

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0253

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 103129). Claimant filed a timely request for hearing. On February 8, 2016, ALJ Seideman conducted a hearing, and on February 10, 2016, issued Hearing Decision 16-UI-52725, affirming the administrative decision. On March 1, 2016, Hearing Decision 16-UI-52725 became final without an application for review having been filed with the Employment Appeals Board (EAB). On March 7, 2016, claimant filed an untimely application for review with EAB.

LATE APPLICATION FOR REVIEW: OAR 657.270(6) and (7) required that claimant's application for review be filed on or before March 1, 2016; claimant filed his application for review on March 7, 2016. Under ORS 657.875 and 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). Claimant's application for review was untimely filed on March 7, 2016. Claimant explained that his application for review was late "due to not getting [the hearing decision] until Saturday, March 6th. Because my letter was delivered to the wrong address my "neighbors home" [sic] and they were out of town in California."¹ Claimant demonstrated that circumstances beyond his reasonable control – misdelivered mail – prevented him from timely filing his application for review. His late application for review is therefore allowed.

¹ In addition to submitting an explanation of the reason why his application for review was late, claimant also submitted written argument regarding the circumstances of his discharge. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) TravelCenters of America employed claimant as a cook and baker from September 22, 2014 until October 18, 2015.

(2) The employer expected that an employee who was unable to report for a scheduled shift would contact a manager no later than four hours before the time the shift was scheduled to begin to report that the employee would be absent. Managers' phone numbers were made available to employees in the workplace. Claimant knew about and understood the employer's expectations about reporting an absence because on June 17, 2015, the employer warned him in writing about his numerous absences and failure to comply with the employer's expectation that he notify a manager of an absence. The warning notified claimant that future failure to comply with the employer's expectations could result in his discharge. In addition, claimant received performance evaluations March 15, 2015 and September 20, 2015, that praised his performance, but criticized him for a lack of dependability in reporting for his scheduled shifts.

(3) On October 17, 2015, at 3 a.m., claimant called the workplace and told the server who answered that he would be unable to report for his shift, which was scheduled to begin at 6 a.m., because he had to take his wife to the hospital. Claimant's wife had a severe migraine. No manager was on duty when claimant called, and claimant asked the server for the phone number of a manager. The server refused to give claimant the phone number of any manager and told him that she could not give him personal information over the phone. The server also told claimant that she would tell a manager about claimant's absence when one reported for work. Claimant called the workplace again at 6 a.m. and was unable either to speak to a manager or obtain the phone number of a manager. Audio at 16:07.

(4) On October 18, 2015, the employer discharged claimant for failing to notify a manager that he was going to be absent for his scheduled shift on October 17, 2015.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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.

The employer expected that an employee who was unable to report for a scheduled shift would contact one of the employer's managers at least four hours before the time the shift was scheduled to begin to notify the employer that the employee would be absent. Claimant knew about and understood the employer's expectations because on June 17, 2015, the employer reprimanded claimant in writing for his failure to comply with the employer's requirements for reporting absences. At that time, the employer warned claimant that he could be discharged for any future failure to comply with the employer's

requirement to notify a manager about an absence. The employer discharged claimant for his failure to contact a manager to report that he would be absent on October 17, 2015.

The ALJ found that

An important factor in this case is that claimant well knew he was to contact the manager. This had been discussed with him several [times] and he had received the written warning. Still he argues that he didn't have the number and couldn't get hold of it. He was given many opportunities to obtain the number but had not done so. Hearing Decision 16-UI-52725 at 3.

Based on this conclusion, the ALJ held that claimant's failure to contact a manager was "a willful and wantonly negligent violation of what the employer had the right to expect and constituted misconduct." *Id.* We disagree.

The record shows that claimant made a substantial effort to comply with the employer's requirement that he contact a manager about his October 17 absence – he called the workplace at 3 a.m., three hours in advance of the time his shift was scheduled to begin, and attempted to obtain a manager's telephone number. He was prevented from contacting a manager only because the server who answered his call refused to give him a manager's telephone number, mistakenly believing she was not authorized to provide claimant with this type of personal information by telephone. Claimant's failure to comply with the employer's policy to report his absence to a manager resulted from a coworker's mistake and not from a conscious refusal to obtain or retain appropriate telephone numbers, or a knowing indifference to the consequences of his actions. We therefore conclude that claimant's conduct on October 17 was not willful or wantonly negligent and did not constitute 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-52725 is set aside, as outlined above.

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

DATE of Service: April 1, 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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