

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0722

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71626). Claimant filed a timely request for hearing. On May 5, 2015, the Office of Administrative Hearings (OAH) sent the parties notice of a hearing on May 19, 2015. On May 19, 2015, ALJ Micheletti conducted a hearing, at which the employer did not appear, and on May 20, 2015 issued Hearing Decision 15-UI-38825, concluding the employer discharged claimant, but not for misconduct. On June 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

In its application for review, the employer's representative, ADP Unemployment Group/UCExpress, asks for a new hearing, asserting that the employer did not appear for the May 19, 2015 hearing because neither the representative nor the employer received notice of the hearing. The employer's request is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The record shows that OAH sent the notice of the May 19, 2015 hearing to the following address: Adp Unemployment Group/ucexpress, For: Ndat Solutions LLC, PO Box 66744, St. Louis, MO 63166-6744. This address is identical to the one that the employer's representative asserts is its correct address in the application for review. The employer's representative offers no additional details, such as problems it may have experienced with mail delivery or processing, to support its claim that it never received the hearing notice. Without supporting details, we have no basis for concluding that the employer's failure to receive notice of hearing was a circumstance beyond its reasonable control.¹ The request to present new evidence is denied.

¹ We note also that under OAR 137-003-0520 (January 31, 2012), documents sent through the US Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. The bare assertion of the employer's representative that it did not receive the hearing notice is insufficient to rebut the presumption of delivery.

FINDINGS OF FACT: (1) NDAT Solutions LLC employed claimant as a receptionist and lead qualifier from July 1, 2013 to March 13, 2015.

(2) Claimant's shift began at 7:00 a.m. The employer expected claimant to report to work by 7:00 a.m. and log into her telephone by no later than 7:05 a.m. at the beginning of each scheduled shift. Claimant understood that expectation.

(3) Claimant had several preparatory tasks to complete before she was able to log into her telephone each shift, including logging into her computer, opening her work programs and email, and learning who was on each day. The process before she logged into her telephone typically took about five minutes.

(4) On October 1, 2014, the employer gave claimant a written warning because she had been late logging into her telephone more than once before October 1, 2014. Claimant started leaving her home earlier to arrive at work and log into her telephone in a timely manner.

(5) On March 13, 2015, claimant was delayed by traffic due to a traffic accident on the highway travelling to work. She arrived at work at 6:59 or 7:00 a.m. As a result of the traffic delay, she logged into her telephone at 7:06 a.m.

(6) On March 13, 2015, the employer discharged claimant for logging into her telephone after 7:05 a.m. that day.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. Although claimant had prior attendance violations, the incident that prompted the employer to discharge claimant was her failure to log into her telephone on time on March 13, 2015. Because that incident was the proximate cause of the discharge, we first focus on that incident to determine whether claimant's discharge was 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. Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). 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).

Although claimant arrived to work on time, she was one minute late to log into her telephone on March 13, 2015 because she was delayed by traffic from a car accident. Claimant did not arrive with

insufficient time to log into the telephone by 7:05 a.m. because she was deliberately late, or consciously engaged in conduct she knew or should have known would probably result in her failure to log into her telephone on time. After her attendance warning in October 2014, claimant began leaving earlier to travel to work so she would not be late despite traffic delays. Moreover, although claimant arrived to work before 7:00 a.m., she was not always able to complete the process of logging into her telephone within five minutes. The record fails to show that claimant either willfully, or consciously caused the delay that made her late to log into her telephone in the final incident, and that it was not mere inefficiency due to lack of job skills, which is not misconduct. OAR 471-030-0038(3)(b). Therefore, the discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-38825 is affirmed.

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

DATE of Service: August 3, 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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