

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1504

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142053). Claimant filed a timely request for hearing. On December 7, 2015, ALJ Triana conducted a hearing, and on December 9, 2015 issued Hearing Decision 15-UI-49050, affirming the Department's decision. On December 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with her application for review, but 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). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Triple A Trailer employed claimant from January 1, 2008 to October 21, 2015.

(2) During the last two or three years of her employment, claimant worked for the employer as a warranty clerk. As such, she was responsible for filing warranty paperwork with manufacturers, which then paid the employer for work it performed. Most manufacturers required the paperwork, including photographs, to be submitted within 60 days after the work was completed.

(3) Claimant understood the employer expected her to file warranty paperwork by the manufacturers' deadlines. However, she had difficulty complying with the employer's expectations because she could not manage her workload, even after the employer hired an employee to assist her.

(4) On May 4 and 11, 2015, the employer performed work on a vehicle covered by the manufacturer's warranty. The manufacturer required the warranty paperwork, including photographs, to be submitted

within 60 days. Claimant repeatedly asked the service writer to provide her the photographs required by the manufacturer, so that she could submit the paperwork. However, the service provider did provide claimant the required photographs.

(5) In mid-October 2015, claimant was able to obtain the required photographs. On October 14, she submitted the warranty paperwork, including the photographs, to the manufacturer. On October 21, 2015, the employer discharged claimant for filing the paperwork late.

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. 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). Good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-49050, the ALJ concluded that claimant's failure to submit the warranty paperwork by the manufacturer's deadline was, at a minimum, wantonly negligent.¹ In support of that conclusion, that ALJ noted that although claimant was waiting for the required photographs, she failed to follow up with the employer's owner or "anyone else" after the service writer failed to provide the photographs, and it was her responsibility to inform her supervisor or the employer's owner, rather than allow the claim to languish for five months.² We agree that claimant was careless, arguably negligent, in allowing the claim to languish for five months. At hearing, however, claimant testified that she likely did inform a supervisor that the service writer failed to provide the required photographs,³ and the record fails to show otherwise. Nor does the record show that claimant knew she also was expected to notify the owner, consciously neglected to do so, and was indifferent to the consequences of her failure to do so. The employer therefore failed to establish that claimant's conduct was willful, or rose to the level of wanton negligence as defined under OAR 471-030-0038(1)(c). Nor did the employer establish that claimant's conduct was not the result of a good faith error in her understanding of what she was expected to do when a service provider failed to provide the required photographs, and/or a lack of job skills or experience in handling such a situation.

¹ Hearing Decision 15-UI-49050 at 3.

² *Id.*

³ Transcript at 26.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-49050 is set aside, as outlined above.⁴

Susan Rossiter and J. S. Cromwell.

DATE of Service: January 14, 2016

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.

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⁴ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.