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BYE: 201453

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1157

Reversed
Late Request to Reopen Allowed
Disqualification

PROCEDURAL HISTORY: On January 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 100936). Claimant filed a timely request for hearing. On March 10, 2014, the Office of Administrative Hearings (OAH) issued notice of an interpreted hearing rescheduled to March 25, 2014 at 10:45 a.m. On March 26, 2014, ALJ Shoemake issued Hearing Decision 14-UI-13429, dismissing claimant's request for hearing for failure to appear. On April 15, 2014, Hearing Decision 14-UI-13429 became final without a request to reopen or an application for review having been filed. On May 7, 2014, claimant filed an untimely application for review with the Employment Appeals Board (EAB).

On May 8, 2014, EAB issued Letter Order 2014-EAB-0783, dismissing claimant's application for review as untimely and advising claimant of the rules governing reopen requests and late reopen requests.[1] On May 30, 2014, claimant filed a late request to reopen with OAH. On June 11, 2014, OAH issued notice of an interpreted hearing scheduled for June 27, 2014 at 10:45 a.m. On June 27, 2014, ALJ Holmes-Swanson conducted an interpreted hearing in which claimant appeared and testified and the employer did not appear, and issued Hearing Decision 14-UI-20575, dismissing claimant's untimely request to reopen.[2] On July 7, 2014, claimant filed an application for review of Hearing Decision 14-UI-20575 with the EAB.

FNDINGS OF FACT: (1) Sysco Portland Inc. employed claimant as an order selecter from August, 2002 to December 27, 2013.

[1] OAR 471-040-0040 and OAR 471-040-00041.

[2] ALJ Holmes-Swanson proceeded with the hearing on the merits of the case.

(2) On March 22, 2004, claimant signed a document entitled "Employee's Statement of Accountability and Activity." Claimant's signature indicated that he agreed to accept certain responsibilities related to on-the-job safety. Among the responsibilities claimant agreed to accept was "[t]o report all accidents or injuries to my supervisor immediately." (Exhibit 2).

(3) On April 28, 2010, June 8, 2011 and October 10, 2013, claimant reviewed or participated in the employer's safety training program. One of the topics covered in the program was "[i]ncident/accident reporting."

(4) On November 15, 2013, claimant attempted to move a box with his leg or foot while operating a pallet jack. On November 21, 2013, the employer warned claimant in writing that his actions in trying to move the box were unsafe and violated the employer's safety rules and work methods. The employer told claimant that "any future problems of this nature" would result in further disciplinary action, up to and including discharge. (Exhibit 2).

(5) On December 18, 2013, claimant ran the fork lift he was operating into the wall of the warehouse where he was working, causing significant damage to the warehouse racking. (Exhibit 2). The accident occurred close to the end of claimant's shift. Claimant, who is a native Cambodian-speaker, talked to a Cambodian-speaking coworker about the accident. The coworker told claimant that because it was close to the end of claimant's shift, claimant should go home and "let them know" about the accident the next day. The coworker also told claimant that a supervisor would talk to claimant about the accident. (Transcript at 14).

(6) On December 19, 2013, claimant reported for work. He did not contact a supervisor about the accident; instead, he waited for a supervisor to speak to him. Claimant was eventually interviewed about the accident.

(7) On December 27, 2014, the employer discharged claimant for violating the employer's safety policy by failing to immediately report the forklift accident.

CONCLUSION AND REASONS: The ALJ made a decision to dismiss claimant's request to reopen his hearing only after he conducted a hearing on the merits of claimant's work separation. Thus, in actual fact, the ALJ allowed claimant's request to reopen. The conclusion the ALJ reached in Hearing Decision 14-UI-13429 – that claimant failed to show good cause to reopen his hearing – is inconsistent with the record. EAB has repeatedly held that it is plain error to dismiss a request for hearing or a request to reopen a hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See, e.g., Darrel L. Scudder,* (Employment Appeals Board, 10-AB-3722, December 3, 2010); *Griselda Mendoza Gomez* (Employment Appeals Board, 10-AB-3975, January 5, 2011); *Kelle J. Dubois* (Employment Appeals Board, 12-AB-2917, November 27, 2012); *Ricardo* Calderon (Employment Appeals Board, 12-AB-3071, December 7, 2012)) and *Faye No. Broadhead* (13-AB-0424, March 18, 2013). Consistent with our reasoning in these cases, we will address the merits of claimant's work separation.

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 wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton 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 acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

Here, the employer discharged claimant for violating the employer's safety policy by failing to report an accident in which the claimant was involved. The employer's safety policy required that an employee immediately report accidents and injuries to a supervisor. Claimant knew or should have known about the employer's policy; on March 22, 2004, he acknowledged in writing his understanding of and willingness to comply with the policy, and in 2010, 2011 and 2013, he participated in training programs where the topic of "accident/incident reporting" was covered.

At hearing, however, claimant contended that because he does not speak English well, he did not fully understand the employer's policies and signed whatever he was told to sign. (Transcript at 14). We find claimant's assertion somewhat implausible. Claimant was able to understand (or to have the assistance of an interpreter in understanding) the written warning he received on November 21 and the discussion with his supervisor about his December 18 accident. Given these circumstances, it is unlikely that claimant participated in three safety training programs without understanding (or obtaining the assistance of an interpreter in understanding) what he was expected to learn. Even if claimant's lack of fluency in English prevented him from fully comprehending the employer's policies, however, he sought and obtained assistance from a Cambodian-speaking coworker after his December 18 accident. The coworker advised claimant to report the accident, advice that claimant did not heed. Because claimant showed indifference to the consequences of his conduct when he knew his failure to report the accident would violate the employer's expectations, his conduct was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated incidence of poor judgment. Under OAR 471-030-0038(1)(d)(D), an act that creates an irreparable breach of trust in the employment relationship does not fall within the exculpatory provisions of OAR 471-030-0038(3). Here, claimant's failure to notify his supervisor of an accident that resulted in serious damage to the employer's significantly undermined the employer's confidence in claimant's judgment. As a result, claimant's conduct created an irreparable breach of trust in the employment relationship.

Finally, claimant's actions cannot be excused as a good faith error. Claimant knew, based on his coworker's advice and the training he had received in the employer's safety policy, that the employer expected him to report an accident to his supervisor. Claimant's failure to report his December 18 accident did not result from a mistaken understanding of the employer's expectation.

DECISION: Hearing Decision 14-UI-20575 is reversed. Claimant is disqualified from receiving benefits because of this work separation.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: August 5, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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