

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0960**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct (decision # 11806). Claimant filed a timely request for hearing. On July 11, 2017, the Office of Administrative Hearings issued notice of a hearing scheduled for July 20, 2017 at 9:30 a.m., to the parties' addresses of record with the Department. On July 20, 2017, ALJ Hall conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 17-UI-88465, concluding claimant was discharged, but not for misconduct. On August 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer's representative stated that the employer's witness "did not appear at the hearing because he did not receive any notice of the upcoming hearing at the address of record. He had received previous notices...[and] the Final Order...[and] if reopened, we can present credible evidence [regarding the reason] Claimant's employment was terminated..." Written Argument at 1. The employer's request for relief is construed as a request to have EAB consider new information 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. No details in support of the employer's request were provided in its argument, e.g., problems the employer may have been experiencing with its mail. Without supporting details, the employer has not shown circumstances sufficient to overcome the presumptions of delivery and the receipt of mail within one to three days of the mailing date,<sup>1</sup> or that the employer's

<sup>1</sup> Under OAR 137-003-0520 (January 31, 2012), documents sent through the US Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. We also take notice of the generally cognizable fact that first class mail shipped through the United States Postal Service generally takes 1-3 days to deliver to the designated recipient. See <https://www.usps.com/ship/first-classmail.htm>. Any party that objects to our doing so must submit such objection to this

failure to present evidence at the previously scheduled hearing was a circumstance beyond its reasonable control. The employer's request to consider new information under OAR 471-041-0090 is, therefore, denied.

**FINDINGS OF FACT:** (1) Bagley Ranch Trucking employed claimant as a tractor trailer driver from May 2016 to sometime after February 8, 2017.

(2) The employer utilized a broker to act as an intermediary between the employer and its truck drivers. The broker notified claimant, as an employer driver, of loads he had to deliver from both his home base and delivery sites.

(3) On February 8, 2017, claimant delivered a load of apples to Chico, CA. When claimant arrived, the broker told him he had no loads for him to deliver and to take the rest of the week off. Claimant never received another delivery assignment from the broker and was never notified by the employer verbally or in writing that he had been discharged from his employment. Claimant never notified the employer that he was quitting his job.

(4) Claimant was willing to continue to work for the employer on and after February 8.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. The employer discharged claimant, but not for misconduct.

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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

The administrative decision states that the employer discharged claimant on February 6, 2017 because he lost his license and ability to perform his job. Record Document. However, the record shows that claimant delivered a load for the employer on February 8, 2017, that he still had his license, and that the employer's agent told him on that date to take the rest of the week off because he had no loads for him. Although claimant was willing to continue to work for the employer at that time, he was never given another assignment. On this record, the work separation was a discharge that occurred between on or after February 8, 2017.

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 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 is conscious of his conduct and knew or should

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office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer did not appear at hearing and thus, presented no evidence. On this record, claimant was discharged on or after February 8, 2017 for unknown reasons. Although the employer may have had its reason to discharge claimant, the record fails to show that it did so because claimant violated a reasonable employer expectation.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-88465 is affirmed.

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

**DATE of Service: August 28, 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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