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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1243

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 90358). The employer filed a timely request for hearing. On July 13, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 27, 2017, at which the employer failed to appear. On July 27, 2017, ALJ Janzen issued Hearing Decision 17-UI-89096, dismissing the employer's hearing request for failure to appear. On August 8, 2017, the employer filed a timely request to reopen the hearing. On September 25, 2017, OAH mailed notice of a hearing scheduled for October 13, 2017. On October 13, 2017, ALJ Janzen conducted a hearing, and on October 17, 2017 issued Hearing Decision 17-UI-94724, allowing the employer's request to reopen and concluding that claimant voluntarily left work without good cause. On October 27, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Halsey Automotive Repair, Inc. employed claimant from approximately 2005 to June 10, 2017.

(2) When claimant began working for the employer he usually billed 50-70 hours per week. In approximately 2016 claimant's production at work began to decline. The owner believed that claimant took excessive breaks and intentionally worked less because he wanted to reduce his income; claimant felt he did not take excessive breaks, and had to use work time to help service write and train new technicians, or sometimes lacked work to do and "would just sit down" to wait.[1]

(3) The owner became dissatisfied with claimant's production levels and thought claimant was "[h]ardly ever working inside the shop."[2] The owner talked to claimant about performance "multiple times."[3]

[1] Transcript at 24.
[2] Transcript at 15.
[3] Transcript at 20.

(4) On June 9, 2017, the owner decided he would no longer pay claimant for full time work and benefits if claimant did not bill for full time hours. The employer's owner initiated a text message exchange that included, in pertinent part, "If you aren't making 36 hours you are not considered full-time. All benefits will be dropped. No more games. I will be there tomorrow if you want to pick up your toolbox." Claimant responded, "I will consider this a notice of termination." The owner replied, "Okay. I will be there at 11:00 a.m. tomorrow. Bring your truck. Take all of your stuff."[4]

(5) The owner did not tell claimant he was fired and considered him to have quit his job.[5] Claimant did not tell the owner that he quit and believed the employer was discharging him. On June 10, 2017, claimant reported to the workplace to collect his personal belongings.

(6) OAH mailed notice of the July 27th hearing to the employer at its address of record but the employer did not receive it. The employer shared the mailing address with another business, and although the U.S. Postal Service delivered the mail to claimant's office and laid it on the counter, "whoever grabs the mail first gets it," then "they go through it and they pass it out."[6] If the other business picked up the mail first the owner had "no control over it except for getting what they give me," and instructed employees to try to get to newly delivered mail before the other business' owner's daughter took it upstairs to their office, "goes through it and hopefully brings me back mine."[7] The employer learned of the hearing in this matter when the owner received the hearing decision dismissing his request for hearing, and timely filed a request to reopen.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that the employer did not establish good cause to reopen the hearing. We also conclude that even if the employer had, the record establishes that claimant's work separation was not disqualifying.

ORS 657.270(5) provides that any party who failed to appear at the hearing may file a request to reopen the hearing if the requesting party files the request within 20 days after the ALJ's written decision is issued and shows good cause for failing to appear at the hearing. OAR 471-040-0040 defines "good cause" as an excusable mistake or factors beyond an applicant's reasonable control.

The ALJ concluded that the employer had good cause to reopen the hearing in this case because "it did not receive the notice of hearing" because "[t]he employer believed it failed to receive the notice of hearing because the business that shared its address failed to provide it to the employer," which amounted to "factors beyond its reasonable control."[8] We disagree with the ALJ's conclusion.

Although it appears the employer failed to receive notice of the July 27th hearing, the employer's failure to receive it under the circumstances described do not amount to factors beyond its reasonable control or an excusable mistake. The owner knew that mail delivered to his address of record risked being collected by the other business and not received or not timely received by him, as shown by instructions

[4] Transcript at 29-30. The record shows that the owner dictated the messages to his son, who typed the text messages and sent them to claimant. Transcript at 35. Although he did not personally send the messages, the owner dictated the content of the messages.
[5] Transcript at 16.
[6] Transcript at 5.
[7] Transcript at 7.
[8] Hearing Decision 17-UI-94724 at 3.

to staff to try to collect the mail before the other business collected it, and his statement that when the other business collected the mail first they would "hopefully" bring his mail back to him. Because the owner knew about the problems he had receiving his mail, and did not take reasonable steps to ensure that business mail directed to him reached him when delivered, for example, by making arrangements with the other business to ensure he sorted through the mail first, obtaining a post office box, or having the mail delivered to his home address or another address over which he had control, we cannot conclude that the employer's failure to receive notice of the hearing, and, consequently, the failure to appear at the hearing, was due to factors beyond the employer's reasonable control. Likewise, the employer's failure to appear at the July 27th hearing cannot be attributed to an excusable mistake. Although the employer's failure to receive notice of the hearing and appear at the hearing were arguably caused by a mistake with respect to the employer's receipt of its mail, the mistake was not excusable within the meaning of OAR 471-040-0040 because it did not, for example, raise a due process issue or result from inadequate notice, reasonable reliance on another or the inability to follow direction despite substantial efforts to comply. The employer therefore has not shown good cause to reopen the hearing, and the employer's request to reopen must be denied.

We note that even if we had allowed the employer's request to reopen the hearing, the outcome of this case would nevertheless have been the same because we disagree with the ALJ that claimant's work separation was disqualifying. The ALJ concluded that the work separation was a voluntary leaving because, "[w]hile neither party necessarily wanted the work separation [*sic*] to end, the parties' conduct established that they mutually agreed to the work separation."[9] We disagree. The employer precipitated the possibility of a work separation by sending claimant a text messaged ultimatum about working certain hours and that, "I will be there tomorrow if you want to pick up your toolbox." Had claimant merely said that he would pick up his tools, the facts might have suggested that the work separation was a voluntary leaving or that claimant agreed about the separation, as merely picking up his tools in response to the ultimatum would have clearly expressed that he was making a choice to stop working for the employer. In this case, however, claimant responded to the employer's ultimatum by stating that he considered the employer's text message "a notice of termination," and the employer replied, "Okay." In other words, when claimant sought to clarify whether or not the owner was intending to terminate his employment, it was incumbent upon the owner to respond; the employer in this case chose to respond "Okay," thus confirming that the text message was, in fact, a termination. The only reasonable interpretation an employee could make based upon that response was that regardless whether he wanted to continue working for the employer, the employer would no longer allow him to do so.[10] The work separation was, therefore, a discharge, not a voluntary leaving.

The owner had concerns about claimant's productivity, thought he was taking excessive breaks and intentionally performing less work than he should, and talked to him about his performance multiple

[9] Hearing Decision 17-UI-94724 at 4. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

[10] *See accord Krahn v. Employment Dep't.*, 244 Or. App. 643, 260 P.3d 778 (2011) (claimant told the supervisor she had concerns about her safety in the workplace, and the supervisor responded "this job isn't for everyone"; a reasonable person in claimant's position would have had no reason to believe that the employer was willing to consider her concerns); *Early v. Employment Dep't.*, 274 Or. App. 321, 360 P.3d 725 (2015) (claimant told the employer why she was quitting and the employer offered her no alternatives, "implicitly suggesting that there was none," leaving claimant with no reasonable alternative but to leave work).

times; under certain circumstances, such behavior might constitute disqualifying misconduct.[11] While claimant might have been aware of the owner's concerns in this case, however, he also testified that he was unable to perform more because he was training technicians, helping service write, and had to spend too much time waiting for work. The evidence as to whether claimant's decreased productivity was the result of his excessive breaks and intentional unproductive behavior, or the result of claimant's inability to perform more work due to his other duties and lack of work, is at best equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has not proven that the discharge was for misconduct, and claimant may not be disqualified from receiving unemployment insurance benefits because of this work separation.

In sum, we disagree with the ALJ that the employer had good cause to reopen the hearing. The employer's request for hearing is, therefore, denied, and Hearing Decision 17-UI-89096 and decision # 90358 remain undisturbed. Even if we had allowed the employer's request to reopen, however, we would conclude that the employer discharged claimant, not for misconduct, and, therefore, that his work separation was not disqualifying.

DECISION: Hearing Decision 17-UI-94724 is set aside, as outlined above.

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

DATE of Service: <u>November 21, 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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[11] 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) 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).