

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1185

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80347). Claimant filed a timely request for hearing. On September 12, 2017, ALJ Shoemake conducted a hearing at which the employer did not appear, and on September 19, 2017 issued Hearing Decision 17-UI-92816, concluding the employer discharged claimant, but not for misconduct. On October 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which its owner stated he did not participate in the hearing “due to work obligations,” which EAB construes as an implicit request to allow the employer another opportunity to present information on the employer’s behalf under OAR 471-041-0090(2) (October 29, 2006). OAR 471-041-0090(2) allows EAB to consider new information if the party offering the information shows that circumstances beyond the party’s reasonable control prevented the party from offering the information at the hearing. While the owner stated that at the time of the hearing he was “working in a crawl space, lost track of time and missed the hearing,” he failed to explain how that happened or show that it was caused by circumstances beyond his reasonable control. It is generally within a party’s reasonable control to keep track of the party’s schedule and, absent exigent circumstances, to prioritize obligations in a manner that allows the party to participate in an unemployment insurance hearing. Absent supporting details, there is no basis on which to conclude that the employer’s failure to appear at the hearing was the result of circumstances beyond its reasonable control. The employer’s implicit request to present new information is denied.

FINDINGS OF FACT: (1) T & T Plumbing and Drains employed claimant as a plumber from approximately April 2016 until July 17, 2017.

(2) Before July 17, 2017, the employer had never taken disciplinary action against claimant or issued any warnings to him.

(3) On July 17, 2017, claimant was scheduled to begin work on 8:00 a.m. That day, as the employer's protocol required, claimant called the customer he was scheduled to see at 8:00a.m., told the customer he was going to be late, and reported for work at 8:30 a.m. Also that day, the employer told claimant, "This [continuing to work for the employer] wasn't gonna work out." Audio Record at ~ 9:01. Claimant construed the employer's statement as discharging him. Claimant did not know why he was discharged.

(4) After July 17, 2017, claimant obtained information suggesting the employer discharged him due to his alleged falsification of his July 17, 2017 timecard by stating that he had started work at 8:00 a.m. that day. However, claimant had recorded 8:30 a.m. as his starting time on his timecard for July 17, 2017.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). 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).

Since the employer did not appear at the hearing, the only information about why the employer discharged claimant came from claimant. With respect to whether claimant falsified his timecard on July 17, 2017, which claimant understood was the basis for his discharge, claimant denied that he had done so. Because there is no other evidence in the record on this issue, the record is insufficient to establish that claimant falsified his time card and that by doing so he engaged in a willful or wantonly negligent violation of the employer's standards.

While claimant testified that he was late reporting for work on July 17, 2017, there is no evidence in the record that the employer discharged claimant for his tardiness. In addition, since the employer had issued no disciplinary warning to claimant before July 17, 2017, it appears that to the extent claimant's tardiness on July 17, 2017 might have been a willful or wantonly negligent violation of the employer's standards, it was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). First, claimant's behavior in violation of the employer's standards was a single or infrequent act. OAR 471-030-0038(1)(d)(A). Second, claimant's act of being 30 minutes late to work on a one day would appear to be a relatively insignificant event in the employment relationship and, absent evidence indicating otherwise, would appear not to be the type of behavior that would "exceed mere poor judgment" and cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C). Accordingly, to the extent the employer might have discharged claimant for tardiness on July 17, 2017, it did so for an isolated instance of poor judgment, which is not misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-92816 is affirmed.

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

DATE of Service: November 9, 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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