EO: 700
BYE: 201826

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-1040

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84705). Claimant filed a timely request for hearing. On August 3, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 17, 2017. On August 15, 2017, the employer requested that the hearing be postponed, and OAH denied the request. On August 17, 2017, ALJ M. Davis conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 17-UI-90603, concluding claimant's discharge was not for misconduct. On August 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a written argument in which it requested that the hearing be reopened. The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of its request, the employer argued that the employer requested on August 15th to postpone the hearing so the employer's key witness was available to participate in the hearing, but its request was denied. OAR 471-040-0021(2) (August 1, 2004) provides that a hearing may be postponed if "[t]he request is promptly made after the party becomes aware of the need for postponement" and "[t]he party has good cause, as stated in the request, for not attending the hearing at the time and date set." "Good cause" means that the circumstances causing the request are "beyond the reasonable control of the requesting party," and "[f]ailure to grant the postponement would result in undue hardship to the requesting party." OAR 471-040-0021(3). The employer's request for postponement was not promptly made. The employer did not establish when it learned that its key witness was going to be unavailable to participate, much less show that the request for postponement was made promptly thereafter, especially considering that the request was made 12 days after notice of the hearing was issued, and only 2 days prior to the hearing. Nor did the employer establish that one witness's unavailability made the employer unable to participate in the hearing or caused the employer undue hardship as far as presenting evidence.

Hearsay evidence is admissible in unemployment insurance hearings, so the inability of one witness to provide an account of events would not bar the employer from presenting the evidence through other witnesses or documentary evidence. OAH did not err in denying the employer's postponement request. The employer has not shown that factors or circumstances beyond its reasonable control prevented the employer from presenting all relevant and material information during the hearing; the employer's request to submit additional information is therefore denied.

FINDINGS OF FACT: (1) Charter Communications, LLC employed claimant as a maintenance technician from October 2007 to June 29, 2017.

(2) The employer required claimant to use safety gear, including using a harness when he was in an aerial lift and a hardhat when he was on a ladder. Claimant understood the employer's expectations.

(3) In March 2016, the employer issued claimant a warning for poor performance. In October 2016, claimant was on a ladder and wearing a hardhat that fell off his head. Claimant immediately retrieved the hat and put it back on before continuing work, but the employer issued claimant a written warning for being on a ladder without a hardhat. In December 2016, the employer issued claimant a final written warning for unprofessional behavior and using inappropriate and offensive language.

(4) On June 28, 2017, claimant was in a hurry and using an aerial lift, but failed to use the safety harness as required. On June 29, 2017, the employer discharged claimant for failing to wear the safety harness the previous day.

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. 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. 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).

There is no dispute in this case that claimant failed to use a safety harness while in an aerial lift, nor is there any dispute that his failure to use a harness violated the employer's safety policy. In order for claimant's failure to constitute misconduct and his work separation disqualify claimant from receiving unemployment insurance benefits, however, the employer must show that claimant's violation was either willful or wantonly negligent. Here, although claimant was negligent in failing to use his harness and no doubt failed to exercise due care, he acted as he did because he was distracted and in a hurry, and not with the intent to violate the employer's expectations or with conscious disregard for the

consequences of his conduct. Claimant's conduct was not, therefore, wantonly negligent, and his discharge was not for misconduct.

Even if we had determined that claimant's failure to use the harness was wantonly negligent, the outcome of this decision would remain the same because his conduct was excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Although the employer had several concerns about claimant's work performance and had issued him several warnings, the employer lacked sufficient detail about most incidents to establish that his conduct was willful or wantonly negligent, and, with respect to claimant's failure to wear a hardhat on one occasion, the record shows that it was merely accidental and he quickly rectified the situation. His conduct in the final incident would therefore have been no more than a single wantonly negligent exercise of poor judgment that did not exceed mere poor judgment, and would have been deemed excusable because an isolated instance of poor judgment is not considered misconduct.

For either of those reasons, claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-90603 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: <u>September 26, 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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