

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1116

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123017). Claimant filed a timely request for hearing. On September 5, 2017, ALJ Seideman conducted a hearing, at which the employer failed to appear, and on September 7, 2017 issued Hearing Decision 17-UI-92054, concluding claimant's discharge was not for misconduct. On September 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer included a written statement upon which it requested another hearing. The employer's request is construed as a request to present new information under OAR 471-041-0090 (October 29, 2006), which allows a party to submit additional evidence if it is relevant and material to EAB's determination and if circumstances beyond the employer's reasonable control prevented the party from offering the information into evidence at the hearing. In support of its request, the employer explained that at the time of the hearing he did not participate "due to multiple employees calling in sick," causing him to have to work in the field and run machinery at the time of the scheduled hearing. While having to cover for absentee employees might be a factor beyond the employer's control under some circumstances, absent information explaining why that caused the employer's representative to be entirely unable to participate in the scheduled hearing, about which the employer had advance notice, or information explaining why the employer or its representative did not contact the Office of Administrative Hearings (OAH) to request a postponement when it appeared that its representative was going to be unavailable to participate in the hearing, we cannot conclude that it was in this case. The employer's request to submit additional evidence to EAB is, therefore, denied, and we reached this decision based upon our review of the hearing record.

FINDINGS OF FACT: (1) 1Source Home & Lawn Care employed claimant as a landscaper from approximately April 19, 2017 to May 10, 2017.

(2) Claimant experienced harassment from two coworkers including being threatened at job sites. Claimant spoke to the employer about changing crews or for someone to be around and see how the

coworkers were treating her. The employer replied, “Nope, girl, that’s your crew.” Audio recording at ~ 14:25. On one occasion when claimant asked a question and was not working near the coworkers, the employer asked claimant if she was being “a team player.” Audio recording at ~ 14:43.

(3) On May 4, 2017, claimant’s coworker physically pushed her and her belongings out of a truck, then drove away and left her behind at a job site. Claimant tried to reach the employer for days to complain about her coworkers and received no reply. Claimant also tried to reach the employer about her work schedule and received no response until May 9th, when she missed an evening call from the employer.

(4) On May 10, 2017, the owner sent a text message to claimant asking to see her that morning. Claimant met the employer, at which time he told claimant he was letting her go, and explained that the reason for the discharge was that “he didn’t think it was gonna work out.” Audio recording at ~ 8:30.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

The employer discharged claimant for unknown reasons. In the absence of evidence establishing that the basis for the discharge was claimant’s own willful or wantonly negligent conduct attributable to her as misconduct as that term is defined by the Employment Department, claimant is not subject to disqualification from unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-92054 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 17, 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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