

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1083

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant from work, but not for misconduct (decision #153624). The employer filed a timely request for hearing. On May 19, 2014, ALJ Lohr conducted a hearing at which claimant did not appear, and on June 5, 2014 issued Hearing Decision 14-UI-19057, affirming the Department's decision. On June 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Washman, LLC employed claimant at its car wash from May 1, 2008 until April 7, 2014.

(2) The employer expected claimant to avoid accidents with customer's vehicles. Claimant was aware of the employer's expectations as a matter of common sense.

(3) The employer had a written policy in its handbook prohibiting employees from reporting to work under the influence of controlled substances unless those substances were prescribed by a physician. The policy did not include any provisions about testing employees for the presence of controlled substances in their systems. Claimant received a copy of this policy when he was hired.

(4) On April 7, 2014, while at work, claimant had an accident with a customer's vehicle when he drove it into the rear end of a second customer's vehicle. On April 7, 2014, the employer suspended claimant from work for seven days, which was its "standard practice" after an employee had an accident when driving a customer's vehicle. Exhibit 1 at 10. Following the accident, the employer's assistant manager escorted claimant to a drug test at a medical clinic. On April 8, 2014, the drug test was evaluated and claimant tested positive for marijuana in his system.

CONCLUSIONS AND REASONS: The employer suspended claimant but not for misconduct. Claimant was not suspended for a disqualifying act.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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. The employer carries the burden to establish claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It appears that claimant was suspended from work before the employer knew the results of his drug test, and as a result of his workplace accident with the customer's vehicle. The employer did not provide any evidence about how the accident might have happened. Audio at ~12:21. At most, without additional evidence, the fact that claimant was involved in an accident with a customer's vehicle suggests only that he was careless or might have been negligent. The employer's evidence was insufficient to show that claimant's actions rose to the level of *wanton* negligence, which is required under OAR 471-030-0038(1)(c) to disqualify him from benefits. *See e.g. Allen L. Bailey* (Employment Appeals Board, 2014-EAB-0617, May 20, 2014) (without more, the occurrence of a vehicle accident does not show that claimant was indifferent to the consequences of his actions as is necessary to establish wanton negligence); *William B. Carter* (Employment Appeals Board, 13-AB-0405, March 20, 2013) (without more, the occurrence of a motor vehicle accident, showed only that claimant was careless or even negligent, but not that his conduct rose to wanton negligence). The employer did not present evidence show, more likely than not, that claimant's actions that led to the vehicle accident were misconduct.

In its written argument, the employer argued that claimant should be disqualified from benefits because the results of his drug test showed he was under the influence of an illegal substance in the workplace. Written Argument. However, the employer did not have authority under its drug policy to require claimant to submit to a post-accident drug test, or any other drug testing. Audio at ~18:04, ~20:20, ~21:09. As such, the results of the unauthorized drug test cannot be considered in determining whether claimant was under the influence of illegal substances in the workplace. *See* ORS 657.176(9)(a)(B); ORS 657.176(13)(d). Because the employer presented no evidence other than the unauthorized drug test results to establish that claimant was under the influence in the workplace, the employer did not meet its burden show, with competent evidence that it suspended claimant for a disqualifying act. That claimant was involved in a vehicle accident in the workplace, is not sufficient evidence to infer, more likely than not, that claimant was under the influence of illegal substances at the time of the accident.

The employer suspended but not for misconduct or for a disqualifying act. Claimant was not disqualified from receiving benefits during his work suspension.

DECISION: Hearing Decision 14-UI-19057 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: July 24, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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