

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0441

Hearing Decision 15-UI-36412 Reversed – No Disqualification
Hearing Decision 15-UI-34010 Reversed – Late Request for Hearing Allowed, Remanded for Merits Hearing

PROCEDURAL HISTORY: On January 16, 2015, the Oregon Employment Department (the Department) served notice of two administrative decisions; decision # 153302 concluding claimant voluntarily left work without good cause, and decision # 154130 concluding claimant was not able to work for the period of December 21, 2014 through January 10, 2015 (weeks 52-14 through 1-15). On February 5, 2015, decisions # 153302 and # 154130 became final without a request for hearing having been filed. On February 10, 2015, claimant filed untimely requests for hearing.

On February 24, 2015, ALJ Kangas issued Hearing Decision 15-UI-34002, dismissing claimant's request for hearing on decision # 153302 as untimely, subject to claimant's right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.¹ Also on February 24, 2015, ALJ Kangas issued Hearing Decision 15-UI-34010, dismissing claimant's request for hearing on decision # 154130 as untimely, subject to claimant's right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.² On March 10, 2015, the Office of Administrative Hearings (OAH) received one "Appellant Questionnaire" response form from claimant. Based on claimant's response, on March 19, 2015, OAH issued a letter titled "Cancellation of Hearing Decision" for Hearing Decision 15-UI-34002. On April 6, 2015, ALJ Seideman conducted a hearing, and on April 7, 2015 issued Hearing Decision 15-UI-36412, allowing claimant's late request for hearing, and affirming the Department's decision that claimant voluntarily left work without good cause (decision # 153302). On April 16, 2015, claimant filed a late application for review for Hearing Decision 15-UI-34010, and a timely application for review of Hearing Decision 15-UI-36412 with the Employment Appeals Board (EAB).

¹ Hearing Decision 15-UI-34002.

² Hearing Decision 15-UI-34010.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-34010 and 15-UI-36412. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0439 and 2015-EAB-0441).

No adversely affected party requested a hearing on the portion of Hearing Decision 15-UI-36412 in which the ALJ concluded that claimant had good cause to file a late request for hearing. We therefore accept and adopt the ALJ's decision as to that issue.

FINDINGS OF FACT:

Work Separation: (1) Dairy Queen employed claimant as a server and preparer from July 15, 2013 until November 14, 2014.

(2) On November 14, 2014, claimant sustained a broken hip in an auto accident in which a friend and coworker of claimant's died. The victim's mother, Traci, was also claimant's coworker.

(3) On February 14, 2015, claimant obtained a light-duty medical release from her physician. Claimant contacted Traci, who informed claimant that she could probably perform light-duty for the employer.

(4) At the time of the hearing, April 6, 2015, claimant still had light-duty medical restrictions and had not been medically cleared for unrestricted duty. At the time of hearing, the employer's owner had not offered claimant a light-duty assignment because he wanted a full medical release for work since claimant's injury and auto accident were not work-related. Transcript at ~45 and 46. The employer's owner determined that claimant voluntarily left work and used the effective date of November 14, 2014, claimant's last day of work prior to her auto accident, as the date of separation.

Late Request for Hearing: (5) Along with the two hearing decisions ALJ Kangas mailed to claimant on February 24, 2015, OAH mailed claimant two "Appellant Questionnaire" forms. The two "Appellant Questionnaire" forms were identical. Both stated:

You need to provide information about the administrative Decision the Employment Department mailed to you on January 16, 2015. A hearing request for that decision was due on February 5, 2015. You filed you hearing request (appeal) on February 10, 2015.

See Appellant Questionnaire forms. Both referred to the matter at issue as "*In the Matter of [claimant's name]*." Both included the same page numbering. Neither questionnaire included reference to a case or hearing decision number, and neither included reference to the work separation or able to work issues. Neither questionnaire stated that claimant needed to complete and return both Appellant Questionnaire forms to OAH.

(6) The answers claimant provided on her Appellant Questionnaire applied equally to claimant's late request for hearing on the work separation decision (# 153302) and the ability to work decision (# 154130). However, OAH erroneously applied the response only to decision # 153302. Despite receiving a timely response to the Appellant Questionnaire about the circumstances that caused claimant to file a late request for hearing on decision # 154130, OAH took no further action on that matter.

CONCLUSIONS AND REASONS: Hearing Decision 15-UI-36412 is reversed; the employer discharged claimant, but not for misconduct. Claimant is not disqualified based on her separation from the employer (Dairy Queen). Hearing Decision 15-UI-34010 is reversed, claimant's late request for hearing on decision # 154130 is allowed, and this matter is remanded for a hearing on the merits of that issue.

Work Separation:

In Hearing Decision 15-UI-36412, the ALJ found as fact that "Employer determined that claimant voluntarily left work and used the effective date as the day she last worked and had communication with them," and stated that "[a]fter a period of time, employer concluded that claimant had quit and used her last day worked as the quit date. Claimant did not contest that in the hearing."³ However, the ALJ did not apply the facts gathered during the hearing to the applicable law when determining that claimant's work separation was a voluntary leaving.

OAR 471-030-0038(2) (August 3, 2011) provides that, if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving, but if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge.

The record shows that claimant was ambivalent about returning to work for the employer after the accident that resulted in a coworker's death. However, the record fails to show that, at any time, claimant made any decisions about whether or not she was willing to return to work, and, in fact, made some contact with a supervisor, regardless in what capacity, about her employment status. The record also shows that at some point after the accident the employer became unwilling to allow claimant to continue working for an additional period of time, decided claimant had quit work by failing to maintain contact with the appropriate supervisor(s), and decided to end claimant's employment. When questioned at the hearing as to whether the employer had continuing work available to claimant at the time of the work separation given the extent of her injuries and physical incapacity, the employer's witness testified that he did not know and would have preferred claimant have a full medical release before he would allow her to return to work. However, claimant did not have a full medical release at any point in time relevant to her work separation, not even by early April 2015 at the hearing in this matter. Given that evidence, the record fails to show that the employer had continuing work available to claimant; notwithstanding claimant's ambivalence about whether or not she wanted to continue working, it is, therefore, more likely than not that claimant's work separation was a discharge.

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) 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

³ Hearing Decision 15-UI-36412 at 2-3.

Neither party disputed that on November 14, 2014, claimant sustained a broken hip in an auto accident in which a friend and coworker of claimant's died, that the coworker who died in the accident was claimant's supervisor's son, or that claimant was physically incapacitated and mentally distraught by the events that occurred and by the thought of returning to work, and working in close proximity, with other friends and a family member of the deceased. Nor did either party dispute the fact that claimant remained completely incapacitated for work for several months after the accident and remained on restricted duty until at least a week after the hearing in this matter.

The record indicates that, most probably, claimant's discharge was due to a combination of her failure to maintain adequate contact with the employer after her temporarily disabling auto accident and her inability to return to unrestricted duty. Neither reason supports a finding of misconduct. To the extent the employer discharged claimant for failing to maintain contact with the employer, the record shows claimant did maintain some contact with a supervisor. The record fails to show that claimant knew, or, given her distraught mental state at the time of the events in question, should have known, that she was probably violating some expectation the employer held based on the manner in which she contacted the employer's business in the aftermath of her accident. To the extent the employer discharged claimant because she was physically incapable of returning to unrestricted duty due to the accident, absences that are caused by illness or injury are not considered misconduct for purposes of unemployment insurance cases. We conclude that claimant's work separation was a discharge, not for misconduct.

Late Request for Hearing:

In Hearing Decision 15-UI-34010,⁴ ALJ Kangas dismissed claimant's late request for hearing on decision # 154130 subject to claimant's right to provide additional requested information, as listed on the Appellant Questionnaire, within 14 days of the date Hearing Decision 15-UI-34010 was mailed. The information claimant was asked to provide was "information about the administrative decision the Employment Department mailed to [claimant] on January 16, 2015," upon which claimant filed a hearing request on February 10, 2015. Claimant's deadline for providing that information was, therefore, March 10, 2015.

On March 10, 2015, OAH received an Appellant Questionnaire response from claimant in which she provided the information that OAH had requested in Hearing Decision 15-UI-34010. Claimant's response was timely, and should have been considered a timely response to the Appellant Questionnaire in this matter.

Given that claimant submitted a timely response to the Questionnaire in both of the cases to which it applied, and that ALJ Seideman concluded in Hearing Decision 15-UI-36412 that claimant had "good cause to extend the filing period" under circumstances identical to those in this matter, we conclude that

⁴ Claimant's application for review of Hearing Decision 15-UI-34010 was received after the time period for filing a timely application for review expired. However, the late filing was a direct consequence of OAH's failure to renew claimant's request for hearing in that matter upon receiving a timely response to the Appellant Questionnaire in that case, as discussed herein. Where, as here, a party fails to meet a procedural requirement, the first issue is whether that party was afforded due process of law, i.e., whether the party had notice of the requirement at issue, here, a filing deadline. Given that claimant has never received actual notice that OAH had not renewed her request in accordance with the provisions set forth in Hearing Decision 15-UI-34010, thus depriving her of a reasonable opportunity for both a fair hearing on the matter of her late request for hearing and a fair review of that dismissal, due process of law requires that claimant's late application for review be allowed.

the ALJ's conclusion must apply to both of claimant's cases, thus entitling her to a hearing on the merits of the Department's decision # 154130.⁵

DECISION: Hearing Decision 15-UI-34010 is reversed, and this matter remanded for further proceedings consistent with this order. Hearing Decision 15-UI-36412 is reversed; the employer discharged claimant, but not for misconduct. Claimant is not disqualified based on her separation from the employer (Dairy Queen).⁶

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

DATE of Service: May 5, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

⁵ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-34010 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

⁶ This decision reverses a hearing decision that denied benefits. Payment of any benefits owed may take from several days to two weeks for the Department to complete. Please note that reversal of a hearing decision that denied benefits might not result in any payment of benefits where, as here, there are other pending issues that have resulted in suspension of benefit payments. If you have any questions about your entitlement to benefit payments based on this decision, please contact your unemployment insurance center, making sure to allow between several days and two weeks for the Department to process this decision.