

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0322

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 75810). The employer filed a timely request for hearing. On February 14, 2017, ALJ Monroe conducted a hearing, and on February 22, 2017, issued Hearing Decision 17-UI-77448, concluding that claimant voluntarily left work without good cause. On March 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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. Under OAR 471-041-0090(2) (October 29, 2006), EAB may consider new information not offered into evidence at the hearing if the party presenting the evidence demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. In support of his request to have EAB consider new information, claimant asserted that "I was told by Kristine the authorized representative of the Unemployment Dept. that all documents that she used to determine her ruling on my unemployment eligibility would automatically go over to The [sic] Office of Administrative Hearings and that I would not have to do anything else to get my evidence in front of the judge." Claimant asserted that he learned on the day of the hearing that the documents he submitted to the Department had not been forwarded to the ALJ and would not be part of the hearing record.

The record shows that the notice of hearing claimant received for the February 22 hearing¹ stated that the documents enclosed with the hearing notice

¹ The Notice of Hearing, issued by the Office of Administrative Hearings on February 1, 2017, has been marked as EAB Exhibit 1. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

...are the only documents that will be considered by the ALJ at hearing. If 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 at their addresses as listed on the Certificate of Mailing prior to the date of the scheduled hearing. EAB Exhibit 1 at 1.

These instructions in the hearing notice contradicted the instructions claimant had received from the Department representative. It was well within claimant's reasonable control to carefully read the hearing notice, realize that he had received contradictory information, and resolve this contradiction by contacting the Office of Administrative Hearings and clarifying the procedure for submitting documents for the hearing. Claimant's request to have EAB consider his additional evidence is therefore denied, and we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Banker's Life and Casualty employed claimant as a unit field trainer from October 1, 2015 until November 28, 2016. Claimant's job duties included training insurance salespersons, and selling insurance policies.

(2) Claimant was recruited to work for the employer by the employer's branch sales manager; claimant and the branch sales manager had been high school friends. When he was hired, claimant was guaranteed a \$3,000 per month salary for a period of one year. After that date, claimant's earnings would consist only of commissions he earned from the sale of insurance policies.

(3) The employer expected that its insurance agents would process three to five applications and earn \$2,000 in commissions per week. During the last few months of his work for the employer, claimant was unable to meet these expectations. Claimant earned the following amount of commissions for the following months: July 2016 - \$4,021; August 2016 - \$1,786; September 2016 - \$850; October 2016 \$1,972; and November 2016 - \$592. Transcript at 18. Claimant's supervisor, the branch sales manager, talked often with claimant about the need to increase the amount of applications he processed and commissions he earned.

(4) On November 28, 2016, claimant's supervisor met with claimant and told him that he was "getting pressure from his [the supervisor's] boss" because claimant's job performance was poor. The supervisor told claimant that he was "going to have to fire you now." Transcript at 29. Claimant left the employer's office, but returned on November 29 to remove his personal belongings.

(5) On November 30, 2016, claimant's supervisor asked claimant to submit a letter of resignation, explaining that "it was a lot easier for him to, you know, paperwork wise with the company if I resigned versus him firing me." Transcript at 27. Claimant told the supervisor he was concerned that a resignation might affect his qualifications for unemployment benefits, but the supervisor assured him that it would not. *Id.* Claimant then sent his supervisor the following email: "[e]ffective December 1, 2016 I Karl Luessen effectively resign my position at bankers [sic] life." Exhibit 1.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

Nature of the Work Separation. 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).

Claimant and his supervisor disagreed about the nature of the work separation; claimant asserted that his supervisor discharged him at their November 28, 2016, meeting, while the supervisor contended that claimant quit his job on the date that they met. The ALJ found that “[b]oth claimant and the sales manager provided direct, firsthand testimony regarding their recollections of the conversation that precipitated the work separation and, as such, the testimony offered at the hearing is evenly balanced.” The ALJ concluded that claimant quit his job, however, based on the letter of resignation claimant submitted as well as the employer’s failure to give claimant his final paycheck by the end of the business day following the date of discharge.² We disagree.

Unlike the ALJ, we do not find that the testimony regarding the supervisor’s final meeting with claimant was “evenly balanced.” The supervisor repeatedly refused to directly answer the ALJ’s questions about what claimant said at the November 28 meeting. When the ALJ asked the supervisor if claimant made “an explicit statement indicating that he was going to leave the position,” the supervisor responded that “[w]ell, he had – he had made – he had made many – many attempts of, you know, of – of situations of examples of, you know, I can go to work here.” Transcript at 9. When the ALJ asked again if claimant stated he was quitting at the final meeting, the supervisor responded that “[i]t depends on how – it depends. It’s all – it’s all a play on words how you do it.” Transcript at 11. The supervisor refused to provide any rebuttal to claimant’s testimony about the November 28 meeting, asserting that “I don’t have time to hash out all the he said/she said. It’s not my position here. I’ve made my statements and if that’s all you have for me I’d love to get on with my day.” Transcript at 51-52. Given the evasive nature of the supervisor’s responses to the ALJ’s questions about the circumstances of claimant’s work separation, we find his testimony to be unreliable. As a result, where facts are in dispute, we have found facts in accordance with claimant’s testimony. Based on that testimony, we conclude that claimant’s supervisor discharged him on November 28, 2016.

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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

² All wages earned and unpaid at the time an employee is discharged are due and payable “not later than the end of the first business day after the discharge or termination. ORS 652.140(1).

Here, the employer discharged claimant because of his poor job performance. Claimant, who was new to the insurance business,³ was unable to meet the employer's goals regarding the number of insurance policies he was expected to process and the amount of commission he was expected to earn. Inefficiency caused by a lack of experience or job skills is not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-77448 is set aside, as outlined above.

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

DATE of Service: April 4, 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. 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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³ Transcript at 13.