

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1225

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 104210). The employer filed a timely request for hearing. On June 24, 2014, ALJ Triana conducted a hearing, and on June 27, 2014, issued Hearing Decision 14-UI-20545, affirming the Department's decision. July 17, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) McLane Northwest employed claimant as an independent sales representative from July 25, 2005 to April 28, 2014.

(2) Claimant used an employer vehicle to perform her job duties as a sales representative. The employer expected claimant to report to the employer any auto accident she was involved in and to follow the traffic laws with regard to the performance of duties required of a driver involved in a motor vehicle accident. Claimant was aware of and understood the employer's expectations.

(3) On April 15, 2014, claimant was driving an employer vehicle when she stopped at a Dairy Queen restaurant and entered the drive-thru lane. As she proceeded through, she "bumped" the car in front of her. Transcript at 15. Both claimant and the driver of the other vehicle got out of their vehicles, examined them and concluded there was no damage. They moved their cars to the parking while they waited for their food orders to be prepared. Neither party exchanged information, nor requested an exchange of the information required by Oregon law in the event of an accident involving property damage. However, the other driver took a picture of claimant's vehicle that included a picture of her license plate. Claimant did not report the incident to the employer because she believed there was no property damage and no report was necessary or required.

(4) On or about April 17, 2014, the Oregon State Police (OSP) contacted the employer about the incident because the owner of the other vehicle, the driver's mother, reported that there had been an accident in which her vehicle had been damaged in the approximate amount of \$500. The driver's mother told OSP that her son had requested insurance information from claimant, the other driver, but that claimant had refused to give him this information. When the employer contacted claimant about its contact with OSP, she reported what had occurred on April 15 and why she had not reported it or exchanged information with the other driver.

(5) On April 21, 2014, the employer suspended claimant while it investigated the facts of the incident. On April 28, 2014, the employer discharged claimant for failing to perform the duties of a driver involved in accident involving property damage¹ on April 15, 2014.

(6) Claimant was never contacted by law enforcement, charged with a crime or issued a traffic citation regarding the April 15 incident.

CONCLUSIONS AND REASONS: We agree with the Department and 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 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that

¹ ORS 811.700 provides:

A person commits the offense of failure to perform the duties of a driver when property is damaged if the person is the driver of any vehicle and the person does not perform duties required under any of the following:

(a) If the person is the driver of any vehicle involved in an accident that results only in damage to a vehicle that is driven or attended by any other person the person must perform all of the following duties:

(A) Immediately stop the vehicle at the scene of the accident or as close thereto as possible. Every stop required under this subparagraph shall be made without obstructing traffic more than is necessary.

(B) Remain at the scene of the accident until the driver has fulfilled all of the requirements under this paragraph.

(C) Give to the other driver or passenger the name and address of the driver and the registration number of the vehicle that the driver is driving and the name and address of any other occupants of the vehicle.

(D) Upon request and if available, exhibit and give to the occupant of or person attending any vehicle damaged the number of any documents issued as evidence of driving privileges granted to the driver.

claimant consciously engaged in conduct that she knew or should have known would violate the employer's expectations. Here, the employer failed to satisfy that evidentiary burden.

As a preliminary matter, claimant's first-hand testimony regarding the facts of the accident in question differed from the testimony of the employer's human resources representative, which was based largely on hearsay. In the absence of evidence demonstrating that claimant was not a credible witness, her first hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

The employer asserted that claimant was discharged because she failed to follow the law regarding the exchange of information at the scene of a motor vehicle accident. Transcript at 10-11. Consequently, because that conduct triggered the employer's decision to discharge claimant, it 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 obey Oregon traffic laws regarding the required exchange of information in the event of an accident involving property damage as a matter of common sense. Claimant violated that expectation on April 15, 2014, when she failed to exchange insurance, registration and license information with the driver of the other vehicle involved in the Dairy Queen collision that caused approximately \$500 in damage to the other vehicle. However, based on claimant's first hand testimony, it did not appear to either driver at that time that any property had been damaged. Although it was later discovered that they were mistaken in that regard, the employer failed to establish that claimant's apparent violation of ORS 811.700 was a conscious one, and without willful or wanton negligence, i.e. conscious conduct, misconduct has not been shown.

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 her work separation.

DECISION: Hearing Decision 14-UI-20545 is affirmed.

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

DATE of Service: August 18, 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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