

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1131**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On July 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141528). Claimant filed a timely request for hearing. On August 31, 2015, ALJ Shoemake conducted a hearing, and on September 8, 2015 issued Hearing Decision 15-UI-43994, affirming the Department's decision. On September 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. Claimant submitted written argument but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision.

**FINDINGS OF FACT:** (1) Gordon Trucking Inc. employed claimant as a truck driver from October 19, 2006 to June 5, 2015.

(2) The employer expected its truck drivers to obey all traffic laws while driving the employer's trucks, and to avoid preventable traffic accidents. Claimant understood the employer's expectations.

(3) On June 4, 2015, claimant was driving one of the employer's trucks on a highway. Claimant was following a passenger vehicle, which was slowing down at intersections and driveways, as if the driver was trying to determine where to turn. The vehicle ultimately came to a near-stop at an intersection. Claimant believed the vehicle was going to turn left at the intersection, although the vehicle was not turning left, and the driver had not signaled that he or she was going to turn left. Claimant attempted to pass the vehicle on the right, in the emergency lane. However, the vehicle turned right, and claimant collided with the vehicle. Claimant was cited for careless driving, in violation of ORS 811.135.

(4) The employer discharged claimant for attempting to pass the vehicle on the right, and colliding with the vehicle.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to obey all traffic laws while driving the employer's truck, and to avoid preventable accidents. The employer discharged claimant for violating those expectations on June 4, 2015. At hearing, claimant's testimony was inconsistent as to whether he attempted to use the emergency lane to pass the passenger vehicle on the right, or to avoid rear ending the vehicle. Audio Record at 23:15-29:10. However, the record shows that claimant admitted to the employer's risk manager that he attempted to pass the vehicle on the right. Audio Record at 10:30-11:55. We therefore find it likely that claimant attempted used the emergency lane for that purpose, and not to avoid rear ending the vehicle. In doing so, claimant consciously engaged in conduct he knew or should have known probably violated ORS 811.135, which states that a person commits the offense of careless driving if the person drives any vehicle upon a highway in a manner that endangers or would be likely to endanger any person or property. Claimant also knew or should have known his conduct probably violated ORS 811.415, which states, in relevant part, that passing on the right is not permitted unless the overtaken vehicle is making or the driver has signaled an intention to make a left turn. Claimant's conduct therefore was, at best, a wantonly negligent violation of the employer's expectation that he obey all traffic laws while driving the employer's trucks, and avoid preventable traffic accidents.

Claimant's conduct on June 4, 2015 cannot be excused as an isolated instance of poor judgment because is violated, or was tantamount to a violation of, ORS 811.135 and ORS 811.415. Acts that violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Nor can claimant's conduct be excused as a good faith error. Claimant understood he was expected to obey all traffic laws while driving the employer's trucks, and to avoid preventable accidents. His conduct was not the result of an error in his understanding of the employer's expectations.

We therefore agree with the Department and the ALJ that claimant's discharge was for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 15-UI-43994 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service: October 15, 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](http://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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