EO: 700
BYE: 201507

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0617

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 133844). Claimant filed a timely request for hearing. On April 9, 2014, ALJ Hoyer conducted a hearing, and on April 11, 2014, issued Hearing Decision 14-UI-15043, concluding claimant was discharged, but not for misconduct. On April 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) R.S. Davis Recycling employed claimant as a truck driver from May 24, 2010 to February 24, 2014.

(2) The employer expected its drivers to maintain an "acceptable driving record" on an ongoing basis. Exhibit 1. The employer's criteria for "acceptable" included no more than one minor accident in a three year period and no more than one conviction for a "serious" traffic violation and were contained in its written "Fleet" policy that claimant acknowledged receiving in November 2011. Exhibit 1. Claimant was aware of the employer's expectation.

(3) In May 2013, claimant caused a minor traffic accident that resulted in an out-of-pocket cost to the employer of approximately $2,300. On February 19, 2014, claimant was involved in a traffic accident while driving an employer truck-trailer combination. Claimant was driving along an interstate freeway in the middle lane at approximately 55 miles per hour consistent with the flow of traffic. As he approached his destination exit while proceeding around a highway curve, he momentarily took his eyes off the roadway as he checked his mirrors before entering the exit lane. Claimant believed he was a safe

distance behind a truck-trailer combination ahead of him but when he looked back at the roadway, he noticed that traffic was quickly slowing to a stop and attempted to slow and then stop his vehicle. He was unsuccessful and rear-ended the truck trailer combination ahead of him. There was little damage to that vehicle as he had slowed to approximately 5 miles per hour by the moment of impact. However, his vehicle sustained substantial damage and had to be towed from the scene. No injuries were sustained. Claimant was determined to be "at fault" for the accident and cited for careless driving. Neither claimant's CDL nor the employer's vehicle liability insurance was affected by claimant's two accidents. Claimant requested a trial on the careless driving citation and the matter was not resolved by the time of the hearing.

(4) On February 24, 2014, the employer discharged claimant for failing to maintain an acceptable driving record under its Fleet policy by being at fault for two accidents within a ten month period which it also considered equivalent to two serious traffic violations.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. 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.

As a preliminary matter, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, claimant was not discharged until after he was involved in the second accident on February 19. Therefore, that accident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to maintain an "acceptable driving record" under its Fleet policy. Claimant understood the employer's expectation, and on February 19, 2014, probably violated it when he rear-ended the vehicle in front of him, his second accident within a ten month period. However, to disqualify an individual from receiving benefits, an employer has the burden to show by a preponderance of the evidence that a claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer here had the burden to show that while driving the employer's vehicle at the time in question on February 19, claimant was indifferent to the consequences of his actions and knew or should have known that his manner of driving would probably result in a violation of the employer's Fleet policy. Claimant asserted at hearing that just before impact, he "was trying to be as careful as [he]

could" and believed there was a safe distance between his vehicle and the vehicle in front of him. Transcript at 30-32. The employer failed to produce any evidence that controverted claimant's assertions. On this record, at worst, claimant was careless and, arguably, negligent. However, because it fails to show that claimant was indifferent to the consequences of his conduct, at the time he engaged in that conduct, his actions did not rise to the level of *wanton* negligence, as defined under OAR 471-030-0038(1)(c).

Consequently, 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 his work separation.

DECISION: Hearing Decision 14-UI-15043 is affirmed.

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

DATE of Service: May 20, 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.