

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0659

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On February 16 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 90509). The employer filed a timely request for hearing. On March 31, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 14, 2016 at 9:30 a.m. On April 14, 2016, ALJ Seideman convened a hearing, at which the employer failed to appear, and issued Hearing Decision 16-UI-57270, dismissing the employer's hearing request for failure to appear. On April 29, 2016, the employer filed a timely request to reopen. On May 19, 2016, ALJ Seideman conducted a hearing, and on May 20, 2016 issued Hearing Decision 16-UI-60009, denying the employer's request to reopen. On June 6, 2016, the employer filed an application for review of Hearing Decision 16-UI-60009 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The employer received the notice of hearing and planned to have the area supervisor participate in the 9:30 a.m. hearing on April 14, 2016. On approximately April 12, 2016, the employer learned that one of its store managers was leaving work on April 14th. The employer attempted to find someone to cover the store manager's shift that day. The area supervisor believed the employer had covered the shift.

(2) On April 14, 2016 at approximately 9:00 a.m., the area supervisor received a call from employees at the store manager's work site. The store was scheduled to open for business at 11:00 a.m., but workers needed to begin preparing the store for business at 9:00 a.m. and no one had arrived to unlock the store and cover the store manager's shift. The employees told the area supervisor that he had the only available key to the premises and they needed him to unlock the store so they could begin work.

(3) The area supervisor immediately drove to the work site and unlocked the store. The drive took approximately 20 minutes, so he arrived at the store at or shortly before the 9:30 a.m. hearing was scheduled to begin. The area supervisor then helped prepare the store to open for business. He did not call to participate in the hearing at 9:30 a.m., he did not ask someone else to participate in the hearing on his behalf, and he did not call OAH to ask that the hearing be postponed to allow the employer to participate.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer's request to reopen must be denied.

ORS 657.270(7)(a)(c) provides that an ALJ may dismiss a request for hearing if the requesting party fails to appear at the time of the hearing. ORS 657.270(5) provides that an ALJ may reopen a hearing if the party requesting reopening failed to appear at the hearing, the party files the request within 20 days after the ALJ issued a decision in the matter, and the party shows good cause for failing to appear. "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040 (February 10, 2012).

The employer failed to appear at the hearing because an unanticipated scheduling issue necessitated that the area supervisor who planned to attend the hearing open one of the employer's stores. Once there, the area supervisor opted to assist other employees to prepare the store for opening instead of participating in the hearing. The area supervisor made a choice about whether to attend the hearing; as such, it does not appear that a mistake of any sort caused the employer's failure to appear. Nor does it appear that factors beyond the employer's reasonable control caused the failure to appear. Rather, it appears the area supervisor knew of the hearing, planned to attend, and, despite the urgent need for him to unlock the employer's store, he had completed that activity at or before 9:30 a.m. On this record, it is more likely than not that it was within the employer's reasonable control to have the area supervisor attend the hearing as scheduled, arrange for another individual to attend the hearing, or, if he felt he was unable to participate in the hearing due to exigent circumstances, to contact OAH or direct someone to contact OAH to request that the hearing be postponed. Because it does not appear that an excusable mistake or factor beyond the employer's reasonable control caused the employer's failure to appear at the April 14th hearing, the employer has not established good cause to reopen the hearing.

DECISION: Hearing Decision 16-UI-60009 is affirmed.

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

DATE of Service: June 9, 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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