

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1122-R

EAB Decision 2017-EAB-1122 Adhered to on Reconsideration
Hearing Decision 17-UI-92368 Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but her wage credits were not subject to cancelation (decision # 180856). Claimant filed a timely request for hearing. On September 5, 2017, ALJ Shoemake conducted a hearing, and on September 12, 2017 issued Hearing Decision 17-UI-92368, concluding claimant's discharge was not for misconduct. On September 18, 2017, the employer filed a timely application for review with the Employment Appeals Board (EAB). On September 20, 2017 EAB mailed the parties notice that it had received the employer's application for review.

On October 10, 2017, EAB received a timely written argument submitted by claimant. However, claimant's argument included new information that was not part of the hearing record, and although the information was arguably relevant, she did not establish that factors or circumstances beyond her reasonable control prevented her from presenting the information in the hearing. Under OAR 471-041-0090 (October 29, 2006), claimant's new information is not admissible and it was, therefore, not considered by EAB when reaching its decision. EAB considered claimant's argument only to the extent it was based upon the hearing record.

On October 17, 2017, EAB issued EAB Decision 2017-EAB-1122, affirming Hearing Decision 17-UI-92368.

On October 23, 2017, EAB received written argument mailed to EAB by the employer on September 28, 2017. OAR 471-041-0080 (October 29, 2006) states, in relevant part, that EAB will not consider a party's written argument unless the argument is received with 20 days of the date that EAB mailed the parties notice that it has received a timely application for review. EAB received the employer's

argument more than 20 days after September 20, 2017, the date that EAB mailed the parties notice that it had received the employer's application for review. However, because it is unclear why it took 27 days for EAB to receive the employer's argument, this decision is being issued pursuant to EAB's authority under ORS 657.290(3) to reconsider its decision to address that argument.

CONCLUSIONS AND REASONS: EAB Decision 2017-EAB-1122 is adhered to on reconsideration. Hearing Decision 17-UI-92368 is affirmed.

In its written argument, the employer asserted, in relevant part, that it discharged claimant because she "falsified her work time" by remaining "punched in" to work after being told to leave, spending the time she remained punched in on "personal computer use" or "usage," and submitting time cards reporting the time spent as "work time." According to the employer, claimant's conduct was willful and in derogation of the employer's interests, and claimant therefore should be disqualified from receiving benefits.

We agree that the record shows claimant was discharged for allegedly falsifying her work time, which is why we found in EAB Decision 2017-EAB-1122 that the employer discharged claimant for alleged "time card fraud."¹ We also agree that claimant remained clocked into work after being told to leave, which is why we found that she did so.² We also agree that if the employer showed by a preponderance of evidence that claimant willfully falsified her work time, she should be disqualified from receiving benefits. However, the employer failed to make that showing. As we explained in EAB Decision 2017-EAB-1122:

The employer alleged claimant engaged in time card fraud on May 8, 2017 by reporting on that she had worked until 6:30 p.m. despite having been told to finish work at 4:30 p.m. that day. Claimant testified, however, that although the employer wanted her to leave at 4:30 p.m. due to lack of work, she had work to do and did in fact perform work until 6:30 p.m., and therefore only claimed to have worked hours that she actually spent working. The evidence of whether or not claimant committed time card fraud on May 8, 2017 is, therefore, no better than equally balanced, and the employer has not proved that claimant engaged in misconduct on that date.

Likewise on May 9, 2017, the employer alleged that claimant engaged in time card fraud again by reporting that she had worked until 6:30 p.m. despite having been instructed to leave at 4:30 p.m., and by claiming that she worked during a period of time her browser history showed she was using the computer for personal reasons. Claimant testified that she was on the road until 5:15 p.m. and therefore unable to stop working at 4:30 p.m. as instructed. She testified that she sent a text message to the employer stating that she needed to perform specific tasks after returning to the store, and clocked out at 6:30 p.m. after she completed those tasks. The evidence about claimant's activities is again equally balanced, and the record therefore does not show that claimant committed time card fraud by clocking out at 6:30 p.m. on May 9th. With respect to claimant's personal use of the

¹ EAB Decision 2017-EAB-1122 at 2.

² *Id.* at

internet at work, claimant testified that she used the computer only during her paid break period, and the employer did not dispute her testimony that she was entitled to a paid break, used her paid break period to look at the internet, and resumed working when her paid break ended. The record therefore fails to show that claimant engaged in time card fraud by using the computer while on a paid break.³

The record therefore fails to show claimant should be disqualified from receiving benefits based on her work separation from the employer, and we find no error of fact or law in EAB Decision 2017-EAB-1122 that needs to be corrected. EAB Decision 2017-EAB-1122 therefore is adhered to on reconsideration.

DECISION: EAB Decision 2017-EAB-1122 is adhered to on reconsideration. Hearing Decision 17-UI-92368 is affirmed.

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

DATE of Service: October 31, 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 *Id.* at 2-3.