EO: 200
BYE: 201602

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
2015-EAB-0564

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72700). Claimant filed a timely request for hearing. On February 25, 2015, the Office of Administrative Hearings (OAH) mailed to claimant a notice of a hearing scheduled for March 10, 2015. On March 10, 2015, ALJ Holmes-Swanson issued Hearing Decision 15-UI-34869, dismissing claimant's request for a hearing based on her failure to appear. On March 20, 2015, claimant filed a request to reopen the hearing. On April 14, 2015 and April 29, 2015, ALJ Holmes-Swanson conducted a hearing, and on May 4, 2015 issued Hearing Decision 15-UI-37875, allowing claimant's request to reopen and concluding the employer discharged claimant but not for misconduct. On May 12, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it contended the ALJ did not properly consider the evidence it offered during the hearing, and argued that the ALJ should have taken testimony from its director of operations who allegedly had first-hand information that disputed claimant's hearing testimony. EAB construes the employer's objection to the failure of its operations director to be called to testify as a request to have EAB consider additional information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering it shows that it was prevented by circumstances beyond its reasonable control from presenting that information at the hearing. The employer's operations director was present during the hearing, but the employer did not seek to offer testimony from him. When the ALJ inquired of the employer's representative if the employer had any additional evidence to offer before he closed the record, the representative stated that it had no further evidence, and did not mention any testimony from its operations director. Transcript of April 29, 2015 Hearing (Transcript 2) at 21. Because the employer could have, but did not, offer the testimony of the operations director at the hearing, it did not show that factors or circumstances beyond its reasonable control prevented that witness from testifying at the hearing. For this reason, the

employer's request to present new evidence from its operations director is denied. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Moonstruck Chocolate Company employed claimant as a manufacturing lead from October 9, 2006 until December 1, 2015. As a lead, claimant was responsible for performing assigned work duties as well as providing direction and assistance to other employees who worked in her group.

(2) The employer expected claimant to follow the instructions of her supervisors. The employer also expected claimant to refrain from disruptive or unprofessional behavior while working on the production floor. As a matter of common sense, claimant understood these expectations as she reasonably interpreted them.

(3) On November 26, 2014, the day before Thanksgiving, the employer held an unannounced lottery outside the presence of employees to determine which two of its 35 employees would receive chocolate turkeys. The employees in claimant's group were confused about how the two recipients of the chocolate turkeys had been selected. They told claimant that they were unhappy about the distribution of the chocolate turkeys and voiced concern that employer's selection process had not been fair. Some of the employees thought that the employer should have distributed chocolate turkeys to all of its employees. They asked claimant to speak with a supervisor about how the recipients of the turkeys had been determined. Claimant spoke with the supervisor and was told that the employer had held a lottery to select the employees who received the chocolate turkeys. Claimant reported to the employees in her group what the supervisor had told her. Claimant never expressed to the employees in the group any opinion about the manner in which the chocolate turkeys had been distributed or that she thought it was unfair. Transcript 2 at 15, 17.

(4) On December 1, 2014, one of claimant's supervisors asked her to help an employee in her group who was preparing sea salt bark. Because claimant was then preparing a machine to begin processing chocolate, claimant told the supervisor that she could not assist the employee until she completed preparing the machine and that, if he wanted quicker action, he should ask someone else. The supervisor told claimant he would wait for her to complete the machine preparation. When claimant was done with the machine, she, the employee who had needed assistance and the supervisor began to prepare the sea salt bark.

(5) On December 1, 2014, the employer discharged claimant for disruptive and unprofessional behavior on November 26, 2014 when she spoke with the employees in her group about the selection process for distributing the two chocolate turkeys and for allegedly refusing to help the employee in her work group on December 1, 2014 after a supervisor asked her to do so.

(6) On approximately January 24, 2015, claimant put in a change of address with the United States Postal Service (USPS) since was going to move on January 25, 2015 to a new residence in Vancouver, Washington. On January 25, 2015, claimant moved to the new residence. On January 25, 2015, claimant notified the Department of her new residence address.

(7) After January 25, 2015, claimant experienced difficulties in receiving mail at her new address in Vancouver and in timely delivery of the mail that made it through, including bills that were mailed to

her. Sometime in approximately February 2015, claimant went to the central post office in Vancouver and discussed her difficulty in receiving mail at her new address. The USPS representative told claimant that her new address did not appear in the post office's records and he thought that the builder of the newly constructed residential complex to which claimant had moved in Vancouver had failed to update the post office's records to show the existence of the new residential addresses. The USPS representative updated the post office's records. Several of claimant's neighbors in the new complex also had difficulty receiving their mail after moving into it.

(8) Around February 25, 2015, claimant expected to receive some mail from the Department scheduling the hearing she had requested on the February 12, 2015 administrative decision. Claimant checked her mail every day. On March 12, 2015, claimant received the February 25, 2015 notice scheduling the hearing for March 10, 2015, which was after that hearing had occurred. The notice was sent to claimant's correct address in Vancouver.

CONCLUSIONS AND REASONS: Claimant's request to reopen the March 10, 2015 hearing is allowed. The employer discharged claimant but not for misconduct.

The Request to Reopen. ORS 657.270(5) states that when a party who filed a request for hearing had that request dismissed because the party failed to appear at the hearing, the ALJ may allow the party's request to reopen the hearing if it is filed within 20 days after the issuance of the written decision dismissing the party's request for hearing and the party had good cause for failing to appear. OAR 471-040-0040(2) (February 10, 2012) states that good cause exists for a party's failure to appear at the hearing if it was due to an excusable mistake or from factors beyond the party's reasonable control. Claimant filed her request to reopen on March 20, 2015, which was 10 days after the March 10, 2015 hearing decision dismissing her request for hearing, and within the 20 day period in which she was permissibly allowed to file a request to reopen. Therefore, the remaining issue is whether claimant showed good cause for her failure to appear at the March 10, 2015 hearing.

Claimant did not appear at the March 10, 2015 hearing because she did not receive notice that the hearing was scheduled for that day until March 12, 2015, which was after it had already occurred. Although claimant had moved to a new address approximately a month before the notice scheduling the hearing was mailed, she had notified the Department of her change of address and had put in a change of address notice with USPS on the day before she moved. Shortly after claimant moved, but before the notice of the March 10, 2015 hearing was mailed, claimant realized she was not timely receiving items mailed to her new address in Vancouver. Claimant then visited the central post office in Vancouver to try to remedy the problem and, at that time, a USPS representative updated the post office's records to include claimant's new residential address. It appears that claimant took reasonable steps to ensure that she timely received all mail directed to new address in Vancouver, and it was not due to lack of care or effort that she did not receive the notice scheduling the hearing for March 10, 2015 at a time that enabled her to appear at the hearing. Claimant has shown that her failure to appear at that hearing was due to factors beyond her reasonable control. Claimant has shown good cause for failing to appear, and the request to reopen is allowed.

The 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) (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).

The employer's witness contended that the employer discharged claimant for the disruptive and unprofessional way in which she discussed the employer's November 26, 2014 distribution of the chocolate turkeys with other employees and her alleged refusal to help another employee after a supervisor had asked her to do so on December 1, 2014. Transcript of April 14, 2015 Hearing (Transcript 1) at 12, 13. With respect to claimant's behavior on November 26, 2014, although the employer's witness described it as "inappropriate" and involving an "outburst on the production floor," the witness provided little specific information beyond those conclusory characterizations. Transcript 1 at 11, 12; *see also* Exhibit 2 at 6, 8. Claimant explained that on November 26, 2014, she spoke with employees in her group, of which she was the lead employee, and addressed their concern and unhappiness about the employer's selection process for distributing the two chocolate turkeys. According to claimant, she spoke with the supervisor at the request of those employees and told the supervisor what those employees thought about the employer's selection process. Transcript 2 at 6, 14, 15. Claimant's explanation is plausible and, given claimant's apparently limited proficiency in expressing herself in English, it is also plausible that the supervisor did not understand that claimant was not inciting the other employees to protest the distribution of the turkeys, but was listening to their concerns, and was expressing the employees' views of the selection process, and not her personal view. *See* Transcript 1 at 12; Transcript 2 at 14, 15; Exhibit 1 at 6. Claimant's testimony was emphatic that she did not criticize the employer's selection process to the employees in her group or express an opinion on it. Transcript at 15, 16-17. In view of claimant's rebuttal testimony, and inconclusive nature of the employer's evidence on the matter of her allegedly unprofessional behavior on November 26, 2014, the employer did not meet its burden to show that the manner in which claimant spoke to the other employees or the supervisor was a willful or wantonly negligent violation of the employer's standards.

With respect to claimant's alleged unwillingness to follow the instructions of her supervisor on December 1, 2014, claimant disputed the employer's evidence and stated that she agreed to help, but told the supervisor she could only assist after she had completed the task on which she was then working, preparing a machine to process chocolate. Transcript 2 at 20. The employer did not specifically rebut claimant's explanation at the hearing. Transcript 2 at 21. Moreover, claimant's first-hand evidence on the interaction with the supervisor on December 1, 2014 is entitled to greater weight than the employer's hearsay comments from the supervisor. On the evidence in the record, the employer did not meet its burden to establish that the manner in which claimant behaved in response to her supervisor's request on December 1, 2014 was a willful or wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-37875 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: July 2, 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. 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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