

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1514-R

Request for Reconsideration Granted in Part and Denied in Part

PROCEDURAL HISTORY: On August 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125727). Claimant filed a timely request for hearing. On September 15, 2014, ALJ Shoemake conducted a hearing, and on September 18, 2014 issued Hearing Decision 14-UI-25503, concluding the employer discharged claimant but not for misconduct. On September 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB). On October 14, 2014, EAB issued Appeals Board Decision 2014-EAB-1514, affirming the hearing decision at issue. On October 16, 2014, EAB, on its own motion, granted reconsideration of Hearing Decision 2014-EAB-1514.

CONCLUSION AND REASONS: The employer's request for reconsideration is granted in part and denied in part.

EAB may, on its own motion, reconsider a decision to correct a clerical error and a misapplication of the law. ORS 657.290(1)(a) and (b). Appeals Board Decision 2014-EAB-1514 contained a clerical error – it incorrectly stated that the employer did not participate in the September 15 hearing. That error is corrected by this decision, which notes the employer's participation in the hearing in the above "Procedural History." Appeals Board Decision 2014-EAB-1514 also misapplied the law because it failed to consider the employer's written argument. Appeals Board Decision 2014-EAB-1514 correctly noted that the employer's written argument included new information that could not be considered because no explanation was offered as to why it was not presented at the hearing, as required by OAR 471-041-0090(1)(b) (October 29, 2006). However, the employer's written argument also contained arguments based on information received into evidence at the hearing. There is no indication, however, that these arguments were considered in reaching Appeals Board Decision 2014-EAB-1514. Accordingly, we will now consider these arguments raised by the employer.

Claimant worked for the employer as a collector on medical accounts. Because it was a requirement of the Fair Debt Collections Practices Act (FDCPA), the employer required that claimant validate the accounts on which he attempted to collect by sending the debtor a letter regarding the debt. Because

claimant failed to validate a debtor's account on July 10, 2014, the employer discharged him on July 11, 2014.

In its written argument, the employer stated that claimant "was spoken to about the significance of this function (validation notices being required by Federal law) and the severity of the error on several occasions." (Employer's Written Argument, p. 2). The employer noted that prior to his discharge, claimant received multiple verbal warnings about the need to validate, and was formally written up about his failure to validate accounts on June 9 and June 20, 2014. The employer also noted that the claimant acknowledged the need to validate accounts, and refused additional training offered by the employer. The employer concluded that claimant "chose to disregard this [the need to validate accounts] by being wantonly and willfully negligent after telling us he understood and needed no further training. It led us to believe he was purposeful in his choice to fail to adhere to the Fair Debt Collection Practices Act." (Employer's Written Argument, p. 3).

In order to conclude that claimant's actions on July 10 constituted misconduct because they were willful or wantonly negligent, it is necessary to find that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectations. The record is devoid of any such evidence, however. Claimant testified that his failure to validate the debtor's account on July 10 "was a mistake that I made. It was just, you know, it was something that I missed because it can be missed." (Transcript at 20). In regard to previous occasions when he did not validate accounts, claimant told the employer that he did not know why he failed to validate. (Transcript at 11). Accordingly, we agree with the ALJ that the evidence in the record does not support a conclusion that claimant made a conscious choice not to validate an account on July 10. Instead, the evidence indicates that the claimant's errors resulted from deficient work performance, which is not misconduct. *See* OAR 471-030-0038(3)(b) (inefficiency resulting from a lack of job skills or experience is not misconduct). Accordingly, after consideration of the employer's written argument, we conclude that we correctly affirmed the conclusion reached by the ALJ in Hearing Decision 14-UI-25503 – that the employer discharged claimant, but not for misconduct.

DECISION: The employer's request for reconsideration is granted in part and denied in part. Except for correction of the clerical error discussed above, Appeals Board Decision 2014-EAB-1514 remains undisturbed.

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

DATE of Service: October 20, 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. 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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