

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0784

Modified
Motion to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71403). Claimant filed a timely request for hearing. On May 12, 2017, ALJ Sgroi conducted a hearing at which the employer failed to appear, and on May 15, 2017 issued Hearing Decision 17-UI-83416, concluding the employer discharged claimant, not for misconduct. On May 18, 2017, the employer filed a timely motion to reopen. On June 26, 2017, ALJ Sgroi conducted a hearing regarding the employer's motion to reopen and on the merits of decision # 71403. Claimant did not participate in the hearing. On June 28, 2017, ALJ Sgroi issued Hearing Decision 17-UI-86835 denying the employer's request to reopen. On July 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument and a video to EAB. The employer failed to certify that it provided a copy of its argument, including the video, to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Moreover, the video was not part of the hearing record, and the employer provided no explanation for why it did not offer the video at hearing. Thus, the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the video during the hearing as required by OAR 471-041-0090 (October 29, 2006). We therefore considered only information received into evidence at the May 12 and June 26, 2017 hearings when reaching this decision. See ORS 657.275(2).

FINDINGS OF FACT: (1) Stop N Go 3 employed claimant as a cashier from March 19, 2016 until October 30, 2016.

(2) The employer expected claimant to refrain from stealing its inventory. Claimant understood that expectation as a matter of common sense.

(3) The employer sold kratom powder in its store. Claimant's manager believed some of the employer's kratom inventory was missing, so she reviewed the employer's surveillance video from several days,

including October 20, 2016. The manager believed the October 20 video showed claimant taking kratom packets from the employer's stock room, taking them into another storage room, and coming out of the storage room without putting the kratom packets back in the stock room or in the kratom display for sale.

(4) On October 30, 2016, claimant was scheduled to work. Before his shift, claimant went to work to retrieve his paycheck. The owner was at the store. After the owner gave claimant his check, he discharged claimant. The owner discharged claimant for allegedly stealing kratom from the employer.

(5) The employer did not tell claimant why it discharged him or ask claimant about what the manager allegedly saw on the video. Claimant did not admit to stealing from the employer, and no criminal charges were filed against claimant for stealing from the employer.

CONCLUSIONS AND REASONS: The employer's request to reopen the hearing is allowed. The employer discharged claimant, but not for misconduct.

Request to Reopen. In Hearing Decision 17-UI-86835, the ALJ concluded that good cause did not exist to reopen the May 12, 2017 hearing pursuant to the employer's motion, that the merits of administrative decision # 71403 in Hearing Decision 17-UI-86835 would not be addressed, and Hearing Decision 17-UI-83416 would remain undisturbed.¹ The ALJ reached these conclusions, however, only after she conducted a hearing on June 26, 2017 on the merits of claimant's work separation. Audio Record at 29:56 to 43:14 (June 26, 2017). Thus, the ALJ did actually allow the employer's request to reopen, and the conclusion the ALJ reached in Hearing Decision 17-UI-86835, that good cause did not exist to reopen the May 12 hearing, is inconsistent with the record. EAB has repeatedly held that it is error to dismiss a request for hearing or a request to reopen a hearing after a hearing on the merits has been conducted. In such cases, EAB has concluded that the requirements of due process can only be met if EAB considers the merits of the administrative decision at issue. *See, e.g., Appeals Board Decision 10-AB-3722*, December 3, 2010; *Appeals Board Decision 2014-EAB-1157*, August 5, 2014. By conducting a hearing on the merits of the administrative decision, the ALJ has made the issue of whether the employer's motion to reopen the hearing moot, and we decline to address that issue further. Therefore, we confine our review to the issue of whether claimant should be disqualified from unemployment insurance benefits because the employer discharged him for misconduct.

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.

The employer reasonably expected claimant to refrain from taking its property. We presume claimant understood this expectation as a matter of common sense. The employer's manager presented evidence regarding alleged theft by claimant. Audio Record at 34:53 to 37:22 (June 26, 2017). At hearing, claimant denied having stolen anything from the employer, and he never admitted to, or was charged with, theft. Audio Record at 17:49 to 18:19 (May 12, 2017). We find no reasonable basis in the record

¹ Hearing Decision 17-UI-86835 at 2-4.

to conclude that any witness, including claimant, was not credible. Thus, we conclude that claimant's denial is at least equal to the employer's evidence of claimant's alleged theft. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233(1976). Because the evidence regarding claimant's alleged theft was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant stole anything from the employer on October 20, 2016.

In sum, the employer's request to reopen the hearing is allowed, and we conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-86835 is modified, as outlined above.

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

DATE of Service: July 27, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.