EO: 200
BYE: 201547

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

087
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0121

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91613). Claimant filed a timely request for hearing. On January 12, 2015, the Office of Administrative Hearings (OAH) mailed notice of a telephone hearing scheduled for January 26, 2015. On January 26, 2015, ALJ M. Davis conducted a hearing, and on January 28, 2015 issued Hearing Decision 15-UI-32488, concluding the employer discharged claimant, but not for misconduct. On February 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider that argument when reaching this decision. EAB considered written argument received from the employer on February 17, 2015. In that argument, the employer complained that its chief executive officer (CEO) was out of the country from January 9 to 25, 2015, leaving only one day to prepare for the hearing, that OAH's fax number for sending exhibits was not functional on the day of the hearing, and that although the ALJ was informed of the malfunction, she did not offer a continuance.

Prior to commencement of an evidentiary hearing that is held by telephone, each party shall provide to all other parties and OAH copies of documentary evidence that it will seek to introduce into the record. OAR 471-040-0023(4) (August 1, 2004). However, a party may seek to introduce documentary evidence in addition to evidence described in OAR 471-040-0023(4) during the telephone hearing, and the ALJ receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. OAR 471-040-0023(5). Immaterial or unduly repetitious evidence shall be excluded, and erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party. OAR 471-040-0025(5) (August 1, 2004).

At the request of a party or on the ALJ's own initiative, an ALJ may order that a hearing be continued. OAR 471-040-0026(1) (August 1, 2004). An ALJ may grant a continuance at the request of a party if the party has good cause, as stated in the request, for continuing the hearing. OAR 471-040-0026(2)(b). Good cause exists when the circumstances causing the request are beyond the reasonable control of the requesting party, and failure to grant the continuance would result in undue hardship to the requesting party. OAR 471-040-0026(3).

Here, the employer's assertion that its CEO was out of the country from January 9 to 25, 2015 is not sufficient to show that the employer had only one day to prepare for the hearing, or that the employer could not have provided copies of documentary evidence that it would seek to introduce into the record to OAH prior to the day of the hearing. The employer made no attempt to provide copies of documentary evidence that it would seek to introduce into the record to claimant prior to the hearing, as required under OAR 471-040-0023(4). Audio Record at 8:00. The employer did not ask the ALJ for a continuance, and instead indicated that its witnesses could offer the information contained in its documents into evidence through testimony. Audio Record at 8:10. The ALJ was not required to offer the employer a continuance, and the employer did not show that the ALJ's failure to do so would result in undue hardship to the employer. Nor did the employer show that inclusion of its documents in the record was necessary to conduct a full and fair hearing. The ALJ therefore did not err in excluding the employer's documents, and EAB did not consider the documents when reaching this decision.

FINDINGS OF FACT: (1) DFS Gourmet Specialties Inc. employed claimant as an assistant team lead from May 27, 2013 to November 30, 2014. Claimant's husband also worked for the employer.

(2) Claimant and her husband operated the employer's booth at events at Costco, one of the employer's clients. The employer expected them to remain at an event until it ended, and for one of them to be in the booth at all times. If claimant needed to leave an event early, the employer expected her to notify Costco and the employer. Claimant understood the employer's expectations.

(3) On November 15, 2013, claimant and her husband were operating the employer's booth at an event at Costco. During the event, claimant's husband received a telephone call from a family member informing him that his daughter needed help because her house was on fire, and she could not locate some of her pets. Claimant's husband explained the situation to a Costco assistant manager, and stated that he needed to leave the event early. The assistant manager asked if claimant was going to remain at the event and operate the employer's booth. Claimant's husband explained that claimant was his wife, and the assistant manager gave them both permission to leave the event early. Claimant and her husband also notified another Costco assistant manager that they were leaving early to help her husband's daughter.

(4) Claimant and her husband left the event early to help her husband's daughter. Claimant believed that leaving the event early for that reason with Costco's permission complied with the employer's expectations.

(5) The employer discharged claimant for leaving the event early, and for allegedly failing to notify Costco or the employer that they were doing so.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

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. 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). Isolated instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A).

In written argument, the employer asserted that the testimony of its witnesses showed the employer discharged claimant for multiple infractions of the employer's and Costco's policies over an 18 month period, and that her conduct on November 15, 2014 had little to do with her discharge. However, the employer's first witness testified that claimant's conduct on November 15 was the final incident that led to her discharge. Transcript at 5. The employer's president repeatedly testified that claimant's conduct on November 15 was the "last" and "final straw" leading to her discharge. Transcript at 14, 17. The employer's third witness testified that the employer would have discharged claimant for her conduct on November 15 even if she had no prior infractions in her employment record. Transcript at 24-25. Although the employer's CEO testified that claimant's conduct on November 15 was only one of multiple incidents resulting in her discharge,[1] the record shows that the incident on November 15 caused the employer to discharge claimant when it did. We therefore focus on that incident as the reason for claimant's discharge, and address prior incidents only if necessary to determine whether claimant's conduct on November 15 was misconduct, or an isolated instance of poor judgment.

The employer discharged claimant for leaving the event at Costco early on November 15, 2014, and for allegedly failing to notify Costco or the employer that she was doing so. However, the record shows that a Costco assistant manager gave claimant permission to leave early to help her husband's daughter, and fails to show claimant knew or should have known that leaving the event early for that reason with Costco's permission probably violated the employer's expectations. To the extent claimant erred in her belief that doing so complied with the employer's expectations, she erred in good faith. Good faith errors are not misconduct.

Claimant notified Costco that she was leaving the event early. At hearing, claimant testified that she also telephoned her manager and left him a voice message notifying him that she was leaving the event early. Transcript at 31-33. Although claimant's manager testified that did not receive a call or voice

[1] Transcript at 28-29.

message from claimant,[2] we find that evidence as to whether claimant left the voice message equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant did not notify the employer she was leaving the event early. Absent such a showing, we cannot find that claimant violated the employer's expectation that she do so.

The employer therefore failed to establish that claimant violated its expectations willfully or with wanton negligence on November 15, 2014. It therefore is unnecessary to address prior incidents to determine whether claimant's conduct on November 15 was misconduct, or an isolated instance of poor judgment. The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-32488 is affirmed.

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

DATE of Service: <u>March 26, 2015</u>

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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[2] Transcript at 39.