

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0690**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On April 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 72012). Claimant filed a timely request for hearing. On May 25, 2017, ALJ M. Davis conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 17-UI-84304, concluding that the employer discharged claimant, but not for misconduct. On June 7, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based upon evidence in the record. ORS 657.275(2); OAR 471-041-0090. The employer submitted an argument asking that the hearing in this matter be "reopened." We construe the employer's argument as a request that EAB consider new information before reaching a decision in this case. New information may only be considered if the party offering it shows that factors or circumstances beyond its reasonable control prevented the employer from offering the information during the hearing. OAR 471-040-0090. Although the employer notified the ALJ prior to the hearing that its witness was not going to attend, the record fails to show that the employer asked that the hearing be postponed, sent another person to the hearing to provide information or request that the hearing be continued, or otherwise indicated to the ALJ that the employer wished to present evidence about claimant's work separation. Given the size of the employer's organization, and the fact that the employer was represented, it is implausible that no one else was available to appear for the hearing, either to testify or to request a postponement.<sup>1</sup> In the absence of evidence that an ALJ abused his or her discretion in denying a continuance or postponement request, or that circumstances beyond the employer's reasonable control prevented it from participating in the hearing in any capacity, the employer's request is denied, and we have reached this decision based upon the information in the hearing record as required under ORS 657.275(2).

<sup>1</sup> Asante is "the largest healthcare provider in nine counties" with 184 physicians and facilities including a hospital and medical centers in five Southern Oregon communities. See <http://www.asante.org/>.

**FINDINGS OF FACT:** (1) Asante employed claimant as a phlebotomist from September 21, 2015 to March 21, 2017.

(2) On December 5, 2016, claimant was injured at work. Thereafter, she was on a medical leave of absence because the employer could not accommodate her modified duty restrictions.

(3) On approximately February 2, 2017, claimant was released for unrestricted duty. The employer was provided with a copy of claimant's unconditional work release.

(4) Sometime after February 2, the employer began requesting that claimant provide information about medical restrictions and accommodations before she would be allowed to return to work. Claimant explained that she was fully released for work and ready to return without restrictions, and refused to provide the employer with information about restrictions or accommodations she did not need. At one point in discussions with a human resources (HR) representative, the HR representative told claimant that she did not feel claimant was capable of doing her job; claimant responded that the HR representative was not claimant's physician, that the HR representative had only spoken to claimant on the phone, and that claimant did not understand how the HR representative could determine claimant's ability to perform her job based only on phone calls. The employer continued to request information about claimant's medical restrictions but did not tell claimant that she would be discharged if she did not provide this information. Claimant continued to refuse to provide the information the employer requested.

(5) On March 21, 2017, claimant's supervisor notified claimant by phone that although the employer could have put claimant in an on-call position, the employer had just filled all of those positions, so none were available for claimant and she was being discharged. The supervisor told claimant that she could apply for other positions with the employer if she wanted to do so.

**CONCLUSIONS AND REASONS:** We agree with the ALJ 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

On this record, the employer likely ended claimant's employment for one of two reasons, either because the employer did not have on-call work available for claimant, or because claimant refused to provide the employer with information about her medical restrictions or need for accommodation to return to work. To the extent the employer discharged her due to the lack of on-call work, the discharge was not for misconduct because the availability of work is not attributable to her as willful or wantonly negligent misconduct. To the extent the employer discharged her for refusing or failing to provide the employer with information about her restrictions or need for accommodation to return to work, the discharge was also not for misconduct. The record developed at the hearing shows that claimant was fully released to return to work without restriction or need for accommodation. It was, therefore, unreasonable for the

employer to require her to provide information about restrictions she did not have and accommodations she did not need. Therefore, although it appears that claimant consciously refused to comply with the employer's repeated requests for restriction and accommodation information, the employer's expectation that she provide it was not reasonable, and claimant's refusal to comply was not misconduct under OAR 471-030-0038(1)(d)(C). Because claimant's discharge was not for misconduct, claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

**DECISION:** Hearing Decision 17-UI-84304 is affirmed.

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

**DATE of Service:** July 5, 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.

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