

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0512

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 82339). Claimant filed a timely request for hearing. On May 2, 2016, ALJ Seideman conducted a hearing in which the employer failed to appear, and on May 3, 2016, issued Hearing Decision 16-UI-58739, concluding that the employer discharged claimant, but not for misconduct. On May 5, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT

In its written argument, the employer explained why its representative was unable to participate in the hearing and presented new information about claimant's work separation. EAB may consider new information if the party presenting the information demonstrates that circumstances beyond its reasonable control prevented the party from presenting the information at the hearing. OAR 471-041-0090 (October 29, 2006). In support of its request, the employer's representative stated: "I was out of state at a NAPA function in meetings at the time of the hearing. I had planned to try to call in but was not able to at that particular time." Employer's Written Argument at 4. The employer provided no specific explanation why she was unable to call in for the hearing, and also provided no explanation why she did not request a postponement of the hearing. Without these details, we have no basis for concluding that circumstances beyond the employer's reasonable control prevented it from participating in the hearing. The employer's request to present new information is therefore denied.

Even if we had considered the employer's information about the two incidents that resulted in claimant's discharge, it would not have changed the outcome of this decision. The employer noted that on February 16, 2016, "claimant accidentally delivered a part to the wrong store," and on February 17, 2016, claimant "completely forgot" a delivery he was scheduled to make. These statements show that claimant's conduct on February 16 and 17 was not the result of his willful or wantonly negligent behavior, *i.e.*, he did not deliberately and knowingly engage in behavior that violated the employer's

expectations. The employer's evidence therefore supports EAB's conclusion that claimant was not discharged for misconduct.

FINDINGS OF FACT: (1) NAPA Auto Parts employed claimant as a part time delivery driver from January 9, 2015 until February 18, 2016.

(2) Some time prior to February 2016, the employer orally warned claimant about mistakes he was making in his deliveries. After this warning, claimant attempted to be more careful in his work.

(3) On February 16, 2016, claimant accidentally delivered the wrong part to a customer.

(4) On February 17, 2016, when claimant returned to the employer's store at the end of his work day, he realized he had forgotten to make a delivery he had been scheduled to make. Claimant offered to make the delivery, but the employer's manager told him not to do so because the customer was closed.

(5) On February 18, 2016, the employer discharged claimant for his actions on February 16 and 17, 2016.

CONCLUSION AND REASONS: We agree 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant because he delivered the wrong part to a customer on February 16, 2016 and failed to make a delivery on February 17, 2016. The record shows that claimant's delivery of the wrong part to a customer was an accident, and the delivery he missed occurred because claimant forgot about it. Claimant's actions did not result from his conscious or knowing disregard of the employer's expectations. As a result, they did not constitute willful or wantonly negligent violations of the standards of behavior the employer expected of him and were not misconduct.

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

DECISION: Hearing Decision 16-UI-58739 is affirmed.

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

DATE of Service: June 6, 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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