

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1086

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95659). Claimant filed a timely request for hearing. On July 13, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 28, 2016, at which claimant failed to appear. On August 1, 2016, ALJ Vincent issued Hearing Decision 16-UI-64780, dismissing claimant's request for hearing. On August 4, 2016, claimant filed a request to reopen the hearing. On September 7, 2016, ALJ Vincent conducted a hearing, and on September 12, 2016, issued Hearing Decision 16-UI-67310, allowing claimant's request to reopen and concluding that the employer discharged claimant, but not for misconduct. On September 20, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Calbee North America LLC employed claimant from July 24, 2015 until May 23, 2016 as a shift manager.

(2) The employer expected claimant to follow his superiors' directions to enforce the employer's policies, including disciplining employees as directed by the general manager. The employer also expected claimant to complete incident reports regarding incidents that occurred regarding his subordinate employees during his shift.

(3) On May 2, 2016, claimant failed to follow the general manager's instructions to discipline an employee who violated the employer's attendance policy. The employer gave claimant a written warning for the incident.

(4) On May 10, 2016, the day shift manager told the general manager that an employee had failed to pack the appropriate weight of product in the majority of her cases and had falsified the records she kept regarding the weights of the cases.

(5) On May 11, 2016, the general manager told claimant by email to check the weights of the cases and, “[i]f everything looks the same as the numbers that [the day shift manager] . . . got, we need to suspend [the employee] pending investigation.” Transcript at 26. Claimant’s investigation showed that the employee’s records correlated to different cases than those weighed by the day shift manager. Claimant weighed the cases he believed were the correct cases and the resulting weights showed that the employee probably did not pack the cases incorrectly or falsify her weight records. Claimant told the general manager he did not believe the employee falsified her records and did not suspend the employee.

(6) On May 17, 2016, claimant failed to complete all the questions on an incident report regarding an employee incident that occurred during his shift. Claimant did not receive training regarding how to complete the form.

(7) On May 19, 2016, an incident involving an employee occurred during claimant’s shift. Claimant did not complete the report that day because the incident occurred at the end of a 13-hour shift. Claimant normally worked 12-hour shifts. Claimant completed the report to the best of his ability the day after the incident. The general manager was dissatisfied that the claimant did not complete the report immediately or complete all the questions on the report form.

(8) On May 23, 2016, the employer discharged claimant for failing to follow the general manager’s instructions to discipline the employee on May 10, 2016, and for failing to complete incident reports in a thorough manner.

(9) Claimant or his spouse check their mail every day and share its contents with each other. Claimant did not receive the Notice of Hearing for the July 28, 2016 hearing.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant’s request to reopen should be allowed, and that the employer discharged claimant not for misconduct.

Request to Reopen. ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or from factors beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

Claimant filed his request to reopen on August 4, 2016, which was within twenty days of the date on which the ALJ issued Hearing Decision 16-UI-64780. Claimant failed to appear at the July 28, 2016 hearing because he did not receive the notice of hearing mailed to him by the OAH through the U.S. Postal Service. Although documents sent through the U.S. Postal service are presumed to have been received by the addressee, the presumption is subject to evidence to the contrary. OAR 137-003-520(10) (January 31, 2012). Here, claimant testified that he or his spouse checked their mail daily and looked at it, and did not receive the notice. Transcript at 4. Therefore, the record shows it is more likely than not that claimant’s failure to receive notice of the July 28, 2016 hearing was caused by circumstances outside his reasonable control. Thus, good cause has been shown to reopen the hearing.

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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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, in part, for failing to discipline an employee for allegedly improperly filling cases and falsifying the weight records. The employer had a right to expect claimant to refrain from being insubordinate and follow the general manager's reasonable instructions regarding disciplining employees who violated the employer's policies. Claimant understood that expectation from the May 2, 2016 warning he received and as a matter of common sense. However, the record fails to show that claimant refused to follow the general manager's instructions as claimant understood them. Claimant asserted at hearing that the general manager's email directed him to discipline the employee if claimant's own investigation showed that the employee packed the cases incorrectly or falsified the weight records, and that claimant did not discipline her because his own investigation showed the employee probably did not pack the cases incorrectly or falsify the weight records. Transcript at 22-23. The plain language of the email supports claimant's assertion and the record does not show the general manager gave claimant different instructions. Thus, to the extent claimant failed to follow the general manager's intended instructions, the employer failed to establish claimant violated its expectation willfully or with wanton negligence.

The employer also discharged claimant, in part, for failing to complete two incident reports in the manner the employer expected. The record does not show that claimant knew or should have known from prior training, experience or warnings how to complete the reports in a satisfactory manner or that the employer expected him to continue working after a 13-hour shift to complete an incident report rather than complete the report the next day. Nor do we find the employer's expectation that claimant complete the report the day of the incident so obvious that claimant knew or should have known the expectation as a matter of common sense. Thus, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence by failing to answer all the questions on the reports or complete the reports on the day the incidents occurred. To the extent claimant erred in the belief that he was permitted to complete an incident report the day after it occurred, he erred in good faith. Good faith errors are not misconduct.

Therefore, we conclude that the employer discharged claimant not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-67310 is affirmed.

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

DATE of Service: October 18, 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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