

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1886

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 141056). The employer filed a timely request for hearing. On December 2, 2014, ALJ S. Lee conducted a hearing, and on December 5, 2014, issued Hearing Decision 14-UI-29939, concluding that the employer discharged claimant for misconduct. On December 9, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

At the hearing, the ALJ left the record open until 5 p.m. on December 2, 2014, for the employer to submit a copy of the claimant's employee log for October 3, 2014. In Hearing Decision 14-UI-29939, the ALJ acknowledged receipt of the October 3, 2014 log, identified the log as Exhibit 2 and informed the parties that they had 10 days to submit written objections to the admission of Exhibit 2.¹ Claimant submitted his objections to Exhibit 2 within the required 10-day period, but submitted them to EAB with his application for review. Accordingly, we now consider these objections.

Claimant objected to the admission Exhibit 2 because he asserted that the employee log could have been edited by the employer's safety director, and that it incorrectly shows the time of his discharge on

¹ In Hearing Decision 14-UI-29939, the ALJ admitted claimant's October 3, 2014 employee log into the record as Exhibit 2. In addition, the ALJ identified other documents submitted by the employer after the close of the hearing as Exhibit 3, but refused to admit this exhibit into evidence. On this record, however, these exhibits were not marked. Accordingly, we have marked Exhibits 2 and 3 based on the ALJ's descriptions. Exhibit 2 consists of two pages, the claimant's October 3, 2014 employee log. Exhibit 3 consists of four pages, the claimant's employee logs for September 29 and August 12, 2014.

October 3, 2014. Under OAR 471-040-0025(6) (August 1, 2004), the ALJ must exclude evidence that is irrelevant, immaterial or unduly repetitious. Claimant's objections concern his disagreement with the version of the facts presented in Exhibit 2; he has presented no argument that the evidence should be excluded under the standards of OAR 471-040-0035(6). We conclude that Exhibit 2 is evidence that is relevant and material to the circumstances of claimant's work separation, and not unduly repetitious of other evidence in the record. Claimant's objection is overruled.

FINDINGS OF FACT: (1) Sound Delivery employed claimant as a truck driver from June 23, 2014 to October 3, 2014.

(2) Federal and state regulations, as well as the employer's policy, require that a truck driver thoroughly inspect a vehicle before beginning a trip, and inspect the vehicle after the trip is completed. Each driver must complete a Daily Vehicle Inspection Report (DVIR) to record the results of the pre- and post-trip inspections. The DVIR includes a check list of all parts of the truck that must be inspected; drivers must note any parts that are defective on this list. The pre-trip inspection takes a driver approximately 15-20 minutes to perform completely. A thorough inspection requires that the driver check the following in the engine compartment with the engine off: oil, engine compartment belts, power steering fluid, and coolant.

(3) As part of the hiring process, the employer required that claimant demonstrate he was able to perform a thorough and complete pre-trip inspection.

(4) On June 23, 2014, all of the employer's drivers were advised in writing of the importance of performing thorough and complete pre- and post-trip inspections, and required to sign this document to acknowledge that they had read it. On June 23, 2014, claimant signed this document.

(5) The employer's managers received reports that claimant was failing to perform complete pre-trip inspections. On August 1, 2014, the employer's director of safety gave claimant a letter of instruction and additional training on how to conduct complete pre- and post-trip inspections.

(6) On October 2, 2014, the employer's owner observed that claimant failed to perform a pre-trip inspection and failed to properly warm up his vehicle before beginning a trip. The owner gave claimant a "last warning" for failing to perform adequate pre- and post-trip inspections, and told claimant that he would be discharged if he was "caught not doing a 'full' pretrip inspection." (Exhibit 1, p. 7).

(7) Also on October 2, 2014, the employer's safety director waited until claimant left the employer's facility for his dinner break, and then placed bright green tags on various parts of claimant's truck that claimant was required to check as part of the pre-trip inspection. The tags instructed claimant to take them off the vehicle part and bring them to the safety director.

(8) With the employer's permission, claimant slept in his truck during the night of October 2, 2014. On October 3, 2014, at approximately 6 a.m., the safety director observed claimant walk around his truck, open the hood and check the oil, remove one green tag placed by the safety director, and shut the hood. Claimant then started the truck, and entered the employer's facility to give the safety director the green tag. The safety director stopped claimant and told him that he was discharged for failing to complete a thorough pre-trip inspection.

CONCLUSION AND REASONS: We agree with 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for failing to perform a thorough and complete pre-trip inspection on October 3, 2014. At hearing, claimant and the employer's safety director disagreed about the events that resulted in claimant's discharge on that day. The safety director testified that he saw claimant perform an incomplete pre-trip inspection before starting his truck to begin his trip: claimant only checked the oil and inspected the exterior of the truck. Claimant, however, testified that he not yet performed or completed his pre-trip inspection before the safety director accused him of failing to make the inspection and discharged him. Claimant did not dispute, however, that he opened the hood of his truck, checked the oil, shut the hood, and started the engine. Transcript at 35. The pre-trip inspection list required that a driver check a number of items other than the oil in the engine compartment with the engine off. To complete a thorough pre-trip inspection, as claimant asserted he intended to do, claimant would have had to return to his truck, turn off the engine, and check other items in the engine compartment. It is implausible that claimant planned such a procedure, and far more likely that, once claimant closed the hood of his truck and started the engine, claimant did not intend to conduct any additional pre-trip inspection activities that required the engine to be turned off, thus performing an incomplete inspection that did not meet the employer's standards. We therefore find the safety director's testimony regarding the events of October 3 to be more credible than claimant's testimony, and conclude that claimant did not perform a thorough pre-trip inspection on October 3, 2014.

Claimant knew and understood that federal and state law, and the employer's policy, required that he perform a complete inspection of his truck before beginning a trip, and also required that he record the results of the inspection on a DVIR. Claimant demonstrated his ability to perform a pre-trip inspection before he was hired on June 23, 2014 and received a letter of instruction and additional training on the requirements of a complete pre-trip inspection on August 1, 2014. In addition, on October 2, 2014, claimant was warned that he would be discharged if he was ever again "caught not doing a 'full' pretrip inspection." Claimant thus knew or should have known that his failure to make a thorough pre-trip inspection violated the law and the employer's expectations. Claimant's conscious decision not to make a thorough pre-trip inspection on October 3 demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

Claimant's conduct on October 3, 2014 cannot be excused as an isolated instance of poor judgment. Under OAR 471-030-0038(1)(d)(D), acts that violate the law do not fall within the exculpatory provisions of OAR 471-030-0038. Claimant's failure to perform a pre-trip inspection on October 3 violated state and federal law.

Nor were claimant's actions the result of a good faith error. Claimant did not assert or otherwise show that he sincerely believed the employer would excuse his failure to perform a thorough pre-trip inspection on October 3, 2014.

The employer discharged claimant for misconduct and claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-29939 is affirmed.

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

DATE of Service: January 21, 2015

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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