EO: 200
BYE: 201735

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0179

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114946). Claimant filed a timely request for hearing. On December 8, 2016, the Office of Administrative Hearings (OAH) mailed the parties notice of a hearing scheduled for December 12, 2016 at 10:45 a.m. On December 12, 2016, ALJ Triana conducted a hearing, at which the employer failed to appear, and on December 13, 2016 issued Hearing Decision 16-UI-72792, concluding claimant's discharge was not for misconduct. On January 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On January 11, 2017, EAB issued Appeals Board Decision 2017-EAB-0027, reversing Hearing Decision 16-UI-72792 and remanding the matter to OAH for additional proceedings. On January 12, 2017, OAH mailed notice of a hearing scheduled for January 27, 2017. On January 27, 2017, ALJ Triana conducted a hearing, at which the employer again failed to appear, and issued Hearing Decision 17-UI-75595, again concluding that claimant's discharge was not for misconduct. On February 8, 2017, the employer filed an application for review of Hearing Decision 17-UI-75595 with EAB.

With the employer's application for review, the employer again requested a new hearing, arguing that it did not participate in the January 27th hearing because it again did not receive notice of the hearing until after the hearing was over. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Although we previously reversed and remanded this matter for another hearing based upon the employer's claim that it had not received notice of the hearing, the record related to the January 27th hearing significantly differs from previous circumstances. Before, we found that OAH had not provided the legally required amount of notice that the hearing was going to be held, thereby depriving the employer of a reasonable opportunity to participate in the hearing. In this case, however, the record shows that OAH mailed notice of the hearing to the employer's representative fifteen days prior to the date of the scheduled hearing, exceeding the required amount of notice by more than a week; the U.S. Postal Service typically delivers

first class mail such as the notice of hearing within 1-3 days of the date it was mailed.[1] The employer did not provide any circumstantial evidence suggesting a reason why mail sent from Salem, Oregon to Saint Louis, Missouri took at least five times longer to arrive than is customary for that type of mail, nor provide evidence that the employer experienced any other kind of mail delay, nor did the employer make any attempt to show that any such delay was not attributable to its own mail receipt processes. Absent a basis for concluding the employer's delayed receipt of the notice of hearing was due to factors or circumstances beyond the employer's reasonable control, the employer's request is denied.

FINDINGS OF FACT: (1) Centimark Corp. employed claimant as a roofer from January 6, 2014 to August 29, 2016.

(2) The employer expected claimant to report to work on time, and claimant understood the expectation. Claimant was repeatedly late to work during his first year of employment and the employer issued him warnings for tardiness. The last warning claimant received for tardiness was issued in December 2015.

(3) On August 25, 2016, claimant had to work late performing hard physical labor. He knew he was expected to return to work on time the following morning. Because he was overly tired from working late on August 25, 2016 he inadvertently overslept and reported to work 40 minutes late.

(4) On August 29, 2016, claimant reported to work on time for his scheduled shift. Approximately one hour later, the employer's superintendent discharged claimant. Claimant asked the superintendent why; the superintendent did not specify a reason for the discharge, and told him "things are the way they are." Audio recording at ~ 11:00.

(5) Claimant thought the discharge must have been for some sort of a safety violation and reported that reason to the Department when he filed his claim for benefits and reported his work separation. When claimant received notice of decision # 114946 he learned for the first time that he had been discharged for an alleged instance of tardiness on August 29, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ found as fact that the employer discharged claimant for unknown reasons. Hearing Decision 17-UI-75595 at 2. We disagree. Although the employer did not appear at the hearing to explain why it chose to discharge claimant, the record as it was developed at hearing shows it is likely that claimant's

[1] *See* https://www.usps.com/ship/first-class-mail.htm

discharge was for an instance of tardiness alleged to have occurred on August 29, 2016. In the absence of another reason, it appears that was the proximate cause of claimant's discharge.

The employer had the right to expect claimant to report to work on time; claimant had what appears to have been a significant history of tardiness and some warnings, and therefore understood the employer's expectation. The allegation is that claimant reported to work late on August 29, 2016; claimant testified, however, that he reported to work on time that day. Audio recording at ~ 12:00. In the absence of evidence to the contrary, we conclude that claimant was not tardy on the date alleged and his discharge for that tardiness was, therefore, not for misconduct. In the alternative, claimant admitted he was tardy to work just three days earlier; even if we considered that incident the "final incident" that caused his discharge, the record shows that his tardiness was inadvertent and due to being overtired rather than the result of willful or wantonly negligent conduct attributable to him as misconduct. Claimant's discharge was, therefore, not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-75595 is affirmed.

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

DATE of Service: <u>February 24, 2017</u>

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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