

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1345**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122120). Claimant filed a timely request for hearing. On November 6, 2017, ALJ Amesbury conducted a hearing at which the employer did not appear, and on November 8, 2017 issued Hearing Decision 17-UI-96427, reversing the Department's decision. On November 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer filed with EAB a request to reopen the hearing due to its failure to appear. EAB construes the employer's request as one to present additional information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if the party offering it shows that factors or circumstances beyond its reasonable control prevented it from presenting that information at the hearing. The employer explained that its failure to appear and present evidence at the hearing arose from an oversight attributable to "lack of staffing," being "without a Human Resources representative for a period of time" and a "severe lack of resources." However, the employer did not make clear exactly how these alleged reasons caused the employer to miss the hearing or otherwise show that the employer's failure to appear was not caused by its own failure to exercise reasonable care over matters under its control. Absent supporting details, EAB has no basis on which to conclude that the employer's failure to appear and present evidence on its own behalf at the hearing was the result of factors or circumstances beyond the employer's reasonable control. The employer's request to consider new information under OAR 471-041-0090(2) is denied.

**FINDINGS OF FACT:** (1) Essex General Construction, Inc. employed claimant as an apprentice carpenter from January 23, 2017 until August 28, 2017.

(2) Claimant lived in the Portland, Oregon area and the employer usually assigned him to work on jobs in that area. However, beginning Monday, August 21, 2017, claimant was assigned to work on a job in

Eugene, Oregon. Eugene is approximately 110 miles from Portland.<sup>1</sup> In addition to his regular pay, the employer paid claimant \$65 per diem to cover his expenses as a result of working outside of the Portland area. The per diem was intended to pay the transportation, meal and lodging costs that claimant incurred by working in Eugene.

(3) From Monday, August 21 through Wednesday, August 23, 2017, claimant commuted from between Portland and Eugene each day, and stayed each night at his residence in Portland. The per diem amount that the employer paid claimant was insufficient to cover claimant's lodging costs if he stayed overnight in Eugene. Claimant incurred approximately \$40 in gasoline costs for the round trip between Portland and Eugene and spent the \$25 remaining of the \$65 per diem for food. The round trip between Portland and Eugene took claimant between four and five hours each day. During the three days that claimant commuted between Portland and Eugene, claimant started having problems with his car and became concerned about incurring expenses to repair it.

(4) On Wednesday, August 23, 2017, claimant spoke with the superintendent of the Eugene job on which he had been assigned to work. Claimant explained the inadequacy of the per diem he was receiving, the issues he was having with his car and stated he would prefer to work on jobs in the Portland area. The superintendent did not tell claimant that he needed to continue reporting to work in Eugene, but told claimant to call the staff member responsible for work assignments to receive the next assignment in the Portland area. That day, claimant called the staff member that the superintendent had told him to call and left a message. Also that day, claimant called the employer's human resources office and informed a representative that he had spoken with the superintendent of the Eugene job and, as a result, was not going to continue on that job. Claimant told the representative that if no jobs were available in the Portland area, he would return to the Eugene job.

(5) On Monday, August 28, 2017, the staff member responsible for work assignments called claimant and told claimant he was discharged for failing to report for work in Eugene and not notifying the employer. Claimant tried to explain that he had spoken with the superintendent of the Eugene job before not reporting for work on that job, that he had thought he need to continue reporting to the Eugene job and that he had been waiting for an assignment in the Portland area. The staff member told claimant that "it would be better for us to part ways." Audio at ~23:48. On August 28, 2017, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

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<sup>1</sup> EAB takes notice of this generally cognizable fact which was determined using a commonly recognized reference source. <https://www.distance-cities.com/distance-portland-or-to-eugene-or>.

The evidence in this record shows that before ceasing to report for work on the Eugene job, claimant spoke with the superintendent on that job and the employer's human resources office about issues with his long-distance commute and his preference to work in the Portland area. Neither instructed claimant to continue reporting to the Eugene job, and the superintendent told claimant that he should call the staff member responsible for assignments to obtain a Portland assignment, from which claimant reasonably understood he was relieved from the obligation of reporting to the Eugene job. As the superintendent had told him, claimant called and left a message for the staff member responsible for assignments and waited for a return call, which indicated claimant did not think he was violating the employer's standards by not continuing to report for work in Eugene and reasonably thought he had permission not to do so. The record as it exists is insufficient to show that claimant willfully or with wanton negligence violated any of the employer's standards.

Although the employer discharged claimant, the record is insufficient to show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-96427 is affirmed.

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

**DATE of Service:** December 19, 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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