

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1962

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102418). Claimant filed a timely request for hearing. On December 10, 2014, ALJ R. Davis conducted a hearing, and on December 12, 2014 issued Hearing Decision 14-UI-30309, affirming the Department's decision. On December 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. Claimant's argument contained information that was not part of the hearing record. Claimant failed to show that the new information was material to EAB's determination, and that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Northwest Metal Fab & Pipe, Inc. last employed claimant as a heavy equipment operator from June 30 to September 28, 2014.

(2) The employer expected claimant to report for work as scheduled. Claimant understood that expectation.

(3) Claimant asked one of the employer's superintendents, David Cunningham, for time off from work beginning September 15, 2014. Mr. Cunningham granted claimant's request. Mr. Cunningham expected claimant to return to work on September 22, 2014, and scheduled him to work on that date. However, claimant believed Mr. Cunningham expected him to return to work on September 25, 2014. Claimant therefore failed to report for work as scheduled on September 22, 2014.

(4) On September 22, 2014, the employer's other superintendent, Michael Ludwig, telephoned claimant and left him a voice message stating that Mr. Cunningham was upset that claimant did not report for

work as scheduled, and therefore had no work available for claimant at that time. On September 23, 2014 claimant telephoned Mr. Ludwig, who again stated that the Mr. Cunningham had no work available for claimant at that time.

(5) On September 28, 2014, Mr. Cunningham telephoned claimant and discharged him for failing to return to work.

**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. 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 of an employee. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-30309, the ALJ found that claimant "requested and was approved for a one-week vacation," asserting that claimant's testimony that he had requested a 1.5 week vacation was "not persuasive," and alternatively, immaterial because claimant did not return to work after 1.5 weeks, even after receiving a call from the employer expressing its anger at his failure to return to work.<sup>1</sup> However, we have reviewed the record in its entirety and find no reasonable basis for concluding that claimant was a less credible witness than the employer's witness, Mr. Cunningham, on whether claimant requested, and believed he was approved for, a 1.5 week vacation. More likely than not, claimant and Mr. Cunningham simply misunderstood each other regarding the length of claimant's vacation. With respect to claimant's failure to return to work after receiving a call from Mr. Ludwig expressing Mr. Cunningham's anger at claimant's failure to return to work, the ALJ's analysis overlooks claimant's testimony that Mr. Ludwig repeatedly told him that Mr. Cunningham had no work available for claimant at that time. Mr. Ludwig did not testify at the hearing, and absent a reasonable basis for concluding that claimant was not a credible witness, we find his testimony on that issue more persuasive than the employer's hearsay evidence to the contrary.

The record therefore shows that claimant failed to return to work on September 22, 2014 because he sincerely believed he was not expected to return until September 25, 2015. Claimant's failure to report for work on September 22 therefore was the result of a good faith error in his understanding of the employer's expectations, and not misconduct. The record also shows that claimant did not return to work after September 22 because Mr. Ludwig repeatedly told him the employer had no work available for claimant at that time. Absent a showing that claimant knew or should have known he was expected to return to work after September 22, the employer failed to establish misconduct. Claimant therefore is not disqualified from receiving benefits based on his work separation from the employer.

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<sup>1</sup> Hearing Decision 14-UI-30309 at 1, 3.

**DECISION:** Hearing Decision 14-UI-30309 is set aside, as outlined above.

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

**DATE of Service: February 13, 2015**

**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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