

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0556

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On January 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #93840). Claimant filed a timely request for hearing. On March 6, 2014, ALJ Monroe conducted a hearing, and on March 18, 2014 issued Hearing Decision 14-UI-12753, affirming the Department's decision. On April 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Albertsons, LLC employed claimant from June 1, 1998 to December 13, 2013 as a forklift operator.

(2) The employer expected forklift operators to operate its forklifts in a safe manner, including maintaining a distance of at least five feet from any other individual and vehicle when driving the forklift. The employer also had an incident reporting policy requiring forklift operators to report every accident, injury, property damage, or "near miss" to a supervisor or foreperson immediately after the incident occurred. Exhibit 1, Transcript at 8. Claimant understood the employer's expectations from prior training and warnings.

(3) On November 22, 2013, claimant was driving a forklift and collided with a concrete bar protecting other equipment in the warehouse. Claimant did not report the incident.

(4) On November 24, 2013, at the beginning of his shift, claimant broke the bracket on his forklift. He did not report the incident immediately after the incident occurred. He delivered the forklift to the employer's maintenance department. Supervisors work in the warehouse receiving office at all times.

(5) Later during his shift on November 24, 2013, claimant collided with a pallet jack, and did not report the incident when it occurred. Claimant did not report the incident until later in his shift when his coworker told him the pallet jack had been damaged. The employer investigated the incident, and in speaking with the maintenance department, became aware that claimant had brought a damaged forklift

to the maintenance department earlier that day. During the investigation, the employer also learned about the November 22, 2013 incident.

(6) On December 13, 2013, the employer discharged claimant for failing to operate a forklift in a safe manner, and for failing to immediately report the incidents on November 22 and 23, 2013.

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

The employer discharged claimant because he did not operate a forklift in a safe manner, and he failed to follow the employer's incident reporting policy. To the extent the employer discharged claimant because he failed to operate a forklift in a safe manner, the employer did not show claimant's conduct on November 22 or 24, 2013 was a willful or wantonly negligent violation of the standards of the employer's safety expectations. The employer argued at hearing that the incidents on November 22 and 24, 2013 would not have occurred had claimant been operating the forklift in a safe manner. Transcript at 34-35. However, claimant provided the only firsthand evidence about what occurred during the incidents, and the record does not show that claimant consciously engaged in conduct he knew or should have known would probably result in a violation of the employer's safety expectations. Absent such evidence, the employer has not shown the incidents were the result of wilful or wanton negligence.

The employer also discharged claimant, in part, because claimant failed to report the incidents on November 22 and 24, 2013 to a supervisor or foreperson immediately after they occurred. The employer reasonable expected employees to report incidents immediately to ascertain damage, injury and safety concerns. Regarding the November 22, 2013 collision, claimant testified that he did not report the incident because he did not see any damage to the forklift, and implied that he did not have to report the incident because he was in a probationary period in a department he had not worked in before. Transcript at 28, 39. However, claimant conceded at hearing that he knew he did not have authority to decide whether to report an accident, and should have reported the incident. Transcript at 28, 39. When claimant failed to report the November 22 collision, he willfully violated a reasonable employer expectation.

Regarding the first November 24, 2013 incident, when claimant broke the forklift brackets, claimant asserted that he attempted to report the incident, but was unable to do so immediately after the incident because his supervisor did not answer his "page" at that time. Transcript at 29. Claimant testified that he reported the incident to a foreman after he delivered the damaged forklift to the maintenance

department. Transcript at 31. However, the employer's manager asserted that claimant did not report the incident and that he admitted during the employer's investigation that he should have, but did not, report the incident. Transcript at 43. The employer's manager also testified that the employer did not know about the first November 24 incident until an employee reported the second November 24 incident. Moreover, the employer's manager testified that claimant could have contacted a supervisor or foreperson working on the floor or in the receiving office. Transcript at 42. The preponderance of the evidence shows that claimant failed to report that he broke the brackets on the forklift, or at best, reported the incident in an untimely manner. His conduct was, at best, a wantonly negligent disregard of the employer's reasonable incident reporting policy.

Claimant conceded that he did not report the second November 24 incident to the employer until his coworker told him he had damaged the pallet jack during the incident. Transcript at 33. Having conceded that he knew he did not have the authority to decide whether to report an incident, the record shows claimant willfully violated a reasonable employer expectation when he did not report the pallet jack incident immediately after it occurred on November 24.

Claimant's failure to report the incidents on November 22 and 24 cannot be excused as an isolated instance of poor judgment 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 engaged in three distinct willful or wantonly negligent acts or failures to act, each of which was separated from the other by time and circumstance. Because claimant's conduct involved more than one willful or wantonly negligent acts or failures to act, his conduct was not isolated, and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not sincerely believe, or have a factual basis for believing, the employer would condone his failure to report the forklift incidents immediately after they occurred. His conduct therefore was not the result of an error in his understanding of those expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-12753 is affirmed.

Tony Corcoran and J. S. Cromwell, *pro tempore*;
Susan Rossiter and D. E. Larson, not participating.

DATE of Service: May 5, 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>.

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