

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0702

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82028). Claimant filed a timely request for hearing. On May 19, 2015, ALJ C. Smith conducted a hearing, and on May 22, 2015 issued Hearing Decision 15-UI-38998, concluding the employer discharged claimant, but not for misconduct. On June 10, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the parties' written arguments. In its argument, the employer first complained that the ALJ "declined" to take the testimony of the police officer who investigated the final incident resulting in claimant's discharge. Employer's Written Argument at 1. Toward the end of the hearing, however, the ALJ asked the employer's representative if he thought the investigating officer's testimony was needed, and the employer's representative stated he did not. Transcript at 34. At the end of the hearing, the ALJ asked the employer's representative if he believed the employer had had a full and fair opportunity to present evidence at the hearing, and the employer's representative stated that he did. Transcript at 35. It therefore was the employer that "declined" to have the investigating officer testify, and not the ALJ.

The employer also argued that claimant was not a credible witness regarding the primary factual issue in this case, whether claimant was aware that he struck and damaged property while driving the employer's vehicle on December 5, 2014. In Hearing Decision 15-UI-38998, however, the ALJ expressly determined that claimant was a credible witness on that issue, and that his testimony outweighed the

employer's circumstantial evidence to the contrary.¹ We reviewed the record in its entirety, agree with the ALJ's determinations, and adopt the ALJ's following findings of fact:²

(1) Claimant worked for the employer from August 11, 1986 until he was discharged on February 10, 2015.

(2) The employer discharged claimant because it believed that claimant, while operating an employer owned vehicle, was involved in a motor vehicle accident involving damage to property and that he willfully failed to follow its policies regarding the reporting of such accidents and was then purposely untruthful when interviewed by the employer about the incident.

(3) In the event of an accident, the employer required its employees to exchange information with involved parties and/or property owners and to promptly report the accident to the employee's supervisor.

(5) Claimant was aware the above-mentioned policies and had followed them in the past when he was involved in a motor vehicle accident.

(6) On December 5, 2014, claimant drove the employer owned vehicle to a business (Sign Dude) in Medford. When claimant left the business, he struck a landscaping rock with the employer owned vehicle as well as nearby vinyl pole, which had an attached piece of PVC pipe.

(7) The employer owned vehicle was a Ford F350 pickup truck with an attached utility box. It is a rough riding truck with a stiff suspension. It has been claimant's assigned work truck for at least eight years. Claimant had the radio on at the time of the incident. Claimant felt something which he believed to be a something like a "pot hole." Claimant felt a bump but was not aware that he had struck or damaged anything.

(8) A bystander called the employer who several hours later called the police. The police investigated the matter and eventually spoke with a witness who expressed an opinion that claimant would have been aware that he had caused some property damage. The police also examined physical evidence which led them to conclude that claimant violated ORS 811.700, failure to perform the duties of a driver when property is damaged.

(9) At the time of the incident, claimant was not in fear for his job and had no fear of any repercussions had he reported being in an accident.

(10) Claimant had not received any previous warnings prior discipline for any conduct related to what the employer alleged occurred on December 5, 2014.

¹ Hearing Decision 15-UI-38998 at 4.

² See ORS 657.275(2) (When there is evidence in the record both to make more probable and less probable the existence of any basic fact or inference, the board need not explain its decision to believe or rely on such evidence unless the administrative law judge has made an explicit credibility determination regarding the source of such facts or evidence).

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 discharged claimant because it believed that claimant, while operating an employer owned vehicle on December 5, 2014, was involved in a motor vehicle accident involving damage to property, and that he willfully failed to follow its policies regarding the reporting of such accidents, and was then purposely untruthful when interviewed by the employer about the incident. However, claimant was unaware that that he struck and damaged property while driving the employer's vehicle. Claimant therefore did not consciously neglect to report the accident, and was not untruthful when interviewed by the employer about the incident. The employer therefore discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-38998 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: July 31, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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