

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1250

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 120952). The employer filed a timely request for hearing. On July 9, 2014, ALJ Frank conducted a hearing at which claimant did not appear, and on July 18, 2014 issued Hearing Decision 14-UI-21739, affirming the Department's decision. On July 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument which included information not presented at the hearing. The employer did not explain why it did not offer this information during the hearing, and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). Because the employer did not comply with the requirements of OAR 471-041-0090(2), EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

**FINDINGS OF FACT:** (1) Postal Express, Inc. employed claimant as a driver from November 2, 2012 until May 21, 2014. Claimant drove one of the employer's vans when he was working.

(2) The employer expected claimant to perform his assigned work duties during his shift. When claimant was not delivering or picking up packages on his route, the employer expected claimant to perform miscellaneous tasks in the warehouse, such as packing or stacking totes or cleaning up. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Sometime before February 17, 2014, a manager thought that claimant was spending too much time on his route and accompanied claimant one day to determine the cause of his delays. On that ride, after claimant completed all of his scheduled pick-ups and deliveries, he stopped and parked in a parking lot to wait for a call assigning him more work. At that time, the manager advised claimant that, after he

completed all deliveries and pick-ups, he was expected to return to the warehouse to perform miscellaneous tasks and not to wait, doing nothing, for more calls. On March 28, 2014, the employer issued a disciplinary warning to claimant for leaving a tote behind when he was picking up packages.

(4) On May 19, 2014, claimant clocked in to work at 11:13 a.m. and was scheduled to deliver a tote to a client at approximately noon. Sometime around noon, the client called the employer to state that the tote had not been picked up. The operations manager was notified and called claimant to determine his location. Claimant answered his phone and told the manager that he was in his car in the employer's parking lot with the tote. Shortly thereafter, the manager went to claimant's vehicle and told claimant that he was going to deliver the tote to the client. When the manager arrived at his car, claimant explained to the manager that he was waiting for one of the employer's vans to arrive so he could deliver the tote. At that time, none of the employer's vans was available.

(5) On May 21, 2014, the employer discharged claimant for sitting in his car rather than performing work on May 19, 2014.

**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. 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. The employer has 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).

As a matter of common sense, claimant was reasonably aware that the employer expected him not to spend an unreasonable amount of time doing no work when he was waiting for a company van to become available. In this case, the employer's witness did not know how long claimant been at his car waiting for a company van to arrive on May 19, 2014. Audio at ~19:59. Nor did the witness present any evidence about when one of the employer's vans might have arrived to enable him to start his route. That claimant had the tote with him in his car most plausibly suggests that claimant was intending to travel from his car to a company van, after it arrived, to make the scheduled delivery. The employer's evidence does not rule out, more likely than not, that claimant stopped only briefly at his car to pick something up while en route to a van that was expected to arrive very shortly at the workplace or that for some other innocent reason, claimant momentarily stopped by his car in the course of performing legitimate work tasks. Absent ruling out such plausible alternate explanations for claimant's behavior on May 19, 2014, the employer has not met its burden to show that claimant engaged in misconduct by willfully or with wanton negligence failing to perform any work for an unreasonable length of time during that workday.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-21739 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service: August 21, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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