

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0612

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 155933). Claimant filed a timely request for hearing. On March 21, 2014, ALJ Kirkwood conducted a hearing, and on March 25, 2014 issued Hearing Decision 14-UI-13312, reversing the Department's decision. On April 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted an argument which included written statements from its assistant manager and general manager about the final incident that culminated in claimant's discharge. The two managers did not testify at the hearing, and their statements were apparently intended to overcome the ALJ's conclusion that, in light of claimant's testimony rebutting the employer's contentions, the employer failed to meet its burden to establish claimant's misconduct. *See* Hearing Decision 14-UI-13312. We construe the employer's submission of the written statements as a request to have EAB consider new information under OAR 471-041-0090(2) (October 29, 2006), which authorizes EAB to consider new information if the party offering it 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 reasonably should have been aware by the time of the hearing that it would carry the burden of persuasion. The employer also should reasonably have been aware that there was a significant likelihood that claimant would dispute the employer's allegations at the hearing and that testimony from the managers who had personally observed claimant's behavior might be needed to rebut claimant's contentions. Because the employer offered no explanation for its failure to call the two managers as witnesses, and the evidence that a party presents at hearing is generally a matter within its control, the employer failed to establish that it was prevented by factors or circumstances beyond its reasonable control from offering testimony from one or both managers during the hearing. Given that the employer failed to meet the requirements of OAR 471-041-0090(2), we will not consider the new information contained in the submitted statements. Accordingly, the employer's request to have EAB consider new

information is denied. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence when reaching this decision.

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

DECISION: Hearing Decision 14-UI-13312 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 9, 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.