

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0468

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On January 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74653). The employer filed a timely request for hearing. On February 24, 2014, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for March 11, 2014. On March 11, 2014, ALJ Kirkwood conducted a hearing at which claimant failed to appear, and on March 14, 2014 issued Hearing Decision 14-UI-12256, concluding the employer discharged claimant for misconduct. On March 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. In his argument, claimant asked EAB to reopen the March 11, 2014 hearing so that claimant can present new information. Claimant's request is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstance beyond its reasonable control from presenting the information at the hearing. In his request, claimant admitted receiving the February 24, 2014 notice of hearing in the mail, but asserted that his wife misplaced it, causing him to miss the hearing. However, the handling of claimant's mail in his household was within claimant's reasonable control. Claimant's request for EAB to consider new information under OAR 471-041-0090 therefore is denied. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Knife River employed claimant as a heavy haul truck driver from August 21, 2007 to January 6, 2014.

(2) The employer expected its truck drivers to drive at or below the maximum speed limit, and refrain from causing accidents. Claimant understood those expectations.

(3) On December 17, 2013, claimant was hauling a heavy load on a portion of a freeway on which he had hauled heavy loads many times. Claimant knew the maximum speed limit for trucks on Oregon freeways was 55 miles per hour. Claimant drove between 55 and 60 miles per hour for approximately three minutes. He then immediately drove at or above 60 miles per hour for approximately one minute. Claimant rounded a curve at approximately 60.5 miles per hour, which caused his trailer and heavy load to roll to the side, crashing into the freeway's concrete divider, and pushing the divider into the opposite lanes.

(4) The employer discharged claimant for causing the accident on December 17, 2013 by exceeding the maximum speed limit.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for misconduct.

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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect its truck drivers to drive within the speed limit, and refrain from causing accidents. On December 17, 2013, claimant exceeded the speed limit for approximately four continuous minutes, including one minute at or above five miles per hour over the speed limit. We find it unlikely that claimant was unaware he was exceeding the speed limit for that that length of time, and by over five miles per hour. We therefore find that claimant was conscious of that conduct. Given claimant's experience hauling heavy loads over that portion of the freeway, he knew or should have known that rounding the curve at approximately 60 miles per hours would probably cause his trailer and heavy load to roll to the side. Claimant therefore knew or should have known that doing so would probably result in a violation of the employer's expectation that he refrain from causing accidents. Claimant's conscious decision to round the curve at approximately 60 miles per hour demonstrated indifference to the consequences of his actions, and therefore was wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. In exceeding the maximum speed limit, claimant violated the law. Acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Nor can claimant's conduct be excused as a good faith error. Claimant understood through training that he was expected to drive at or below the maximum speed limit. We infer that he understood as a matter of common sense that he was expected to refrain from causing accidents. Claimant's conduct therefore was not the result of an error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-12256 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: April 10, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.