

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0720

Hearing Decision 15-UI-39544 Affirmed
Request to Reopen Denied

Hearing Decision 15-UI-37773 Affirmed on Reconsideration
No Disqualification

PROCEDURAL HISTORY: On March 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 121220). Claimant filed a timely request for hearing. On April 14, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 28, 2015 to claimant and the employer at their addresses of record with the Department. On April 28, 2015, ALJ Vincent conducted a hearing at which the employer failed to appear, and on April 30, 2015, issued Hearing Decision 15-UI-37773, concluding that the employer discharged claimant, not for misconduct. On May 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB). Also on May 5, 2015, the employer filed a request to reopen the hearing with the Office of Administrative Hearings (OAH). On May 15, 2015, OAH issued notice of a hearing scheduled for June 2, 2015. On May 20, 2015, EAB issued Appeals Board Decision 2015-EAB-0527, dismissing the employer's application for review without prejudice, pending the outcome of the proceedings at OAH. On June 2, 2015, ALJ Wyatt conducted a hearing at which claimant failed to appear, and on June 4, 2015, issued Hearing Decision 15-UI-39544, denying the employer's request to reopen. On June 12, 2015, the employer filed an application for review of Hearing Decision 15-UI-39544 with EAB.

EAB reviewed the entire record of the June 2, 2015 hearing on the employer's request to reopen the April 28, 2015 hearing on whether claimant is disqualified from receiving benefits based on her work separation from the employer. On *de novo* review and pursuant to ORS 657.275(2), Hearing Decision 15-UI-39544, the decision denying the employer's request to reopen, is **adopted**.

Under ORS 657.290(3), EAB may reconsider a previous EAB decision. We will exercise this discretion to reconsider Appeals Board Decision 2015-EAB-0527, the decision dismissing the employer's application for review of Hearing Decision 15-UI-37773 without prejudice, pending the outcome of the employer's request to reopen the April 28, 2015 hearing. EAB dismissed the application for review on procedural grounds, and never addressed the merits of Hearing Decision 15-UI-37773, which concluded

that the employer discharged claimant, not for misconduct. It is therefore appropriate to reconsider Appeals Board Decision 2015-EAB-0527 to provide the employer a *de novo* review of Hearing Decision 15-UI-37773 on the record under ORS 657.275(2).

EAB considered the entire hearing record of April 28, 2015 hearing on whether claimant is disqualified from receiving benefits based on her work separation from the employer. EAB also considered the employer's written argument on that issue. However, the employer's argument contained information not offered into evidence at the hearing, which the employer asserted was part of the "Department's record" of claimant's claim. Employer's Written Argument (June 12, 2015) at 1. The employer asserted that the ALJ therefore erred in failing to consider the information, and asked EAB to consider it.

However, the employer's information was not part of the hearing record, and the ALJ therefore did not err in failing to consider it. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB may consider information that was not part of the hearing record only if the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. In Hearing Decision 15-UI-39544, the ALJ concluded that employer failed to establish that factors or circumstances beyond its reasonable control prevented the employer from appearing at the April 28, 2015.¹ EAB adopted Hearing Decision 15-UI-39544, and we therefore conclude that the employer failed to establish that factors or circumstances beyond its reasonable control prevented the employer from offering its information into evidence at the hearing. The employer's request for EAB to consider its new information therefore is denied.

FINDINGS OF FACT: (1) Computerpros Internet employed claimant as an on-call technical support worker from April 2, 2014 through February 4, 2015.

(2) During the last week of January 2015, claimant moved from Grants Pass, Oregon to Troutdale, Oregon. After she moved, claimant told the employer that she would return to work for them any time they had work available for her. Audio at 8:23.

(3) On February 4, 2015, claimant worked 9 hours for the employer. Audio at 7:09. Claimant talked to the employer's manager and told him that she would be happy to travel to Grants Pass to work if the employer had work available for her. The manager did not offer claimant any additional work.

(4) Sometime after February 4, 2015, claimant contacted the employer's owner to clarify her work status. The owner did not explain why the employer had not offered claimant any work after February 4, and did not offer her any additional work during or after their conversation. Audio at 12:15.

CONCLUSION AND REASONS: We agree with the ALJ that the employer discharged claimant, but not for misconduct.

¹ Hearing Decision 15-UI-39544 at 2-3.

The first issue is the nature of claimant's work separation. 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. OAR 471-030-0038(2)(a) (August 3, 2011). 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. OAR 471-030-0038(2)(b). Here, claimant offered to continue working for the employer after February 4, 2015, but the employer did not offer her any additional work after that date. The record therefore shows that claimant was willing to continue working for the employer for an additional period of time, but was not allowed to do so by the employer. Claimant's work separation was therefore 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) (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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, the record contains no definitive reason why the employer refused to allow claimant to continue working. On her last day of work for the employer, claimant told her manager that she was willing to accept additional work if offered; her supervisor had no response and offered her no additional work. When claimant subsequently contacted the employer's owner to clarify her work status, the owner did not explain why the employer had not offered claimant any work after February 4, or why it would not do in the future. The record fails to show the employer discharged claimant for a 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.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decisions 15-UI-37773 and 15-UI-39544 are affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: June 26, 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.