

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0208

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 75652). Claimant filed a timely request for hearing. On December 4, 2015, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for December 15, 2015 at 3:30 p.m. On December 16, 2015, ALJ issued Hearing Decision 15-UI-49462, dismissing claimant's hearing request for failure to appear at the December 15 hearing. Claimant filed a timely request to reopen. On February 4, 2016, ALJ Frank conducted a hearing, and on February 11, 2016, issued Hearing Decision 16-UI-52857, granting claimant's request to reopen and concluding that the employer discharged claimant, but not for misconduct. On February 26, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) BiMart employed claimant as a cashier from October 19, 2001 until October 12, 2015.

(2) The employer's policy permitted employees to purchase items at a discount for themselves, their spouses or registered domestic partners and minor dependent children, and prohibited employees from making discounted purchases for adult children. The policy also permitted employees to make discounted purchases of "occasion gifts." The policy did not define what was an "occasion gift," but gave as examples gifts for weddings, birthdays or Mother's Day. Claimant knew about and understood these employer policies.

(3) Claimant and her husband lived in Maupin, Oregon. Claimant spent her days off work with her daughter and grandchildren in Salem, Oregon. Claimant purchased food from the employer at discounted prices which she took to Salem to eat while she was staying with her family. Claimant also used her employee discount to purchase gifts for her grandchildren.

(4) Sometime prior to October 12, 2015, the employer's loss prevention department received a report that claimant was purchasing large quantities of food at discounted prices, and that she was giving this food to her daughter and grandchildren. The loss prevention department investigated claimant's purchases for the past year, and determined that the amount of discounted purchases claimant made far exceeded the amount of discounted purchases typically made by other employees.

(5) On October 12, 2015, representatives from the employer's loss prevention department interviewed claimant about her purchases. During this interview, claimant admitted that she had kept her purse with her at her work station on October 12 so that she could readily access needed medications. Audio Recording at 29:04. Claimant's supervisor was aware that claimant had her purse with her during her work shift. Claimant was unaware of an employer policy that prohibited employees from keeping purses and other bags with them at their work stations unless they obtained prior approval from a supervisor for doing so.

(6) Also on October 12, 2015, the employer discharged claimant because it believed she had violated the employer's policies by making discounted purchases of food and gifts for her adult daughter and grandchildren and by keeping her purse with her at her work station.

(7) On December 12, 2015, claimant woke up with a swollen neck and eye; she was also experiencing severe itching and mild throat swelling. Claimant went to a hospital emergency room for treatment of these conditions. She was prescribed Valium, which she found altered her mental state. Exhibit 3.

(8) On December 15, 2015, claimant was experiencing severe neck tightness, throat swelling and itching. Because her eye was still swollen, claimant found it difficult to see. Claimant was continuing to take Valium as prescribed by the emergency room physician. Because of the effects of this medication, claimant "zoned out" and failed to call in for the hearing scheduled for 3:30 p.m. Audio Recording at 10:49. At approximately 3:47 p.m., claimant remembered the hearing and called the OAH. An OAH representative told claimant that she had missed the hearing and explained the procedure for requesting a reopening.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that claimant demonstrated good cause for reopening. We also conclude that the employer discharged claimant, but not for misconduct.

Request to Reopen

Under OAR 471-040-0040 (February 10, 2013), an ALJ may reopen a hearing if the party requesting reopening failed to appear at the hearing, requests reopening within 20 days of the date on which the hearing decision is mailed, and demonstrates good cause for failing to appear at the hearing. Good cause for reopening exists if the party's failure to act arises from an excusable mistake or factors beyond the party's reasonable control. OAR 471-040-0040(1)(a).

Claimant's failure to appear at the December 15 hearing was caused by medication she was taking for her swollen neck, throat and eye. The medication affected her ability to function effectively; she became "zoned out" and failed to call in for the hearing at the appropriate time. We conclude that the

medication claimant was taking constituted a circumstance beyond her reasonable control that prevented her from participating in the hearing. Claimant has therefore demonstrated good cause for reopening.

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. 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).

The employer discharged claimant because it believed she violated its policy regarding use of the employee discount, a policy that permitted employees to make discounted purchases only for themselves, spouses, registered domestic partners, and minor dependent children, and permitted the discounted purchase only of "occasion gifts." In addition, the employer asserted that claimant violated its policy that prohibited employees from keeping purses or bags at their work station.

In regard to the alleged violation of the employee discount policy, the employer asserted that claimant's purchased food and gifts for her adult daughter and grandchildren in violation of this policy. The employer was unable to specify what purchases claimant made in violation of the employer policy, when these purchases were made, and what the total amount of these purchases was, however. Audio Recording at 27:19. Claimant denied that her discounted purchases violated the employer's policies; she testified that she bought food that she took with her when she went to Salem to care for her grandchildren, and that she consumed the food she purchased during her stay in Salem. Audio Recording 34:07, 37:28. On this record, the employer therefore failed to carry its burden to establish that claimant's discounted purchases of food and gifts violated its policies.

The employer also asserted that claimant violated its policy regarding bags and purses in the workplace when she kept her purse with her at her work station on at least one occasion – October 12, 2015. Audio Recording at 29:04. Claimant testified that she was unaware of any policy that prohibited her from keeping her purse with her at her workstation, and also testified that her supervisor knew that claimant had her purse with her during her work shift. Because claimant did not knowingly violate the employer's policy regarding purses and bags at an employee's work station, her actions did not constitute a willful or wantonly negligent violation of the employer's expectations and were not misconduct.

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 16-UI-52857 is affirmed.

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

DATE of Service: March 16, 2016

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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