

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1223

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74513). The employer filed a timely request for hearing. On April 28, 2014, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for May 6, 2014. On May 6, 2014, ALJ Messecar conducted a hearing at which claimant failed to appear, and on May 12, 2014 issued Hearing Decision 14-UI-17392, concluding claimant voluntarily left work without good cause. On May 29, 2014, claimant filed a timely request to reopen the hearing record. On July 8, 2014, ALJ Seideman conducted a hearing, at which claimant appeared and testified, and on July 9, 2014, issued Hearing Decision 14-UI-21105, concluding claimant showed good cause to reopen the hearing record, cancelling Hearing Decision 14-UI-17392, and concluding the employer discharged claimant, not for misconduct. On July 16, 2014, the employer filed an application for review of Hearing Decision 14-UI-21105 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) OAH mailed the April 28, 2014 notice of hearing scheduled for May 6, to claimant at his address of record. Claimant did not receive the notice. Claimant was not having problems with his mail during the period around April 28, 2014, and received other mail from the Department, and Hearing Decision 14-UI-17392 from OAH.

(2) West Coast Cart Co. of Oregon, Inc. employed claimant from October 27, 2013 to March 7, 2014 as a service worker on the employer's service truck. The employer repairs equipment, such as grocery carts, for grocery stores.

(3) The employer is located in Clackamas, Oregon and claimant lived in Wood Village, Oregon. The employer paid for lodging and food for claimant when he traveled for work.

(4) From 8:00 p.m. on March 5 to 7:00 a.m. on March 6, 2014, claimant and a coworker worked for the employer in Florence, Oregon. They stayed in a hotel until they had to travel to Coos Bay, Oregon, where they were scheduled to begin working at 5:30 p.m.

(5) Claimant's coworker became intoxicated from alcohol during the day on March 6, and was unable to work. Claimant worked alone from 5:30 p.m. to 2:30 a.m. on March 7, 2014, but was unable to complete all the work. Claimant was unable to find hotel accommodations in Coos Bay, Oregon, so slept in the employer's vehicle for approximately 2.5 hours. He understood the employer expected him to finish the work in Coos Bay and travel to another job assignment in Brookings, Oregon that was scheduled to begin at 8:00 p.m. He was unable to find hotel accommodations that morning.

(6) The morning of March 7, 2014, claimant called the employer's secretary and told her he was too tired to continue working that day due to lack of sleep because he was unable to find a hotel room the night before. The secretary told claimant the employer would reschedule the work assignments and that he should go home.

(7) After claimant spoke with the secretary, claimant's coworker called the operations manager and told him claimant had quit. Claimant called the manager immediately after the coworker finished the call, and told him he did not quit, but that he was dissatisfied with the working conditions in Coos Bay.

(8) On March 8, 9 and 10, 2014, claimant called the employer's office to ask about his next scheduled assignment. The employer did not schedule claimant for additional work after March 7, 2014. The employer told claimant to wait to report back to speak with the operations manager on the next pay day.

(9) On approximately March 15, 2014, the operations manager gave claimant his final paycheck and told him the employer would not give him additional work.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant showed good cause to reopen the hearing and that the employer discharged claimant, not for misconduct.

Request to Reopen. ORS 657.270(5) allows ALJs to consider a request to reopen after the hearing decision has been served. In such cases, the request must be in writing, filed within 20 days of the date of mailing of the decision, and explain in detail why the party failed to appear. OAR 471-040-0040(1)(b) and (3) (February 10, 2012) and OAR 471-040-0041(1)(b) and (4) (February 10, 2012). Unless the party demonstrates "good cause," the hearing may not be reopened. "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040(2).

Claimant did not appear at the hearing and requested reopening because he had no notice of the May 6, 2014 hearing. Although documents sent through the U.S. Postal service are presumed to have been received by the addressee, the presumption is subject to evidence to the contrary. OAR 137-003-0520(9). Here, claimant presented sufficient circumstantial evidence to overcome the presumption of receipt, including that he received other mail from the Department and OAH during May 2014, from which we infer that claimant was checking his mail during that time. There was no information tending to show that claimant failed to check his mail on a regular basis. Therefore, it is more likely than not that his failure to receive notice of the May 6 hearing was either caused by circumstances outside his reasonable control or some inadvertent, excusable mistake collecting his mail. Either way, good cause has been shown, and claimant's request to reopen is allowed.

Work Separation. The parties disputed the nature of the work separation with the employer asserting claimant quit. OAR 471-030-0038(2)(b) (August 3, 2011) provides that 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 by the employer, the separation is a discharge. 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. OAR 471-030-0038(2)(a). As used in OAR 471-030-0038(2), the term “work” means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a).

The employer’s operations manager testified that he had a brief conversation with claimant on March 7 during which claimant told him he quit. Audio Record ~ at 17:32 to 17:50. The remaining information from the employer’s witness tending to show claimant quit was hearsay. Claimant testified that he did not quit and did not tell the manager or the secretary that he quit. Audio Record ~ at 20:01 to 20:09, 24:49 to 25:10. The employer did not allow claimant to work after March 7. Claimant showed he was willing to continue working for the employer by calling and going to the office for three days after March 7, 2014. More likely than not, as of March 7, 2014, claimant had no further opportunity to perform services for the employer, making the work separation a discharge.

Discharge. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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). OAR 471-030-0038(3)(a) 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.

At hearing, the employer’s witness denied that the employer discharged claimant. However, based on the events of March 7, the employer discharged claimant because he complained about the working conditions while he was in Coos Bay, and asked to return to Clackamas because he was exhausted. Claimant provided the only firsthand testimony about what occurred in Coos Bay. Although the employer may have had reasons for discharging claimant when it did, it failed to show that it discharged him for willfully or with wanton negligence violating a reasonable employer expectation. Consequently, the employer failed to establish that it discharged claimant for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-21105 is affirmed.

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

DATE of Service: August 19, 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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