

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0605-R

Requested for Reconsideration Allowed
Appeals Board Decision 2016-EAB-0605 Adhered to on Reconsideration

PROCEDURAL HISTORY: On April 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144301). Claimant filed a timely request for hearing. On April 20, 2016, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for May 4, 2016. On May 4, 2016, ALJ Frank conducted a hearing, and on May 12, 2016 issued Hearing Decision 16-UI-59441, affirming the Department's decision. On May 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On June 1, 2016, EAB issued Appeals Board Decision 2016-EAB-0605, affirming Hearing Decision 16-UI-59441. On June 1, 2016, the employer submitted a timely written argument to EAB, and on June 4, 2016, claimant submitted a timely written argument to EAB. We will exercise our discretion under ORS 657.290(3) to reconsider Appeals Board Decision 2016-EAB-0605 to address some of the issues raised in these written arguments.

Both written arguments contain a considerable amount of information that was not presented at the hearing. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information if the party presenting the information demonstrates that circumstances beyond the party's reasonable control prevented the party from presenting the information at the hearing. In her argument, claimant explained her submission of new information on the basis that she feels a need "to tell my side of the story and clarify a few things since I feel I did not really have a chance to at the time of my telephone hearing on May 4th 2016." Claimant's Written Argument at 2. We have reviewed the entire record of the May 4 hearing and conclude that the ALJ gave claimant a full and fair opportunity to present facts and argument at the hearing. The ALJ's conduct of the hearing was therefore not a circumstance beyond claimant's reasonable control that prevented her from offering the information at the hearing she now wants EAB to consider. Claimant's request to present new information is therefore denied.

In its argument, the employer explained its submission of new information on the basis that the information "was submitted with our original paperwork on 3/17/2016 to the Employment Department but was not present at the Administrative Hearing on 05/04/16 with Judge Frank." Employer's Written Argument at 1. The April 20, 2016 notice of hearing included a "Notice of Rights" which advised parties to immediately provide documents they wanted the ALJ to consider to the ALJ and the other

parties; the “Notice of Rights” explained that if a party did not provide documents before the hearing, “they may not be considered by the ALJ.” It was well within the employer’s reasonable control to carefully read the hearing notice and understand the procedure for submitting documents to be considered at the hearing. The failure of the documents to be “present” at the May 4 hearing was not a circumstance beyond the employer’s reasonable control that prevented it from offering at the hearing the documents it now wants EAB to consider. The employer’s request to present new information is therefore denied.

We considered both parties' arguments only to the extent they were based on the hearing record. ORS 657.275; OAR 471-041-0090.

CONCLUSION AND REASONS: Appeals Board Decision 2016-EAB-0605 is adhered to on reconsideration.

In Appeals Board Decision 2016-EAB-0605, we agreed with the ALJ’s finding that claimant willfully and wantonly violated the employer’s internet, computer and email policy when she made personal use of her office computer in August 2015 and again on January 26, 2016. We therefore affirmed the ALJ’s conclusion that the employer discharged claimant for misconduct when it discharged her for her January 26 computer use.

The main point of claimant’s argument is that the employer’s decision to discharge her was unfair. In both her written argument and at the hearing, claimant admitted that she made personal use of the employer’s computer. She asserted, however, that she “was a valued employee and the act of terminating [my employment] was extreme and not necessary.” Claimant’s Written Argument at 2. Claimant’s frustration at her discharge is understandable; the record shows that the only disciplinary actions she received during her nine years of work for the employer were a warning for her personal use of the computer in August 2015 and her discharge for the same conduct on March 3, 2016. The relative fairness of the employer’s decision to discharge claimant is not relevant to determining whether she is qualified to receive unemployment benefits, however. Under applicable law, her personal use of the employer’s computer constituted a willful violation of the standards of behavior the employer reasonably expected of her and was misconduct. ORS 657.176; OAR 471-030-0038(1) and (3)(a)(August 3, 2011). For this reason, we did not err in affirming the ALJ’s conclusion that claimant is disqualified from the receipt of unemployment benefits.

The remaining issues raised in claimant’s written argument are fully addressed in Appeals Board Decision 2016-EAB-0605. We therefore find no error of fact or law in this decision that would require correction on reconsideration. *See* ORS 657.290(3) (reconsideration by EAB may include making a new decision “to the extent necessary and appropriate for the correction of a previous error of fact or law.”)

DECISION: Reconsideration is granted. Appeals Board Decision 2016-EAB-0605 is adhered to on reconsideration.

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

DATE of Service: June 8, 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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