

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0122**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93354). The employer filed a timely request for hearing. On January 15, 2016, ALJ Jarry conducted a hearing and on issued Hearing Decision 16-UI-51231, affirming the Department's decision. On February 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons that follow.

The employer's primary argument was that the ALJ erred by denying the employer's request to continue the hearing to allow Gallagher, an employee, to provide "critical first-hand testimony" about the work separation, and that EAB should remand the case for an additional hearing. OAR 471-040-0026 (August 1, 2004) provides that an ALJ may allow a party's request for continuance if the request is made prior to the issuance of the ALJ's decision, and the party has "good cause" for continuing the hearing. "Good cause" exists if the "circumstances causing the request is beyond the reasonable control of the requesting party," and denying the request "would result in undue hardship to the requesting party." OAR 471-040-0026(3). We review denial of a request for continuance for abuse of discretion.

In this case, although the employer's efforts to have Gallagher participate in the hearing failed, the employer had over two weeks' notice of the hearing and the opportunity to have the witness participate, so we cannot conclude that it was outside the employer's reasonable control to secure the witness's testimony. The record also shows that five other individuals testified on the employer's behalf, those witnesses mentioned Gallagher and provided hearsay testimony about his observations almost thirty times during the hearing, and the employer's representative indicated that that purpose of calling Gallagher as a witness was to "confirm the information." Transcript at 47. Because it appears that the

substance of the evidence Gallagher would have offered had he testified has already been admitted into the record as hearsay, and we have no reason to disbelieve the evidence provided by the employer's other witnesses, we cannot conclude that the ALJ's denial of the employer's request for a continuance resulted in an undue hardship for the employer. The ALJ's denial of the employer's request for a continuance was consistent with application of the relevant administrative rule to the facts of this case, and, therefore, does not appear to have constituted an abuse of discretion. Therefore, even if we had considered the employer's argument, we would not have allowed the employer's request to remand the case for an additional hearing.

**FINDINGS OF FACT:** (1) Jeld-Wen, Inc. employed claimant as a labeler from May 1, 2005 to October 26, 2015.

(2) The employer expected employees to be honest. Claimant understood the expectation.

(3) On October 19, 2015, claimant and a coworker argued. On October 20, 2015, claimant submitted a written statement about the argument in which she alleged the coworker was the aggressor and had told her to "fuck off." Transcript at 7.

(4) Later on October 20, 2015, a lead worker, Gallagher, notified management that claimant told Gallagher she misspoke when making a report about her coworker's conduct. Gallagher reported that claimant said her coworker had not told her to "fuck off," and that she would like to correct or recant her earlier statement.

(5) Management subsequently met with claimant about recanting her statement. Claimant denied that she ever told Gallagher that she wanted to recant her statement. Management checked with Gallagher again, and Gallagher confirmed his belief that claimant had recanted her statement. Management believed Gallagher was truthful when he reported that claimant had recanted her story, and believed that claimant was dishonest when she denied telling Gallagher that she wanted to recant.

(6) On October 26, 2015, the employer discharged claimant for being dishonest about telling Gallagher she was recanting her statement. The employer would have disciplined claimant because of her argument with the coworker, but would not have discharged her had management not concluded claimant had been dishonest. Transcript at 13-14.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ 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.

The employer bears the burden to prove misconduct occurred by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In order to do so, generally, the employer must prove both that claimant engaged in the conduct alleged, and that she acted with a

willful or wantonly negligent mental state. In order to prove misconduct in this case, the employer must first prove that, more likely than not, claimant was dishonest when she denied recanting her statement.

The employer alleged that claimant was dishonest because she denied that she told Gallagher she wanted to recant her statement about the argument with her coworker. *See* Transcript at 18-19. The employer's belief that claimant had recanted her statement was based on Gallagher's report to management that claimant told him she wanted to recant. It appears that whatever conversation informed Gallagher's belief that claimant had recanted her statement occurred while claimant and Gallagher were alone.<sup>1</sup> Therefore, claimant and Gallagher are the only individuals who know what claimant said. The hearing record, through credible hearsay provided by the employer's witnesses, shows that Gallagher believed, and reported to the employer, that claimant had recanted her statement. Claimant just as credibly denied that she ever recanted her statement. Transcript at 34, 53. Absent a basis for disbelieving either witness, the evidence as to whether or not claimant recanted her statement to Gallagher is at best equally balanced.<sup>2</sup> Therefore, the preponderance of the evidence does not show that claimant was dishonest when she denied recanting her statement.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-51231 is affirmed.

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

**DATE of Service:** February 26, 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](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.

---

<sup>1</sup> *See* Transcript at 9, 23, 51 (showing that the employer's witnesses all heard of claimant's alleged recantation from Gallagher).

<sup>2</sup> Even if Gallagher had testified, his allegation that claimant recanted her statement about the argument with her coworker would still be equally balanced against her denial, because the only individuals who claimed to have participated in the conversation in which claimant allegedly recanted her statement were claimant and Gallagher. The fact that Gallagher did not provide direct testimony about claimant's alleged recantation has not materially affected the outcome of this decision. We have no reason to disbelieve the employer's witnesses, most of whom testified that Gallagher believed and reported to them that he heard claimant recant her statement. Therefore, for purposes of this decision, we have not discounted the weight of the employer's witnesses' hearsay, and have assumed for the sake of argument that, had Gallagher testified at the hearing, he would have confirmed that he heard claimant recant her statement, and that we would consider such testimony credible and consistent with the employer's other witnesses.

**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.