966 as unsupported by a complete record, and remanding the matter for such other and further proceedings as may be necessary. On January 24, 2014, the Office of Administrative Hearings submitted a complete hearing record. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

EAB considered the entire hearing record and the employer's written argument, to the extent it was based on the record. The employer's written argument contained additional information, consisting of hearsay evidence that was not part of the hearing record and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. For example, the employer submitted letters from its staff, some of which were not offered at the hearing because the employer's representative was allegedly told by a Department employee "that all the evidence (letters from staff) I originally submitted when (claimant) first filed for unemployment would be given to the judge to view for the hearing." Written Argument at 1. However, the November 12, 2013 notice of hearing from the Office of Administrative Hearings (OAH) notified the parties as follows:

"The documents enclosed here (notices regarding the hearing) are the only documents that will be considered by the ALJ at hearing. If you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ at the office of Administrative Hearings at their addresses as listed on the Certificate of Mailing prior to the date of the scheduled hearing."

Hearing Notice at 1. The record fails to show that the employer did not receive the notice in question. Because the employer failed to make the required showing under OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). Even if we had, the outcome of this decision would have remained the same for the reasons explained by the ALJ.

The employer's written statements from staff members and the owner's testimony, based on conversations with those individuals, were its only evidence that claimant fell asleep while at work. Because the individuals who reportedly were the source of that evidence did not testify at hearing, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from current employees to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. The fact that claimant had the opportunity to question the owner regarding what she had been told was insufficient to test the source of those statements. Absent a reasonable basis in this record for concluding that claimant was not a credible witness, we agree with the ALJ that claimant's first-hand testimony is not outweighed by the employer's hearsay. The evidence as to whether claimant fell asleep while at work was, at best, equally balanced, and the ALJ's conclusion that the employer did not meet its burden to prove that she did is supported by both appellate case law and previous decisions of this board.¹

On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

DECISION: Hearing Decision 13-UI-06966 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: February 25, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

¹ *See, Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence necessary for misconduct, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements); *Loraine C Veach* (Employment Appeals Board, 13-AB-0576, May 1, 2013)(discharge for theft at work based strictly on allegations of coworkers who did not testify, not for misconduct in the absence of substantial evidence); *Marian Martinelli* (Employment Appeals Board, 12-AB-1927, August 20, 2012)(discharge for unprofessional conduct at work based strictly on allegations of coworkers who did not testify, not for misconduct in the absence of substantial evidence).