

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0545

Affirmed
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On November 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 63843). On December 12, 2016, decision # 63843 became final without claimant having filed a timely request for hearing. On January 9, 2017, claimant filed a late request for hearing. On April 18, 2017, ALJ Lohr conducted a hearing, and on April 24, 2017 issued Hearing Decision 17-UI-81638, allowing claimant's late request for hearing and concluding claimant voluntarily left work with good cause. On May 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB marked administrative decision # 63843 and the January 9, 2017 request for hearing as Exhibits 1 and 2, respectively. The ALJ identified and admitted both exhibits at hearing, but did not mark them. Audio Record at 7:45 to 8:07; Transcript at 4.

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant from May 19, 2016 to September 28, 2016.

(2) The employer expected claimant to notify a lead clerk or manager in advance of her scheduled shift if she knew she would be unable to report to work due to illness. Claimant understood the employer's expectation.

(3) Claimant last worked for the employer on September 26, 2016. Claimant was scheduled to work on September 27 and 28, 2016. Four hours before her shift on September 27, and again on September 28, claimant contacted the lead clerk and reported that she was unable to work her shift that day due to illness.

(4) On September 29, 2016, claimant went to work to check the work schedule. While at the store, claimant's supervisor told claimant that she was not on the schedule because the general manager was

“cutting hours.” Transcript at 23. Claimant’s supervisor told claimant she would notify claimant if the employer needed her to report to work. On October 3, 2016, claimant returned to work to check the schedule, but the employer had not put her on the schedule. Claimant’s supervisor told claimant again that the manager was reducing employee hours and that she would contact claimant if the employer put claimant back on the schedule.

(5) Claimant was willing to continue working for the employer after September 28, 2017, but the employer did not schedule claimant to work again. On October 8, 2016, claimant filed a claim for unemployment insurance benefits.

(6) On November 22, 2016, the Department mailed notice of decision # 63843 to claimant at her address of record. The mailboxes for claimant’s apartment complex were located on the street. Claimant experienced problems with her mail during November and December 2016 because people would block her mailbox for three or four days at a time by parking their cars in front of it. The mail carrier told claimant the cars impeded the carrier’s access to the mailboxes. Claimant tried to resolve the mail problem through her apartment manager and the postal service. Claimant did not receive decision # 63843.

(7) No earlier than January 2, 2017, claimant received notice of another Department administrative decision, issued on December 22, 2017, that referred to claimant’s failure to request a hearing for decision # 63843. Claimant realized at that time that she had not received decision # 63843.

(8) On January 9, 2017, claimant used the form sent to her with the December 22, 2016 decision to request a hearing regarding decision # 63843 and the December 22, 2016 decision.

CONCLUSIONS AND REASONS: Claimant has shown good cause to extend the filing deadline in this matter a reasonable time and her late request for hearing is allowed. The employer discharged claimant, but not for misconduct.

Late Request for Hearing. ORS 657.269 provides that the Department’s administrative decisions become final unless a party files a request for hearing within 20 days after the date the decision is mailed. The deadline to request a hearing on decision # 63843 was December 12, 2017. Because claimant filed her request on January 9, 2017, it was late. However, ORS 657.875 provides that the 20-day deadline may be extended a “reasonable time” upon a showing of “good cause.” OAR 471-040-0010 (February 10, 2012) provides that “good cause” includes factors beyond an applicant’s reasonable control or an excusable mistake, and defines “reasonable time” as seven days after those factors ceased to exist. OAR 471-040-0005(1) (July 14, 2011) provides that an individual may use a form provided by the Department to request a hearing, but that use of the form is not required “provided the party specifically requests a hearing or otherwise expresses a present intent to appeal.”

Claimant experienced problems receiving her mail during November and December 2016 due to cars impeding the mail carrier’s access to claimant’s mailbox. Because claimant’s efforts to address the problem were unsuccessful, it is plausible that claimant may not have received all her mail, and that some mail was delayed. Claimant’s circumstantial evidence of non-receipt regarding decision # 63843 was based on personal knowledge, was not implausible, and shows that claimant was diligent in trying to ensure receipt of her mail. We conclude that the evidence is sufficient to show that, more likely than

not, claimant never received decision # 63843. Therefore, her failure to file a timely request for hearing in the matter was the result of factors beyond her reasonable control. Claimant has shown good cause to extend the deadline to request a hearing for a “reasonable time.” Claimant learned of decision # 63843 no earlier than January 2, 2017, and filed her late request for hearing on January 9, 2017, which was within seven days and was thus within a “reasonable time.” We agree with the ALJ that claimant’s late request for hearing is allowed, and that claimant was entitled to a hearing on the merits of decision # 63843.

Work Separation. We next address that nature of claimant’s work separation from the employer. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

At hearing, claimant argued that she was discharged, asserting that she was willing to continue working for the employer for an additional period of time, but the employer did not allow her to do, as evidenced by the fact that it removed her from the work schedule after September 28, 2016 and never again scheduled her to work. Transcript at 23-25. Claimant went to her workplace and asked about her work schedule twice after September 28, but her supervisor told her the general manager was reducing hours and that she would contact claimant if they had work for her. Although the employer’s witness testified that claimant did not contact the employer on September 27 and 28, and that the store was not reducing hours or taking employees completely off the schedule at that time, claimant’s firsthand testimony outweighs the hearsay testimony from the employer’s witness because the employer’s witness was not an employee and had no firsthand knowledge of the employer’s practices during the relevant time period, and the supervisor with whom claimant spoke on September 29 and October 3 did not testify. Transcript at 28-29, 31-32. Thus, the record shows claimant was willing to continue working for the employer for an additional period of time, and the employer prevented claimant from doing so by not scheduling claimant for work after September 28, 2017. The work separation therefore is a discharge, and not a quit.

Discharge. 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 carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer’s witness at hearing provided hearsay testimony that claimant quit work when she failed to contact the employer the last two days she was scheduled to work, or thereafter. However, we afford more weight to claimant’s firsthand testimony, based on the personal records she kept on her calendar in September and October 2016, that she informed the lead cashier she was sick and unable to work on September 27 and 28, 2016, and was told on September 29 and October 3 that she had been taken off the schedule until further notice. Transcript at 36. Assuming claimant was discharged due to lack of work,

the basis for that discharge would not have been for any misconduct attributable to claimant. Aside from claimant's testimony there is no other discernible reason in the record for claimant's discharge. Accordingly, the employer did not meet its burden to show that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not do so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-81638 is affirmed.

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

DATE of Service: June 1, 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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