EO: 200
BYE: 201629

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1137

Reversed
Disqualification

PROCEDURAL HISTORY: On August 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104807). Claimant filed a timely request for hearing. On September 18, 2015, ALJ Wyatt conducted a hearing, and on September 25, 2015 issued Hearing Decision 15-UI-44913, concluding the employer discharged claimant, but not for misconduct. On September 29, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Gordon Trucking Inc. employed claimant as a long haul driver from June 5, 2013 to July 27, 2015. The employer also employed claimant's wife, and the two operated as a long haul drive team that took turns driving and sleeping in their assigned tractor unit.

(2) The employer prohibited its truck drivers from misusing or tampering with employer equipment, including tractor units. The employer's expectation was communicated to its drivers during their initial orientation and was contained in its employee manual. Claimant was aware of and understood the employer's expectations.

(3) The employer installed an "Iteris" safety device on their tractor units. Transcript at 6-7, 45. The device was a lane detection device that made a loud buzzing sound in the tractor cab if the associated camera detected the tractor crossing a lane line on the road. The device was intended to alert drivers if they fell asleep or became inattentive while driving and began to drift across lanes. Claimant believed the device was unnecessary and hazardous for driver teams because he believed the device alarm sounded without justification and interrupted the sleep of the non-driving team member.

(4) Prior to May 2014, claimant heard that mechanics at a tractor repair facility of the employer's parent company, Heartland, in Phoenix, Arizona, had disabled the Iteris device on tractor units when requested. On May 21, 2014, while in Phoenix, claimant approached a mechanic while the mechanic was taking a break and discussed how to disable the device. The mechanic showed claimant how to temporarily disable the speakers on the device with paperclips and how to return the device to normal functionality when assigned another tractor. Thereafter, claimant similarly disabled the Iteris device on more than

"two or three" other assigned tractor units, and, typically, returned the Iteris device on each tractor unit to normal functioning when he was assigned a different unit. Transcript at 23-24.

(5) Shortly before July 2015, claimant disabled the speakers of an Iteris device on a tractor unit he was assigned. When he returned that tractor unit to the employer upon being assigned another, he failed to remove the paperclips from the speakers. Subsequently, a mechanic for the employer in Rancho Cucamonga, California discovered the modification and notified the employer's management. When claimant was questioned about it, he denied making the modification, blamed it on the Heartland repair facility and stated, "[I] didn't monkey with the camera. Heartland shop must have done it." Transcript at 11. The employer became suspicious, but accepted claimant's explanation without disciplining him.

(6) On July 10, 2015, the employer assigned claimant a different tractor unit. On July 27, 2015, claimant arrived at an employer facility and without warning, the employer had a mechanic examine claimant's tractor unit. The mechanic discovered that both speakers of the Iteris device had been disabled with paperclips in the same manner as the unit examined in Rancho Cucamonga. When the employer's fleet manager questioned claimant, he admitted he had modified the unit examined in Rancho Cucamonga and "two or three others" before that, but denied modifying the unit he drove on July 27, 2015. At claimant's request, the fleet manager contacted the Heartland repair facility, which denied modifying the Iteris device on the employer's tractor units in the past.

(7) On July 27, 2015, the employer terminated claimant's employment for tampering with and misusing employer equipment by modifying the Iteris safety device in violation of its policy.

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

In Hearing Decision 15-UI-44913, after finding that the employer discharged claimant for disabling the Iteris device on the tractor assigned to him on July 10 when the device was already disabled when the unit was assigned, the ALJ concluded the employer discharged claimant, not for misconduct, reasoning,

> At the hearing, claimant testified frankly that he and his driving team had disabled "Iteris" safety devices in the past, on earlier trucks. However, I found claimant's

> testimony credible that he did not disable the speakers on the truck assigned to him on July 10, 2015, and inspected by the employer on July 27, 2015. . . . I am persuaded that the employer discharged claimant for an alleged violation that, more likely than not, he did not commit. The fact that claimant admitted to earlier such violations does not establish that claimant committed the final violation.

Hearing Decision 15-UI-44913 at 2-3. However, we disagree with the ALJ's finding that claimant was credible. The fact that claimant appears to have testified frankly about some of his conduct did not make him a credible witness. Claimant had previously lied to the employer about modifying the Iteris device, he had a history of modifying the Iteris device with paperclips, likely in all the vehicles he drove since learning how to modify the device from the off-duty mechanic, and it is implausible that claimant did not modify the device in the final incident, and claimant's testimony was entirely self-serving. Considering claimant's testimony in its totality, we did not find claimant to be credible or plausible when he denied disabling the Iteris device on the truck assigned to him on July 10th.

We also disagree with the ALJ that the employer's reason for discharging claimant was confined to the employer's July 27th discovery. The employer discharged claimant on July 27, 2015 for "misuse" of employer property in violation of its policy based on the information it obtained that day. However, that information included claimant's admission that he had temporarily disabled the Iteris device on assigned tractor units using paperclips more than two or three times between May 21, 2014 and July 27, 2015, a mechanic's report that the Iteris device on claimant's assigned tractor unit on July 27 was similarly disabled, and the employer's realization that day that claimant had been dishonest with the employer when he denied "monkey[ing]" with the device on his prior assigned tractor unit examined in Rancho Cucamonga. By previously lying to the employer about modifying the Iteris device and repeatedly taking steps to return the operation of the device to normal to hide the fact that he had modified the device from the employer, claimant demonstrated that he was conscious of his conduct and demonstrated that he knew that disabling the Iteris device probably violated standards of behavior the employer had the right to expect of him. Claimant's conduct on each occasion he modified the employer's safety equipment was at least wantonly negligent, and his lie was willful.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). OAR 471-030-0038(1)(d)(A) provides that an isolated instance of poor judgment is a single or infrequent occurrence *rather than a repeated act* or pattern of other willful or wantonly negligent conduct. (Emphasis added.) Based on claimant's admission that he disabled the device in question at least three times after May 21, 2014, claimant's conduct was not isolated, and cannot be excused as such under OAR 471-030-0038(3)(b). Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectations. Although claimant asserted that he thought his actions were permitted after speaking with the Heartland mechanic, by lying to the employer about disabling the device on a prior unit shortly before July 2015 and engaging in a practice of returning the Iteris units in the tractors he drove to normal functionality before returning the tractors to the employer, claimant demonstrated that he did not sincerely believe the employer would condone his actions.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-44913 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 4, 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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