

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1306**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 161648). The employer filed a timely request for hearing. On October 14, 2015, ALJ Holmes-Swanson conducted a hearing at which claimant failed to appear, and on October 15, 2015, issued Hearing Decision 15-UI-45940, concluding the employer discharged claimant for misconduct. On November 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB containing new information for EAB to consider regarding claimant's work separation. First, we construe claimant's request as a request for EAB to consider its new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information when 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. Claimant provided no explanation regarding why she failed to appear at the hearing. Second, claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Adecco USA, Inc. employed claimant from March 27, 2015 to July 17, 2015 as a contact center agent. Claimant's duties included taking inbound calls and answering customers' questions.

(2) The employer expected claimant to report to work as scheduled. Claimant understood the employer's expectations.

(3) Claimant was absent from work on July 7, 8, 9 and 10, 2015 due to illness.

(4) On July 13, 2015, claimant was absent from work due to a swollen lip.

(5) On July 17, 2015, the employer discharged claimant for being absent from work on July 13, 2015.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant, 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. Isolated instances of poor judgment and absences due to illness or other physical disabilities are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-45940, the ALJ concluded that claimant's absence from work due to a swollen lip was a willful disregard of the employer's attendance expectations because claimant did not explain to the employer, and the record does not otherwise show, how she obtained the swollen lip, or why it prevented her from working.<sup>1</sup> The ALJ also found that claimant's conduct was not an isolated instance of poor judgment because claimant also violated the employer's expectations on July 13 by failing to notify the employer in a timely manner that she would be absent that day.<sup>2</sup>

However, the record shows the final instance, without which claimant would not have been discharged, was when claimant was absent from work on July 13, 2015 due to a swollen lip, and not her alleged failure to follow the employer's notification procedures on July 13. The employer's witness testified that the employer discharged claimant because her July 13 absence caused her to accrue more attendance violation points than the employer permitted under its attendance policy. Audio Record at 16:35 to 17:07. The employer did not consider claimant's failure to contact the employer before her shift as a reason for discharge, and testified that claimant "did follow protocol as to calling out on the last day," and that the only issue on July 13 was claimant's accrued absences from work. Audio Record at 18:24 to 18:53. When a claimant is discharged because of the total number of attendance violations accrued under a point-based attendance policy, EAB limits its evaluation to whether the final absence constituted misconduct. See June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, claimant's absence on July 13, 2015 is the proper focus of the misconduct analysis.

Claimant was absent on July 13 due to illness or physical disability, because her lip was swollen.<sup>3</sup> Absences from work for that reason are not misconduct. Claimant's primary duties required her to

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<sup>1</sup> Hearing Decision 15-UI-45940 at 3.

<sup>2</sup> *Id.*

<sup>3</sup> The Merriam-Webster online dictionary defines "illness" as "a condition of being unhealthy in your body or mind; a specific condition that prevents your body or mind from working normally; a sickness or disease." [www.merriam-webster.com/dictionary/illness](http://www.merriam-webster.com/dictionary/illness).

speak to customers on the telephone and it is likely that a swollen lip would have prevented or at least inhibited claimant from speaking and conducting her work duties normally. Although claimant's July 13 absence caused her to accrue more attendance points than the employer permitted under its attendance policy, thereby violating the employer's policy, because the absence was due to her illness or physical disability, the violation is not considered "misconduct."

The employer discharged claimant but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment benefits on the basis of her work separation.

**DECISION:** Hearing Decision 15-UI-45940 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: December 9, 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](http://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.

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