

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0215-R**

*Request for Reconsideration Allowed*  
*Employment Appeals Board Decision 2016-EAB-0215 Adhered to on Reconsideration*  
*Hearing Decision 16-UI-52925 Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 160619). The employer filed a timely request for hearing. On February 4, 2016, ALJ K. Monroe conducted a hearing, and on February 12, 2016 issued Hearing Decision 16-UI-52925, affirming the Department's decision. On February 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB). On March 7, 2016, EAB issued Employment Appeals Board Decision 2016-EAB-0215, affirming the ALJ's decision. On March 14, 2016, the employer filed a request for reconsideration. This decision is being issued pursuant to EAB's authority under ORS 657.290(3).

**CONCLUSIONS AND REASONS:** The employer's request for reconsideration is allowed. We adhere to Appeals Board Decision 2016-EAB-0215 as clarified herein. Hearing Decision 16-UI-52925 is affirmed.

Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Department rule, or officially stated Department position, or prior Department practice. ORS 657.290(3); OAR 471-041-0145(1) (October 29, 2006). The request is subject to dismissal unless it includes a statement that a copy has been provided to the other parties, and is filed on or before the 20th day after the decision sought to be reconsidered is mailed. OAR 471-041-0145(2). In the present case, claimant filed a timely request for reconsideration to correct alleged errors of material fact and law, and certified that a copy of its request had been provided to claimant. Employer's Request for Reconsideration at 2. The employer's request for reconsideration therefore is allowed. With its request for reconsideration, however, the employer submitted documents and information not offered into evidence at the hearing, and failed to show that factors or circumstances beyond its reasonable control prevented from offering the documents and information into evidence at that time. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

In Employment Appeals Board Decision 2016-EAB-0215, EAB found that the employer discharged claimant. Employment Appeals Board Decision 2016-EAB-0215 at 2. In its request for reconsideration, the employer argues that EAB erred in concluding that claimant was discharged, asserting that “per our strict attendance policy,” claimant “actually quit her job.” Employer’s Request for Reconsideration at 3. However, OAR 471-030-0038(2)(a) (August 3, 2011) states the work separation is a quit only if the employee could have continued to work for the same employer for an additional period of time. 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). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.* Here, it is undisputed that the employer severed the employment relationship because claimant failed to report for work as scheduled on October 31, 2015 or notify the employer she would be absent. The work separation therefore is a discharge and not a quit, the employer’s attendance policy notwithstanding.

In Employment Appeals Board Decision 2016-EAB-0215, EAB found the following:

(3) The employer typically scheduled claimant to work Thursdays and Fridays, day shift. The employer posted hard copies of monthly work schedules, which employees checked to confirm their schedules. In September 2015, however, the employer implemented “shift planning” software that allowed employees to check their schedules using a computer or cell phone. Exhibit 1.

(4) On September 20, 2015, claimant volunteered to work the swing shift on Saturday, October 31, 2015. The employer scheduled claimant to work that shift. Claimant subsequently was involved in an automobile accident and took a two to three week medical leave of absence, during which she forgot she was scheduled to work on October 31, 2015.

(5) On October 27, 2015, claimant was released to work. A manager reminded claimant she was scheduled to work the swing shift on Friday, October 30, 2015. After clocking in to work on October 30, claimant checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31.

The employer argues that EAB erred in not finding that two managers reminded claimant that she was scheduled to work on October 31. Employer’s Request for Reconsideration at 2. In Employment Appeals Board Decision 2016-EAB-0215, however, we explained that the employer’s hearsay evidence that the managers reminded claimant she was scheduled to work on October 31 did not outweigh claimant’s sworn testimony that they did not. Employment Appeals Board Decision 2016-EAB-0215 at 2. The employer therefore did not meet its burden to show by a preponderance of evidence that the managers reminded claimant she was scheduled to work on October 31. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). EAB therefore did not err in not finding that they did.

The employer also argues that EAB erred in finding that claimant checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31.

Employer's Request for Reconsideration at 2. At hearing, however, on direct examination by the ALJ, claimant testified that when she returned to work after October 27, she checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31. Audio Record at 28:00-29:10. On cross-examination, the employer's representative asked claimant if she recalled that the employer had stopped posting hard copies of the monthly schedules after implementing its shift planning software in September 2015, and claimant stated that she did not recall that, and believed the employer continued posting monthly work schedules while testing the shift planning software. Audio Record at 34:00-34:30. On redirect examination by the ALJ, claimant again testified that the employer continued posting hard copies of monthly work schedules, and that when she returned to work after October 27, there was a hard copy of the monthly work schedule posted at her work site. Audio Record at 35:15-36:30. The employer failed to show otherwise. EAB therefore did not err in finding that on or about October 30, 2015, claimant checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31.

In sum, the employer failed to establish that EAB made an error of material fact or law in Employment Appeals Board Decision 2016-EAB-0215. We therefore adhere to that decision and conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Reconsideration is granted. Employment Appeals Board Decision 2016-EAB-0215 is adhered to as clarified herein. Hearing Decision 16-UI-52925 is affirmed.

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

**DATE of Service:** March 15, 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.

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