

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0155**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80030). Claimant filed a timely request for hearing. On January 17, 2017, ALJ Murdock conducted a hearing, and on January 19, 2017 issued Hearing Decision 17-UI-75039, affirming the Department's decision. On February 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. See ORS 657.275(2).

**FINDINGS OF FACT:** (1) Holiday Inn Express employed claimant as a housekeeper from May 16, 2016 to October 24, 2016.

(2) The employer scheduled housekeepers based upon its occupancy rates, and expected claimant to call in each morning to determine whether or not the employer needed her to work. In approximately July 2016 claimant learned of the employer's expectation that she call in each day.

(3) Claimant last worked on October 16, 2016. Effective October 24, 2016, the employer discharged claimant after concluding that she had abandoned her job.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer discharged claimant but 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. The employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

During the hearing, the employer's witness alleged that, after October 16, 2016, claimant stopped calling the employer to determine her work schedule and did not respond to the employer's efforts to contact her to work, in essence, abandoning her job. Audio recording at ~ 5:15-7:30. Claimant testified, on the other hand, that she called "Maria's" cell phone "every single day" to try to work, exchanged text messages with Maria about work, and was told there was no work. Claimant asserted that she did not abandon her job but was, rather, told by Maria on October 26<sup>th</sup> that she would contact claimant when the employer needed claimant to work again. Audio recording at ~ 17:05, ~ 19:15, ~ 19:45, ~ 23:50. The evidence was, therefore, equally balanced, and, absent a reason to disbelieve either party, the employer has not met its burden to prove misconduct.

The ALJ nevertheless found in favor of the employer, reasoning that although claimant asserted the employer's evidence was false, "I find no reason to disbelieve the employer's witnesses; their testimony was logical and plausible." Hearing Decision 17-UI-75039 at 3. Although the ALJ implicitly found claimant's testimony less credible, the ALJ did not cite any basis in the record for disbelieving her, and, while the employer's witnesses suggested that claimant should have done something other than contact Maria or the other head housekeeper about whether she was expected to work, they did not present any evidence suggesting that claimant did not, as she alleged, call and/or text Maria every day about the availability of work. The preponderance of the evidence therefore does not suggest that claimant abandoned her job by failing to call in every day.

To any extent the employer discharged claimant on belief that she had abandoned her job resulting from claimant's failure to correctly call in about the availability of work, *e.g.* to call the front desk or someone on-duty to inquire about work, the record also fails to show misconduct. On our review of the record, claimant was apparently sincere in her belief that she was taking the appropriate steps to maintain daily contact with the employer about the availability of work, and despite her daily contact with Maria about the availability of work, does not appear to have been instructed by Maria that she should not contact Maria on her personal cell phone or was required to call or contact someone else. The preponderance of the evidence suggests that claimant was probably mistaken about the proper way to contact the employer about the availability of work, but it appears more likely than not that her mistake was the result of nothing more than a good faith error. OAR 471-030-0038(3)(b) specifically states that good faith errors are not misconduct.

For the foregoing reasons, we conclude that claimant's discharge, whether for allegedly abandoning her job or failing to take appropriate steps to maintain daily contact about the availability of work, was not the result of misconduct on claimant's part. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-75039 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service: February 23, 2017**

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

---

<sup>1</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.