

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0472

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124745). Claimant filed a timely request for hearing. On February 13, 2014, ALJ Murdock conducted a hearing, and on March 7, 2014, issued Hearing Decision 14-UI-11867, affirming the Department's decision. On March 26, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Professional Transportation Inc. employed claimant as a long haul driver from March 20, 2013 to August 26, 2013.

(2) The employer's drivers transported railroad crews to various destinations in Oregon and Washington using the employer's vehicles. Each day they were assigned to work, drivers called the dispatch unit to determine the order in which they would be called. Drivers were not on duty or paid for their time until dispatched, after which they were expected to obtain sufficient water and ice, supplied by the railroad at the railroad yard where the employer's vehicles were kept, for the crews they were transporting. Drivers fueled and cleaned the vehicle they had been driving at the end of their trips so the vehicles would be ready for the next driver and trip.

(3) The employer expected drivers to refrain from using its vehicles for non-business reasons which included waiting in the vehicles until being dispatched for a trip and on duty. The employer's

expectations were contained in its driver agreements and written rules of conduct which claimant acknowledged at hire. Claimant was aware of the employer's expectations.

(4) During the period of claimant's employment, he was homeless and his personal vehicle was undergoing repairs. When the employer found claimant sleeping in one of its vehicles, it gave him one day to move his belongings to a homeless shelter and verbally warned him that using the employer's vehicle for personal reasons including sleeping violated its policy. Shortly thereafter, it again discovered that claimant had been sleeping in one of its vehicles while waiting to be dispatched for a trip. The employer warned claimant in writing that his conduct violated its vehicle use policy.

(5) On August 25, 2013, the employer's manager was in the area where the employer kept its vehicles and saw claimant arrive. He determined that claimant was fifth on its call list which typically meant that it would be four to eight hours before claimant might be dispatched for a trip. Shortly thereafter, he observed claimant driving one of the employer's vehicles and apparently headed off the lot. He confronted claimant and directed him to return the vehicle. He did not believe claimant's explanation that he was performing pre-trip duties, and on August 26, 2013, the employer discharged claimant for unauthorized use of its vehicle on August 25, 2013.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to use its vehicles only for business purposes because claimant acknowledged the employer's expectations at hire and had been warned for violating them twice prior to August 25. Claimant violated the employer's expectation on August 25 when he drove the employer's vehicle during off duty hours before he was dispatched by the employer. Claimant's explanation to the manager that he was performing pre-trip duties was implausible given that he was off-duty, fifth on the dispatch list and acknowledged at hearing that the vehicle in question had a full tank of gas, and appeared to be clean. In addition, claimant knew the vehicle might be used by another driver. Audio Record ~ 16:00 to 16:30 and 30:30 to 33:00. Moreover, claimant asserted that he was homeless and lived in his vehicle which was undergoing repairs and unavailable at the time and had "nowhere else to go." Audio Record ~ 12:00 to 14:00. More likely than not, claimant was conscious of the fact that he was using the employer's vehicle without authorization, was indifferent to the consequences of his conduct and was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered "isolated," it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's prior conduct in sleeping in the employer's vehicle while waiting to be dispatched after being warned against such conduct and directed to stay at a homeless shelter also demonstrated indifference to the employer's expectations when he knew or should have known such conduct would violate them. Claimant's conduct was not isolated. Claimant also failed to show that he sincerely believed, or had a factual basis for believing, the employer would condone using the employer's vehicle while off duty and without authorization.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation until he requalifies under ORS 657.176(2).

DECISION: Hearing Decision 14-UI-11867 is affirmed.

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

DATE of Service: April 15, 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.