

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0107**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82204). Claimant filed a timely request for hearing. On October 30, 2014, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for November 13, 2014. Claimant did not appear at the hearing. On November 14, 2014, ALJ Lohr issued Hearing Decision 14-UI-28688, dismissing claimant's request for hearing for failure to appear. On December 4, 2014, claimant filed a timely request to reopen the hearing. On December 26, 2014, OAH issued notice of a hearing scheduled for January 12, 2015. On January 12, 2015, ALJ Seideman conducted a hearing at which the employer failed to appear, and on January 16, 2015, issued Hearing Decision 15-UI-32011, concluding that claimant showed good cause for reopening the hearing, and that the employer discharged claimant, but not for misconduct. On February 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTERS:** At hearing, the ALJ identified Exhibits 4 to 12, and admitted them into the record without objection. Audio Record at 3:39 to 11:11. The ALJ did not mark Exhibits 4 to 12. To complete the record, those documents have been marked as EAB Exhibits 4 to 12.

The employer submitted written argument to EAB. In its argument, the employer asked EAB to reopen the January 12, 2015 hearing so that the employer may present new information. The employer's request is construed as a request for EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information when the party offering the information establishes that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. The employer asserted it was unable to attend the hearing due to a conflict in its schedule. However, the employer did not show what attempt, if any, it made to participate in the hearing despite the conflict, or to have the hearing postponed. Absent such a showing, the employer failed to establish factors or circumstances beyond its reasonable control prevented it from offering its information into the hearing record. The employer's request to have EAB consider new information therefore is denied. EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) OAH mailed the October 30, 2014 notice of hearing scheduled for November 13, 2014 to claimant at her address of record. During early November 2014, claimant experienced pain, difficulty concentrating, confusion, and “blank moments” due to a thyroid condition and “extreme stress” from her divorce case. Exhibit 1. Claimant received the hearing notice before November 13, but mistakenly believed it was a document regarding an appeal in her divorce case. Claimant disregarded the notice because she believed she had already filed all the necessary paperwork for her divorce case.

(2) The Mederi Foundation, Inc. employed claimant from September 1, 2000 to August 21, 2014 as a distribution coordinator. Exhibit 2.

(3) The employer expected claimant to use professionalism and courtesy in conduct and communication with clients. Exhibit 4. Claimant understood the employer’s expectations.

(4) In July 2014, the employer received a complaint from a client asserting claimant had delayed the client’s orders and communicated in a “commanding” and “grumpy” manner with the client’s staff and patients. Exhibit 4. On July 24, 2014, the employer gave claimant a written warning instructing claimant to use professionalism and courtesy when communicating with clients.

(5) On or about mid-August, the manager directed claimant to refrain from filling orders for the client that complained in July 2014.

(6) On August 21, 2014, the employer discharged claimant for allegedly exhibiting a poor attitude toward clients.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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) states that an ALJ may reopen a hearing after serving a hearing decision if the party requesting the reopening failed to appear at the hearing, files the request within 20 days after the ALJ issued the hearing decision, and shows good cause for failing to appear. OAR 471-040-0040(1) (February 10, 2012). “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 failed to recognize the notice of hearing as a document related to her unemployment benefits claim during a period of time when she was experiencing confusion due to stress and a medical condition. Claimant mistakenly believed the notice of hearing was a document related to an appeal in her divorce case, which was occurring during the same time period. Given the circumstances, claimant’s error was an excusable mistake, and claimant therefore showed good cause existed for her failure to appear at the November 13, 2014 hearing.

**Discharge.** 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) 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had a right to expect claimant to be professional and courteous toward clients. Claimant understood the employer's expectations both as a matter of common sense and as a result of the July 24, 2014 warning she received from the employer. The record shows the employer discharged claimant because she allegedly had a poor attitude at work. However, the employer failed to prove claimant engaged in the behavior alleged.

The employer discharged claimant because she allegedly had a poor attitude at work. The July 24 warning alleged that claimant lacked professionalism and courtesy when she communicated with a client, and caused delays in the client's orders. Claimant testified at hearing that she was patient and courteous with all of the employer's clients, including the client from the July 24 warning, and that the delayed orders occurred because the client submitted incomplete, illegible handwritten order forms, and not because claimant failed to follow employer policies or procedures. Audio Record at 16:40 to 20:04. The record fails to show claimant consciously engaged in conduct she knew or should have known probably violated the employer's expectations regarding workplace behavior. Therefore, the employer failed to show claimant engaged in a willful or wantonly negligent violation of those expectations. Absent such a showing, we cannot find misconduct.

In sum, we conclude claimant showed good cause to reopen the hearing and that the employer discharged claimant, not for misconduct. She is not disqualified from receiving unemployment insurance benefits on the basis of her work separation from the employer.

**DECISION:** Hearing Decision 15-UI-32011 is affirmed.

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

**DATE of Service:** March 19, 2015

**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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