

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1910

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132608). Claimant filed a timely request for hearing. On December 3, 2014, ALJ Seideman conducted a hearing, and on December 4, 2014 issued Hearing Decision 14-UI-29812, reversing the Department's decision. On December 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument but failed to certify that it provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Arrowhead Towing & Recovery employed claimant as a tow truck operator from September 12, 2014 until October 15, 2014.

(2) The employer expected claimant, when assigned to on-call duty, to promptly answer his cell phone and respond to any tow jobs that the employer assigned to him. Claimant was aware of the employer's expectations.

(3) On Saturday, October 4, 2014, when claimant was on-call, the employer's owner called claimant on his cell phone with a tow job. At the time the owner called, claimant's young son was ill, claimant's wife was leaving the house to report to her own job and claimant was the only adult available to care for the son. Claimant asked the owner if he could pass on the tow job. The owner told claimant that he was not going to allow him to do so because claimant was the only driver on-call and he had a tow truck. Claimant then told the owner that he would take the tow job. Claimant completed that job and

claimant's wife took the sick son with her to her own work. Claimant responded to all the owner's later calls that day to assign tow jobs to him.

(4) On Sunday, October 5, 2014, claimant was also on-call. Sometime during that day, claimant received a call on his cell phone from his step-father, who lived in Missouri and was the widower of claimant's mother. Claimant's step-father became distraught during the call as he discussed claimant's mother, who had died five years earlier from brain cancer. The step-father was very emotional and crying. Because of the depth of his step-father's emotions, claimant did not want to terminate the call abruptly. While claimant was speaking with his step-father, the employer's owner attempted to reach him with a tow job assignment. Claimant was not aware of the owner's call. Claimant's cell phone did not have a feature that made a noise or otherwise alerted him of an incoming call while he was speaking to another person. Audio at ~17:20, ~17:51. The owner tried two more times to reach claimant on his cell phone. Audio at ~11:30. The owner's three attempts to contact claimant were approximately two minutes apart, and the total duration of time over which the owner made the attempts was four or five minutes. Audio at ~11:30, ~11:44. A few minutes after the owner's final attempt to reach him, claimant was able to calm his step-father and hung up from their conversation. Claimant immediately looked at the missed calls display on his cell phone and saw that the owner had attempted to reach him when he was on the cell phone with his step-father. Claimant called the owner back. Because claimant called the owner shortly after the owner's last attempted call to him, the owner assumed claimant had intentionally ignored his calls.

(5) On October 5, 2014, the employer discharged claimant for failing to answer his cell phone when the owner called him with a tow job assignment.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's owner contended that claimant knowingly ignored his attempts to reach him on his cell phone on October 5, 2014, based on his assumption that claimant had a call-waiting feature on that phone to alert him to incoming calls when he was speaking on the phone, claimant testified that he did not. Audio at ~9:03, ~9:41, ~17:20. Claimant further testified that after he was discharged, he tested his phone for call-waiting or an alerting feature and inquired of his provider if he had such any such features and learned that he did not. Audio at ~ 17:28, 17:51. Claimant's specific testimony about the features on his own cell phone is entitled to greater weight than the employer's assumptions and speculations about them. While it likely would have been a willful violation of the employer's standards

if claimant had intentionally ignored work calls from the owner, the preponderance of the reliable evidence does not support that he did, or that his phone even had the capacity to alert him to an incoming call when he was otherwise speaking on it. In addition, because the owner did not contend that the employer required claimant to have call-waiting or a similar alerting feature on his cell phone, his failure to have one was not a willful or wantonly negligent violation of the employer's standards.

That claimant was on his cell phone speaking with his step-father during the same time that the owner tried to reach him on his cell phone was also not, in and of itself, a willful or wantonly negligent violation of the employer's standards. Notably, the owner did not contend that claimant was prohibited from personal use of his cell phone when he was on on-call duty. In its essentials, the owner's testimony reduces to the fact that he was unable to reach claimant on his cell phone for the short span of approximately four or five minutes on October 5, 2014. Audio at ~11:30, ~11:44. The owner did not rebut the testimony of claimant's wife that claimant returned the owner's calls within three minutes of the time his last call was shown as having been made to claimant's cell phone. Audio at ~24:43. Claimant's testimony that he was reluctant to abruptly end his step-father's call to him, given his step father's emotional state, was plausible and understandable. There was no evidence that the duration of this call, and the period of which claimant was not aware of any incoming calls to his cell phone, was unreasonable in light of these circumstances. Since claimant promptly checked his cell phone display for missed calls after he ended his conversation with his step-father and responded to the owner's calls, his behavior did not demonstrate an indifference to the employer's needs or the responsibilities of his job. On this record, the preponderance of the evidence does not show that claimant willfully or with wanton negligence violated the employer's standards by not answering the owner's calls to him on his cell phone on October 5, 2014, or by not returning the owner's last call for approximately three minutes after it was placed.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-29812 is affirmed.

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

DATE of Service: February 5, 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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