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State of Oregon
**Employment Appeals Board**
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2016-EAB-1021

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On July 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 124741). Claimant filed a timely request for hearing. On August 4, 2016, the Office of Administrative Hearings (OAH) sent the employer notice of hearing for August 18, 2016 at its last known address as shown by the Department's records. The Department records do not show that the employer had a representative.[1] On August 18, 2016, ALJ Buckley conducted a hearing at which the employer failed to appear and issued Hearing Decision 16-UI-65881, concluding the employer discharged claimant, not for misconduct. On September 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

On September 12, 2016, the employer submitted written argument to EAB requesting that EAB reopen the hearing, asserting that neither the employer nor its representative received notice of the hearing. The argument is considered a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party presenting the information shows that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. However, 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, EAB did not consider the argument when reaching this decision. However, even if EAB had considered the employer's argument, the outcome of this decision would remain the same because the record shows that, on August 4, 2016, OAH sent the employer notice of the August 18, 2016 hearing at its last known address as shown by the record of the Department, which is more than the five days required by OAR

[1] We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

471-040-0015(1)(August 1, 2004). Nor does the employer's argument provide sufficient supporting details, such as problems it may have experienced with mail delivery or processing, to support or explain its claim that it did not receive notice of the hearing. Without supporting details, we have insufficient basis for concluding that the employer's alleged failure to receive notice of the hearing was a circumstance beyond its reasonable control. The employer's request to present new evidence to EAB therefore is denied.

**FINDINGS OF FACT:** (1) Trees, Inc. employed claimant from January 12, 2015 to June 22, 2016 as a journeyman trimmer.

(2) Claimant used a bucket truck to lift himself up while he trimmed trees. The employer expected claimant to buckle himself into the bucket with all the straps of the buckle harness when he was in the bucket. The employer expected claimant to refrain from putting the bucket directly on the ground when he lowered it to exit the bucket. Claimant understood the employer's expectations.

(3) On June 22, 2016, claimant was trimming a tree from up in a bucket. Claimant had all his harness straps attached to the bucket harness while in the bucket. Claimant lowered the bucket to one foot above the ground. He unbuckled his leg straps and began to unbuckle his chest straps from the bucket harness so that he could get out of the bucket to get a bottle of water. Claimant noticed that a foreman came up behind him at that time.

(4) Later on June 22, 2016, the general foreman went to claimant's job site and told him to collect all of his personal belongings from the company truck. After claimant collected his belongings, the general foreman drove claimant to a nearby town where claimant had parked his vehicle. The foreman told claimant, "You either quit right now or I am firing you on the spot." Audio Record at 7:40 to 7:45. The employer was no longer willing to allow claimant to work due to an alleged safety violation. Claimant asked if the employer could instead give him a written warning and suspension or some other form of discipline, but the foreman refused. Claimant told the foreman that he preferred to quit rather than be discharged.

(5) Claimant had not been disciplined by the employer before June 22, 2016.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

Because the Department concluded that claimant voluntarily left work, the first issue in this case is the nature of the work separation. Even though claimant told his foreman that he chose to quit rather than to be discharged, the parties' characterization of the nature of the work separation is not dispositive. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). 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). The employer initiated the work separation by telling claimant he had to quit or be discharged. Claimant asked the foreman to consider alternatives to ending the employment relationship, but the foreman refused, showing that claimant was willing to continue working for the employer, but the employer would not allow claimant to do so. Thus, under OAR 471-030-0038(2), the work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) 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 discharged claimant for allegedly violating its safety standards by failing to use the harness properly. However, the record fails to show that claimant violated the employer's safety standards , let alone that claimant knew or should have known his conduct probably violated the employer's expectations. Thus, because there was no evidence presented at hearing that claimant willfully or with wanton negligence violated the employer's expectations, no incidents of misconduct are discernible from the record. The record fails to show the employer discharged claimant for misconduct.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-65881 is affirmed.

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

**DATE of Service: <u>October 5, 2016</u>**

**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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