

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0504

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 103042). On December 4, 2014, the Department issued two decisions, both with the same number, # 194220: one decision assessed an \$11 overpayment, based on claimant's failure to accurately report work and earnings, and the other assessed an overpayment of approximately \$3,000, based on decision # 103042. On December 23, 2014, decision #103042 became final without a request for hearing having been filed. On December 24, 2014, overpayment decisions # 194220 became final without requests for hearing having been filed.

On July 29, 2015, claimant filed late requests for hearing on decisions # 194220. On August 20, 2015, ALJ Kangas issued Hearing Decision 15-UI-42428, dismissing claimant's request for hearing on decisions # 194220 as untimely, subject to claimant's right to renew her requests by responding to an appellant questionnaire within 14 days. Claimant did not respond to the appellant questionnaire, and on September 9, 2015, Hearing Decision 15-UI-42428 became final without an application for review having been filed.¹

On December 29, 2015, claimant filed untimely requests for hearing on decision #103042, the work separation decision. On December 29, 2015, ALJ Kangas issued Hearing Decision 15-UI-50158, dismissing claimant's request for hearing on decision # 103042, subject to claimant's right to renew her request by responding to an appellant questionnaire within 14 days. Claimant timely responded to the appellant questionnaire. By letter dated January 14, 2016, OAH cancelled Hearing Decision 15-UI-50158. On January 22, 2016, OAH issued notice of a hearing scheduled for February 3, 2016. On February 3, 2016, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on February 5, 2016, issued Hearing Decision 16-UI-52485, concluding that claimant demonstrated good cause for filing a late hearing request and that the employer discharged claimant, but not for misconduct.

¹ On October 14, 2015, the copy of Hearing Decision 15-UI-42428 the Office of Administrative Hearings (OAH) mailed to claimant was returned to OAH as undeliverable.

On February 18, 2016, the employer filed a timely request to reopen. On March 23, 2016, ALJ Wyatt conducted a hearing; at the hearing, the ALJ granted the employer's request to reopen and continued the hearing to another date to reconsider claimant's late hearing request and, if the hearing request was granted, to consider the merits of her work separation from the employer. On April 8, 2016, ALJ Wyatt conducted the continued hearing, and on April 15, 2016, issued Hearing Decision 16-UI-57335, concluding that claimant demonstrated good cause for filing a late hearing request and that the employer discharged claimant, but not for misconduct. On May 4, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of that portion of Hearing Decision 16-UI-57335 that granted the employer's request to reopen. We therefore confined our review to the issues of claimant's late request for hearing and her work separation.

FINDINGS OF FACT: (1) Shooters Café and Saloon employed claimant as a bartender from July 17 through July 25, 2015.

(2) On July 24, 2014, claimant reported for her shift, even though she was ill. She worked for approximately two hours and concluded she was too ill to continue working. She called a coworker, and asked if he would work the remainder of her scheduled shift; the coworker agreed to do so. Claimant then called the employer's manager and asked if she could leave and have the coworker work the rest of her shift. The manager agreed to claimant's request, and claimant left the workplace. Because she was not feeling well, claimant did not count the contents of the cash register before she left and did not lock up the money in the register before she left.

(3) After claimant left the employer's bar and restaurant, the employer's owner called her and questioned why she had left work. Claimant and the owner argued angrily, and the owner told claimant he was going to write her up for calling in an employee to work for her without permission to do so and for taking \$60 from the cash register. The owner also told claimant he was going to hire someone to replace her.

(4) On July 25, 2014, claimant reported to the employer's bar and restaurant and received her final paycheck and a written reprimand for calling in an employee to work for her without having obtained permission to do so and for taking \$60 from the employer's cash register. Claimant did not work for the employer after July 24, 2014.

(5) On December 3, 2014, the Department mailed decision # 103042 concerning claimant's work separation to her address of record with the Department which was: 3729 Mooreland Ct NE, Salem OR 97205-3890. Claimant no longer lived at that address, however; she had moved in October 2014. Because claimant was not claiming unemployment benefits in December 2014, she had not contacted the Department to change her address.

(6) Sometime after December 2014, claimant learned about the overpayment decisions (decisions # 194220) that the Department had issued. Claimant was unaware of the decision concerning her work separation until a Department representative called her mother in December 2015. The Department was attempting to contact claimant to tell her that the Department was going to intercept her tax refunds to recover the benefits she had been overpaid. Once claimant learned about the Department

representative's call, she called the Department on December 24, 2015. On that date, a Department representative told her about the decision concerning her work separation, and claimant requested a hearing on that decision.

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

Untimely Hearing Request

ORS 657.269 provides that parties have 20 days to request a hearing on an administrative decision issued by the Department. ORS 657.875 allows that time period to be extended a "reasonable time," upon a showing of "good cause." OAR 471-040-0010(1) (February 10, 2012) defines "good cause" as a failure to act due to an excusable mistake or factors beyond a person's reasonable control. A "reasonable time" is defined as seven days from the date on which the circumstances that prevented a timely filing ended. OAR 471-040-0010(3). Good cause does not include a person's failure to receive a document due to the person's failure to notify the Department of an updated address while the person is claiming unemployment benefits or while the person knows, or reasonably should know, about an appeal pending with the Department or OAH. OAR 471-040-0010(1)(b)(A).

Claimant was not claiming benefits on the date that the Department issued the decision concluding that she voluntarily left work without good cause, and she had no appeal of any decision pending with either the Department or OAH. As a result, she reasonably believed it was unnecessary to inform the Department of her change of address. We conclude that claimant's failure to provide the Department with her updated address was an excusable mistake and constituted good cause for extending the period for requesting a hearing on the decision concerning her work separation. The record also shows that claimant filed her hearing request within seven days after she the circumstances that prevented her from timely filing her hearing request ended. Claimant testified that she contacted the Department the same day that the Department called her mother in December 2015; when the Department representative told her about the decision concerning her work separation, claimant immediately requested a hearing. 4/8/15 Hearing Transcript at 6-7. Because claimant has demonstrated good cause for filing her untimely hearing request, we will consider the merits of Hearing Decision 16-UI-57335.

Work Separation

Claimant asserted that the employer's owner discharged her after a contentious July 24, 2014 phone call in which the owner falsely accused claimant of taking \$60 from the cash register and of calling in an employee to work for her without obtaining authorization to do so. The employer, however, asserted that claimant quit during the July 24 phone call; the owner testified that during this phone call, claimant became angry about the owner's perceived intrusion into her personal affairs and told the owner he should give her job to somebody else.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). The employer's

owner did not dispute that during the July 24 phone call, he told claimant he was going to reprimand her in writing for her purported theft of \$60 and failure to obtain authorization to have another employee work for her. The owner's undisputed and expressed displeasure with claimant's conduct indicated that he no longer wanted claimant to continue working. We therefore conclude it is more likely than not that the employer discharged claimant.

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 owner discharged claimant because he believed that she had taken \$60 from the register, and that she called in another employee to work for her without first obtaining authorization to do so. Claimant denied that she took money from the employer, and asserted that she got permission from the employer's manager to have a coworker work in her place. The owner's understanding of what claimant supposedly did was based on a phone call he received from the manager on July 24. 4/8/16 Hearing Transcript at 15-16. Claimant's first-hand testimony about her actions on July 24 is entitled to greater weight than the hearsay testimony of the owner. We therefore conclude that the employer failed to meet its burden to demonstrate that claimant engaged in willful or wantonly negligent behavior by stealing money and failing to obtain permission to have another employee work in her place.

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-57355 is affirmed.

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

DATE of Service: June 2, 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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