

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0632

Affirmed
Request to Reopen Denied
No Disqualification

PROCEDURAL HISTORY: On February 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130300). Claimant filed a timely request for hearing. On March 14, 2017, the Office of Administrative Hearings (OAH) mailed notice to the parties of a hearing scheduled for March 27, 2017. On March 27, 2017, ALJ Snyder conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 17-UI-79713, concluding the employer discharged claimant, but not for misconduct. On April 10, 2017, the employer filed a timely request to reopen the March 27th hearing. On April 20, 2017, OAH mailed notice to the parties of a hearing scheduled for May 5, 2017. On May 5, 2017, ALJ Snyder conducted a hearing, at which claimant failed to appear, and on May 8, 2017 issued Hearing Decision 17-UI-82876, denying the employer's request to reopen. On May 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB); we construe the employer's request to reopen as a valid application for review of the underlying matter.¹

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-79713 and 17-UI-82876. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0632 and 2017-EAB-0637).

FINDINGS OF FACT: (1) Asante Physician Partners employed claimant from April 6, 2015 to January 20, 2017.

(2) The employer had a policy that prohibited employees from eating at their desks. The policy stated that its purpose was to prevent contamination by pathogens; claimant did not work in an environment in which he came into contact with pathogens. Although claimant and his coworkers knew about and were told about the policy, they frequently lacked time to take lunch breaks away from their work stations and

¹ See OAR 471-041-0060(1) (applications for review may include when a party requests for "review of a specific hearing decision, or otherwise expresses an intent to appeal a specific hearing decision").

ate at their desks as a result. Based on common practice, claimant observed that the policy prohibiting employees from eating at their desks was not enforced at his work location and thought that eating at his desk would not result in discipline.

(3) On January 20, 2017, claimant ate at his desk. Based on that conduct and his history of other policy violations and discipline, the employer discharged him effective immediately.

(4) OAH mailed notice of the March 27th hearing to the employer's representative at its address of record. The representative notified the employer of the hearing. The employer notified the representative that none of the employer's witnesses could attend the hearing because they would all be out of the office during the spring break period. The representative knew that no one was going to attend the hearing, but because the case involved a claimant appeal the representative decided to wait to see what the outcome of the hearing was and request reopening if it was adverse to the employer's interests.

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

The employer failed to appear at the hearing because all of its witnesses were on vacation and therefore unavailable to participate. The employer nevertheless failed to establish that it was beyond its reasonable control to participate in the hearing because the employer chose not to contact OAH to request that the hearing be rescheduled even though the representative both knew when the hearing was and knew that no one would appear at the hearing on the employer's behalf. Although the employer's failure to either appear at the hearing or request postponement was certainly a mistake, at least in hindsight, that sort of a mistake is not considered "excusable" because it does not, for example, raise a due process issue or result from inadequate notice, reasonable reliance on another or the inability to follow directions despite substantial efforts to comply. The employer failed to show that its failure to appear was the result of factors beyond its reasonable control or an excusable mistake, and its request to reopen is therefore denied.

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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant had a history of some policy violations and discipline prior to January 20th, but it appears more likely than not that the employer would not have discharged claimant but for his decision to eat at his desk on January 20th. That incident is therefore the proximate cause of claimant's discharge, without

which the discharge would not have occurred; only if we determine that claimant's conduct on that occasion was willful or wantonly negligent would the other violations and discipline be relevant to the misconduct analysis.

The employer had a policy that prohibited employees from eating at their desks; however, the policy was intended to prevent an issue that was not prevalent at claimant's work location and it was not enforced. Claimant and his coworkers regularly ate at their desks without experiencing repercussions or being disciplined for it. Claimant therefore sincerely believed, and had a basis in fact for believing, that his conduct, while perhaps in violation of the employer's policy as it was written in the handbook, would be either tolerated or condoned by the employer. As such, claimant violated the employer's policy as the result of a good faith error. Good faith errors are not misconduct; therefore, claimant's discharge was not for misconduct. Having so concluded, we need not and do not address claimant's prior violations and discipline.

DECISION: Hearing Decision 17-UI-82876 is affirmed.

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

DATE of Service: June 14, 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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