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

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0360

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 150232). The employer filed a timely request for hearing. On March 20 and 22, 2017, ALJ Seideman conducted a hearing, and on March 23, 2017 issued Hearing Decision 17-UI-79499, affirming the Department's decision. On March 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

On March 24, 2017, the employer's representative sent EAB a letter requesting that EAB reopen the hearing because the employer did not receive timely notice of the hearing. ORS 657.270(5) provides that a party whose hearing request was dismissed because the party failed to appear at the hearing may request reopening of the hearing by filing a request with the Office of Administrative Hearing and meeting certain other requirements. The statutes provide no right to request reopening to a party that appeared at and participated in the hearing, as the employer did here. EAB therefore has no statutory authority to rule on the employer's request to reopen.

To the extent that the employer's request to reopen may be construed as a request to present new information, that request is also denied. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not offered into evidence at the hearing if the party presenting the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. If the employer's representative is asserting that lack of timely notice of the hearing prevented the representative from adequately preparing for the hearing, the representative has provided no details about how a failure to receive timely notice of the hearing negatively affected the representative's ability to obtain relevant evidence and prepare for the hearing. In addition, the representative does not explain what evidence or argument the employer would have offered at the hearing, had the representative received more timely notice of the hearing. Without this information, we have no reason to conclude that circumstances beyond the employer's control prevented its representative from offering relevant evidence at the hearing and therefore deny any request to present new information.

FINDINGS OF FACT: (1) Walmart Associates, Inc. employed claimant from April 12, 2014 until December 30, 2016 as a cashier.

(2) The employer expected employees to refrain from taking money left at a register, and to turn the money in to a supervisor. Despite the employer's policy to turn all money in to a supervisor, customers sometimes left small amounts of change behind that employees put in a small basket or bowl at the registers for other customers to use. Cashiers would sometimes use the small change to help customers purchase items.

(3) On December 13, 2016, claimant breathed in a chemical at work that triggered an asthma attack. Claimant needed to drink hot coffee to relax her breathing before she used her inhaler to treat the asthma. There was no hot coffee available at claimant's workplace at that time. Claimant took $1.00 from the change basket located at one of the self-serve registers for use in purchasing a cup of hot coffee. Claimant told the cashier responsible for the register that she would reimburse the $1.00 to the change basket as soon as possible. Claimant went to a nearby fast food restaurant where she purchased and drank a cup of coffee and used her inhaler. Claimant continued to feel ill throughout the day and forgot to return the $1.00 to the change basket that day.

(4) Later on December 13, 2016, the cashier for the self-serve register told a supervisor claimant had taken $1.00 from the basket at the register and not reimbursed the money. Claimant did not reimburse the $1.00 until after her manager interviewed her about having taken the money on December 13.

(5) Claimant had not received other warnings regarding money-handling issues.

CONCLUSIONS AND REASONS: We agree with the ALJ 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 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. 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 for using small change left at a cash register to purchase a cup of coffee to treat an asthma attack. The employer had a right to expect claimant to turn in all change left by customers to a supervisor and to refrain from using it for personal purchases. However, the record fails to show that that claimant knew or should have known through prior training, experience or warnings that using $1.00 from leftover small change to purchase coffee to treat an emergency asthma attack probably violated the employer's expectations. To the extent claimant erred in the belief that using the

small change to purchase coffee to treat her asthma attack was permissible, she erred in good faith. Good faith errors are not misconduct. Moreover, to the extent that the employer discharged claimant because she failed to reimburse the $1.00 she borrowed, the employer did not show that claimant consciously disregarded the employer's interest in doing so. When claimant took the $1.00, claimant told the cashier at the register that she would repay the money, but forgot to pay back the money until the employer questioned her about it. Claimant's explanation for doing so, that she forgot because she was still sick due to her asthma when she left work that day, was plausible and shows her lapse was unintentional and due to illness and not to a willful or wantonly negligent disregard for the employer's expectations.

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

DECISION: Hearing Decision 17-UI-79499 is affirmed.

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

DATE of Service: April 12, 2017

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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