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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-1463

Late Application for Review Allowed
Reversed – No Disqualification

PROCEDURAL HISTORY: On September 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 95550). The employer filed a timely request for hearing. On October 30 and November 16, 2015, ALJ Vincent conducted a hearing in which the employer and claimant participated. On November 19, 2015, ALJ Vincent issued Hearing Decision 15-UI-47953, in which he mistakenly dismissed the employer's hearing request for failure to appear at the November 16 hearing. On December 9, 2015, Hearing Decision 15-UI-47953 became final, without an application for review having been filed. On December 11, 2015, the employer filed an untimely application for review with the Employment Appeals Board (EAB).

LATE APPLICATION FOR REVIEW: OAR 657.270(6) and (7) required that the employer's application for review be filed on or before December 9, 2015; the employer filed its application on December 11, 2015. Under OAR 471-041-0070(2) (March 20, 2012), the period for filing an application for review may be extended a reasonable time upon a showing of "good cause." "Good cause" exists if an applicant demonstrates that "factors or circumstances beyond the applicant's reasonable control prevented timely filing." OAR 471-041-0070(2)(a). In the application for review, the employer's representative asked that the application for review "be considered timely as we just received the Decision [sic]. Also it is incorrect as a review of the record will show. There were many hours of testimony taken in the matter." The employer's failure to promptly receive Hearing Decision 15-UI-47953 and the clearly erroneous conclusion the ALJ reached in this decision constitute circumstances beyond the employer's reasonable control that prevented timely filing of the application for review. The late application for review is therefore allowed.

FINDINGS OF FACT: (1) Fred Meyer employed claimant as produce manager at its Newberg store from August 9, 1981 to July 13, 2015.

(2) The employer's policy required that employees treat coworkers and customers with respect and courtesy. Claimant knew and understood this employer policy.

(3) On November 4, 2014, claimant and another employee engaged in a heated verbal altercation. The employer suspended claimant for three days for violating its policy regarding respectful and courteous treatment of coworkers. The employer also warned claimant in writing that any future violations of its policies would result in his discharge.

(3) Work schedules for employees in the produce section that claimant supervised were automatically generated through a computer program, based on information from employees regarding the days they wanted to work and the needs of the store. The schedules were then reviewed by the store food manager and modified, as necessary. Employees in the produce section who needed to make any last minute changes in their scheduled work hours could ask either the food manager of the produce manager to make these changes. Claimant never unreasonably denied an employee's requested schedule change.

(4) The employer expected that managers will ensure that employees notify their supervisors when they want to take their rest or lunch breaks. Sometime in June or July 2015, claimant and one of the employees he supervises had a misunderstanding regarding the time the employee had scheduled her lunch break. As a result, claimant paged the employee during her lunch and called her back to work for a few minutes. Claimant and the employee clarified their misunderstanding, and the employee resumed her lunch break.

(5) Sometime in June or July 2015, claimant noticed that one of the produce employees was using the wrong type of cart to transport watermelons. He counseled the employee about the appropriate cart to use when moving watermelons; another employee overheard a portion of this conversation and claimant asked the second employee to confirm that the instructions he was giving were accurate.

(6) On July 13, 2015, the employer discharged claimant for creating a hostile work environment for the employees he supervised.

CONCLUSION AND REASONS: 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(30(b). 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 asserted that it discharged claimant because he created a hostile work environment for the employees he supervised. The employer alleged that claimant refused to allow employees to take their scheduled rest or lunch breaks until they completed assigned work, that claimant inappropriately disciplined employees in front of customers and coworkers, and that claimant manipulated work schedules to punish employees. The evidence regarding claimant's treatment of employees was hearsay, based on complaints the employer's human resources director received from the produce employees claimant supervised. Claimant testified that he never engaged in inappropriate behavior with subordinate employees, that he had little responsibility for scheduling employees' work, and that he never attempted to punish employees through their work schedules. The evidence regarding claimant's behavior is, at best, evenly balanced. As a result, any uncertainty must be resolved against the employer, since it is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). We therefore conclude that the employer failed to meet its burden to show that claimant engaged in misconduct by creating a hostile work environment for the employees he supervised.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-47953 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>December 18, 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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