EO: 200
BYE: 201824

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-1070

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83316). Claimant filed a timely request for hearing. On August 10, 2017, the Office of Administrative Hearings (OAH) mailed the parties notice of a hearing on August 24, 2017. On August 24, 2017, the employer submitted to OAH a request to postpone the hearing. On August 24, 2017, ALJ Amesbury conducted a hearing, at which the employer failed to appear, and on August 30, 2017, issued Hearing Decision 17-UI-91554, concluding that the employer discharged claimant but not for misconduct. The ALJ acknowledged receipt of the employer's request for postponement, but did not rule on the request. On September 8, 2017, the employer 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 24, 2017 to postpone the hearing so the employer's witness could be available to participate in the hearing. The request for postponement states that the witness was out of town and "not made aware of the hearing due to there being changes made internally with the company." Request for Postponement. 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).

Although OAH did not rule on the employer's postponement at the time of the hearing, no prejudice resulted from the error because the request for postponement could not be allowed under OAR 471-040-0021(2). The employer's request for postponement was not promptly made. Although the employer's representative stated in the request for postponement that it had "just been informed" that the witness was unavailable, the employer presumably received notice of the hearing within a few days after OAH sent the notice on August 10, and the request for postponement does not state when the employer knew the witness would be unavailable or otherwise show that it's request was promptly made. 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. Because the postponement was not allowable, 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) Amerigas Propane, Inc. employed claimant as a district manager from January 2016 until June 6, 2017.

(2) The employer expected claimant to refrain from damaging its vehicles, having accidents while driving its vehicles, or driving its vehicles with cargo exceeding legal weight limits. Claimant knew or should have known these expectations as a matter of common sense.

(3) In May, 2017, claimant was using her manager's pickup truck, and learned that the employer needed to complete an emergency delivery of gas cylinders. Claimant's coworkers loaded the truck claimant was using with the cylinders so claimant could complete the delivery. While claimant was driving with the cylinders, she had to maneuver the truck to avoid a collision, and the motion caused the load of cylinders to shift and break the rear window of the pickup truck.

(4) Claimant reported the incident to the employer's area director and safety manager. Two weeks after the accident, the area safety manager called claimant, told her he was investigating the pickup truck accident, and asked her if she knew her truck was over the permissible weight limit when she drove it to deliver the cylinders. Claimant responded that she did not load the truck and did not know it was over the permissible weight.

(5) On June 6, 2017, the employer notified claimant that it was suspending her while it conducted an investigation, but did not tell claimant the subject matter of the investigation.

(6) On June 16, 2017, claimant met with the employer's area manager, who told claimant that the employer had decided to end her employment, and collected the employer's keys and other property in claimant's possession. The employer did not tell claimant why it discharged her.

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).

Claimant damaged the employer's truck while driving it, which likely violated the employer's expectation that she not damage its vehicles or have accidents with the vehicle. Based on the question the safety manager asked claimant about the truck's weight limit, claimant may have violated the employer's expectation that she not exceed allowable weight limits when transporting cylinders in the employer's vehicles. However, the record fails to show that claimant failed to exercise due care while operating the truck and avoiding a collision, or that she knew or should have known she was over the legally allowable weight limit for the truck. Moreover, there is no evidence that claimant was cited by law enforcement for a driving or maximum allowable weight violation in connection with the accident. Given the circumstances as developed on this record, claimant did not engage in willful or wantonly negligent misconduct with respect to the May 2017 truck accident. Nor is there evidence of other alleged misconduct by claimant. Accordingly, her discharge was not for misconduct and she is not disqualified from receiving benefits because of this work separation.

DECISION: Hearing Decision 17-UI-91554 is affirmed.

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

DATE of Service: <u>October 5, 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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