

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

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1217**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140544). Claimant filed a timely request for hearing. On October 6, 2016, the Office of Administrative Hearings (OAH) mailed the parties notice of a hearing scheduled for October 20, 2016. On October 20, 2016, ALJ Murdock conducted a hearing, and on October 24, 2016 issued Hearing Decision 16-UI-69774, affirming the Department's decision. On October 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**Employer's written argument.** The employer submitted a written argument for EAB's consideration that included copies of documents that were not part of the hearing record, specifically, a credit card payment confirmation indicating that an individual other than claimant made a \$757 payment to Hanson Insurance Group on behalf of Advanced Staffing Solutions, LLC, an Oregon Secretary of State Corporation Division Business Registry Business Name Search results showing that claimant registered a business name called Advance Staffing Solutions, LLC on August 2, 2016, and a Craigslist advertisement for millwrights, fitters and welders that appears to have been placed by claimant on behalf of Advanced Staff Solutions, LLC on October 24, 2016.

Although OAH notified the parties prior to the hearing that "[i]f you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ at the Office of Administrative hearings . . . prior to the date of the scheduled hearing," the employer did not provide OAH or claimant with copies of the documents it now seeks to have admitted.<sup>1</sup> Although the employer stated at the hearing that it could provide a copy of some of those documents to the ALJ and offered them into evidence, the ALJ reiterated that evidence needed to be provided prior to the hearing and denied the employer's request, or at least deferred ruling on it unless it appeared the evidence was "necessary."<sup>2</sup> The hearing ended without the employer having established the necessity of having the documents themselves in evidence and without the ALJ having admitted them into the record.

<sup>1</sup> See Notice of Hearing, page 1.

<sup>2</sup> Transcript at 23, 25-26.

The employer now seeks to admit the documents to EAB. ORS 657.275(2) requires that EAB performs "review on the record," meaning, review of the record compiled by the ALJ at the hearing. OAR 471-041-0090 provides, in pertinent part, that "[i]nformation not received into evidence at the hearing will not be considered on review" except if the information is either "necessary to complete the record" or "[f]actors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing." The employer's documents do not meet those standards. The information is not necessary to complete the record. The employer testified substantially about the content of the credit card payment confirmation, there is no factual dispute between the parties that claimant registered a business name on August 2nd, and it is unlikely that anything that occurred in October 2016 is pertinent to whether claimant's August 2016 discharge was for misconduct. Given the instructions provided by OAH in the notice of hearing and the fact that all the information and documents the employer now seeks to offer into evidence existed at the time of the hearing, factors or circumstances beyond the employer's reasonable control did not prevent the employer from offering the information into evidence at the hearing. The employer's request to submit new information to EAB is, therefore, denied, and EAB considered the employer's argument only to the extent that it was based upon the record the ALJ developed at the hearing.

**Claimant's written argument.** Like the employer, claimant's written argument to EAB also included new information. The information included, in part, her application for employment and related information, a resume, a direct deposit authorization form, criminal background information and an authorization form, policies, acknowledgment forms, a property receipt, and an email disclosing claimant's personal relationship with someone to the employer. Those materials are either irrelevant to the issue before EAB or unduly repetitious of testimony in evidence, and are therefore excluded. The information also included screenshots of text messages and some workers' compensation insurance payment information, all of which we conclude must be excluded from evidence for the same reasons we denied the employer's request to submit similar information.

The information also included, however, a three-page narrative written by claimant explaining the circumstances surrounding her activities with respect to purchasing worker's compensation insurance. That information is relevant, material and necessary to complete the record for reasons we explain below. We therefore admit the three-page narrative, and only the three-page narrative, into evidence under OAR 471-041-0090. Claimant's narrative is marked as EAB Exhibit 1. 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. Unless such objection is received and sustained, the exhibit will remain in the record.

In claimant's narrative, she wrote, "After [] three events taking place [during the first half of August], it become [*sic*] clear that I was about to lose my job so I made an effort to bind coverage for workers [*sic*] compensation insurance . . . Therefore, I reached out to an insurance agency. They worked up a quote and on August 18th requested a deposit. When I received the email . . ." <sup>3</sup> During the hearing, however, claimant vehemently denied having sought workers' compensation coverage before being discharged, testifying, "No. I don't. There's – I mean nothing ever happened before then [August 18]. I applied for

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<sup>3</sup> EAB Exhibit 1, page 2 (we have omitted from the quotation any suggestion as to what claimant thought her boyfriend did, or why, as that is hearsay and, for purposes of this analysis, irrelevant to the issue of claimant's own statements and actions).

Workers' Comp. after I was terminated. I paid for it in September and I got coverage in – in September. I never did anything before then. I don't know what she's talking about [*sic*][boyfriend's name] paying for anything"; "I didn't do any of that stuff until after I was terminated."<sup>4</sup>

Claimant's narrative is irreconcilably inconsistent with her testimony at the hearing about her activities with respect to seeking workers' compensation insurance coverage. Her argument made it clear that she sought coverage when she was "about to lose" her job, meaning while still employed, which fundamentally contradicts her claim at the hearing that she did not "do any[thing]" until after her discharge. The inconsistency undermines the reliability of claimant's testimony with respect to any of the events that occurred at the end of her employment with respect to the formation of her own business. Because claimant's version of events was not reliable, where facts are in dispute we have found them in accordance with the employer's evidence.

**FINDINGS OF FACT:** (1) Allstar Labor and Staffing, LLC employed claimant as a staffing coordinator from February 8, 2016 to August 18, 2016.

(2) The employer had a confidentiality policy under which employees agreed not to disclose or use confidential information gained through employment for any reason or purpose contrary to the interests of the employer or the client, and to immediately return any company property upon termination of employment. On February 3, 2016, claimant signed her agreement to abide by the confidentiality policy. The employer did not have or require claimant to sign an agreement not to compete with the employer's business during or after her employment ended.

(3) On August 2, 2016, claimant registered the business name Advanced Staffing Solutions, LLC with the Oregon Secretary of State's Corporation Division. On August 18, 2016, claimant's boyfriend paid \$757 to a workers' compensation insurance carrier on behalf of Advanced Staffing Solutions, LLC. The boyfriend used to work for the employer; the insurance company emailed a receipt for his payment to the email address he had used while working for the employer.

(4) On August 18, 2016, the employer's director received the misdirected insurance receipt. She showed the receipt to another employee, who searched the Oregon Secretary of State's website and reported that claimant had registered a business name, too, and noted from the name that it was a staffing business. The employer's director concluded that claimant's creation of a staffing company was in direct competition with the employer's business, and constituted a conflict of interest that warranted her immediate discharge. On August 18, 2016, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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 connected with work. 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. OAR 471-030-0038(1)(c)

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<sup>4</sup> See Transcript at 14, 24, 42.

defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The ALJ found as fact that claimant's formation of a staffing company "would be directly competitive" with the employer, and "[t]he employer could not trust claimant to perform her work for the employer with the employer's best interests in mind and in keeping with the employer's expectations for keeping its trade secrets and proprietary information confidential and secure."<sup>5</sup> The ALJ concluded that claimant had committed misconduct, reasoning that her business "posed a conflict of interest," "was reasonably likely to have an impact on the workplace," and the employer "could no longer trust claimant with the security of its proprietary and confidential information when claimant had access to it at work and potentially could use it for her own business."<sup>6</sup> The ALJ continued that claimant "should have known" that by "opening a competing business, especially without disclosing it", "she damaged the employer's confidence and trust in her," and "irreparably destroyed the trust necessary to maintain the employment relationship."<sup>7</sup>

As previously noted, claimant's testimony in this matter was not reliable. Considering only the employer's evidence, however, we disagree with the ALJ and conclude that the record fails to show that claimant's discharge was for misconduct. The employer did not assert or show that it had a policy prohibiting employees from registering their own business names or requiring them to disclose entrepreneurial efforts. Nor is there evidence that the employer requested or required that claimant enter into an agreement not to compete as a condition of gaining or maintaining employment. The only pertinent policy is the employer's policy prohibiting employees from misusing confidential information, and, while the employer suggested the possibility at the hearing that claimant might have misused confidential information at some point after her employment ended, there is nothing in the record suggesting that claimant had or intended to misuse confidential information while remaining employed.

The employer also alleged, however, that claimant's registration of a business name and contact with a workers' compensation company represented a conflict of interest and violated a "common law duty of being loyal" claimant owed to the employer, by which we infer that the employer meant that, beyond any policy, claimant also had a duty not to compete with the employer's business that she should have been aware of as a matter of common sense.<sup>8</sup> For the reasons that follow, however, the record does not establish that claimant had a business or that she was in competition with the employer at the time of her discharge.

The sum of the relevant evidence in the record is that, on August 2, 2016, claimant registered a business name that implied the business was a staffing company. In mid-August, prior to her discharge, claimant contacted an insurance company about worker's compensation insurance, and, on August 18, 2016, someone other than claimant paid \$757 to an insurance company on behalf of claimant's registered business name. Among those, the only acts attributable to claimant are her registration of a business

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<sup>5</sup> Hearing Decision 16-UI-69774 at 2.

<sup>6</sup> Hearing Decision 16-UI-69774 at 3.

<sup>7</sup> *Id.*

<sup>8</sup> Transcript at 5, 7.

name and pre-discharge contact with an insurance company. The question is, then, whether either of those acts constituted a conflict of interest with the employer. We conclude they did not.

Claimant registered a business name but did not actually operate a business while she was employed by the employer. She had contacted a workers' compensation insurance carrier but did not have workers' compensation insurance. The record contains no evidence that claimant engaged in any activities in furtherance of her business while employed, such as advertising for workers or clients, obtaining office equipment, renting an office space, printing business cards, or other such activities. While the employer apparently suspected that if claimant had a registered business name and workers' compensation insurance she must have planned to steal or misuse confidential information gained by virtue of her employment, there is nothing in the record establishing that she actually did so during her employment, that she intended to do so, or that she was likely to do so.

The fact of the matter is that, at the time the employer discharged claimant, she was not operating a business, much less one in competition with the employer. There was no actual conflict of interest, and the existence of such a conflict was purely speculative. In the absence of evidence that claimant willfully or with wanton negligence violated either the employer's confidentiality policy or its expectation that she avoid a conflict of interest while employed, or was engaging in conduct that made it likely that she intended to do either while employed, we conclude that registering a business name and seeking workers' compensation insurance do not amount to misconduct, and claimant's work separation was not disqualifying.

**DECISION:** Hearing Decision 16-UI-69774 is set aside, as outlined above.<sup>9</sup>

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

**DATE of Service:** November 23, 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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<sup>9</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.