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BYE: 201701

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

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<p><b>EMPLOYMENT APPEALS BOARD DECISION</b> <b>2016-EAB-1065</b></p>
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*Affirmed*  
*Request for Hearing Allowed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 121155). Between June 10, 2016 and June 23, 2016, claimant filed a request for hearing with an Employment Department office. On June 24, 2016, OAH received claimant's request for hearing. On June 28, 2016, ALJ Kangas issued Hearing Decision 16-UI-62681, concluding claimant's request for hearing was late, and dismissing it subject to her right to renew the request by responding to an appellant questionnaire by July 12, 2016. On July 12, 2016, the Office of Administrative Hearings (OAH) received claimant's response. On July 26, 2016, OAH sent a letter canceling Hearing Decision 16-UI-62681. On August 12, 2016, OAH mailed notice of a hearing scheduled for August 29, 2016 at 2:30 p.m. On August 29, 2016, ALJ Vincent conducted a hearing, at which the employer failed to appear, and on September 6, 2016 issued Hearing Decision 16-UI-66954, allowing claimant's request for hearing and concluding that the employer discharged claimant, but not for misconduct. On September 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In written argument, the employer asked for a new hearing on the grounds that its representative inadvertently left the notice of hearing inside her vehicle while it was at the dealership for repairs, thereby preventing the employer from participating in it. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer's statement did not explain why leaving the notice of hearing in a car prevented attendance, however, or explain when she discovered her mistake or why she could not have contacted OAH to request the hearing details or ask that the hearing be postponed if the vehicle repair prevented her from attending. Because human error of the sort that caused the employer to miss the hearing is considered to be within a party's reasonable control to avoid, the employer's request to have EAB consider its additional evidence is denied.

**FINDINGS OF FACT:** (1) Harvest503, LLC employed claimant as a prep cook at The Blackbird Restaurant from October 1, 2015 to December 31, 2015.

(2) On December 31, 2015, the employer removed claimant from the work schedule. The employer did not notify claimant that she had been removed from the schedule or tell her why she was no longer scheduled to work.

(3) For approximately three weeks after claimant learned she had been removed from the schedule, claimant repeatedly attempted to contact the employer to ask about her removal and returning to work but got no response. At some point thereafter, claimant heard that the employer was hiring and called to inquire about reapplying, but got no response. Claimant did not return to work or communicate with the employer about her employment status after December 31, 2015.

(4) Claimant received notice of the Department's June 3, 2016 decision, # 121155, shortly after it was mailed. She disagreed with the decision and decided to request a hearing. On June 10, 2016, claimant signed the request for hearing form the Department had attached to decision # 121155. Between June 10, 2016 and June 23, 2016, claimant filed the request for hearing with an office of the Department. The Department office that received claimant's request contacted claimant and informed her that she had filed the request with the wrong Department office by sending it to the wrong address. The office with which claimant filed her request told claimant they would forward her request for hearing to OAH, and, on June 24, 2016, OAH received claimant's request.

**CONCLUSIONS AND REASONS:** Claimant's request for hearing is allowed. The employer discharged claimant, but not for misconduct.

**Request for hearing.** ORS 657.269 requires that parties file requests for hearing within 20 days after the date the decisions were mailed. In order to be timely, claimant's request for hearing in this matter had to be filed no later than June 23, 2016. OAR 471-040-0005(2) (July 14, 2011) provides that requests for hearings may be filed with OAH, "any Employment Department Unemployment Insurance (UI) Center or UI Section in Oregon," or "any publicly accessible Employment Department office in Oregon." OAR 471-040-0005(2) provides that requests for hearing in cases such as this one may be filed by delivery, mail, or fax.

Claimant alluded to having sent her request to the wrong address and to her request having been forwarded to OAH. We therefore infer that claimant's request was, more likely than not, mailed to an Employment Department office via the U. S. Postal Service.<sup>1</sup> The filing date of items filed by mail is the postmarked date affixed by the U. S. Postal Service. OAR 471-040-0005(4)(b). The record in this case does not contain any evidence of a postmark, however. In the absence of a postmark, the filing date is determined by assessing the most probable date the document was mailed. OAR 471-040-0005(4)(b). From the record as developed, claimant signed and dated the request for hearing form on June 10, 2016,

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<sup>1</sup> The only other common usage of the terms "address" and "forwarding" would be with regard to emailing. There are no provisions in the applicable administrative rules allowing requests for hearing in this type of case to be filed by email, however, and nothing in this record (*e.g.* documentation of an email message or confirmation date) indicates that claimant had attempted to email her request for hearing to the Department. We therefore excluded emailing as a possible delivery method for claimant's request for hearing and focus our analysis on mailing via the U. S. Postal Service.

and would have had to have mailed it to the wrong Department address in time for it to be forwarded to and received by OAH on June 24, 2016. It is unlikely that the document could be received by the Department, forwarded to OAH and received by OAH all within the space of one business day, particularly given that the Department contacted claimant about the document before forwarding it, making it a virtual certainty that claimant mailed the request to the wrong Department address before the filing period expired. Because the date claimant mailed the request is the filing date, it is therefore more likely than not that claimant's request for hearing was timely. Claimant's request for hearing is, therefore, allowed.

**Work separation.** 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 discharged claimant by removing her from the work schedule. Because the employer failed to appear at the August 29, 2016 hearing in this matter, and has not shown that it is entitled to present new information at this point in the proceedings, the record fails to show the basis for the employer's decision to discharge her. Likewise, claimant was unaware of the reason the employer discharged her and attempted for well over three weeks after her discharge to return to work for the employer. In the absence of evidence about the basis of the employer's decision to discharge claimant, the record fails to show that the discharge was for misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-66954 is affirmed.

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

**DATE of Service:** September 20, 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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