EO: 200
BYE: 201627

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-1207

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 12, 20115, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #172924). Claimant filed a timely request for hearing. On September 24, 2015, ALJ Halpert conducted a hearing, and on September 25, 2015 issued Hearing Decision 15-UI-44918, affirming the Department's decision. On October 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to present facts and documents that it did not offer into evidence or discuss during the hearing, including a warning letter issued to claimant on May 6, 2015 and a summary of witness statements about claimant's behavior on July 9 and 10, 2015. EAB may not consider such new information unless the party seeking to introduce it shows that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. OAR 471-041-0090 (October 29, 2006). At hearing, the ALJ inquired of the employer's witness at length if he was aware of any warnings that claimant received between March 2014 and the final incident on July 9, 2015 and, after reviewing claimant's personnel file for some time during the hearing, the witness stated that he could locate none other than from March 24, 2014, July 10, 2014 and January 28, 2015. Transcript at 15, 43, 44. When preparing for the hearing, it was within the employer's reasonable control to locate relevant information and documents and to offer them into evidence so that claimant had an opportunity to respond to them before the ALJ determined their appropriate evidentiary weight. Because the employer did not show that factors or circumstances reasonably beyond its control precluded it from offering this new evidence during the hearing, EAB may not consider the new information the employer sought to introduce. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Gresham Transfer, Inc. employed claimant as a truck driver from June 23, 2007 until July 15, 2015.

(2) The employer expected its drivers to call the dispatcher between 5:00 p.m. and 7:00 p.m. to learn whether the driver was assigned to drive the next day. Despite this requirement, it was not out of the ordinary for a driver not to call in during these hours and for the dispatcher to contact him instead. Transcript at 8. The employer also expected its drivers to follow the reasonable instructions of the dispatcher. Claimant was aware of the employer's expectations.

(3) On March 25, 2014, the dispatcher issued a warning to claimant for "becom[ing] angry and hang[ing] up" on him when he gave instructions to claimant on March 24, 2015. Transcript at 16.

(4) Sometime in July 2014, the dispatcher issued a warning to claimant for refusing to complete an assignment as directed on July 10, 2014. At the time the dispatcher gave claimant the directions, claimant had only one hour of time remaining out of the fourteen hours he was permitted to drive each shift without a break and claimant told the dispatcher that his instructions would cause claimant to violate the hours of service requirements in the federal motor carrier regulations. Transcript at 15-16, 18. Sometime later, claimant contacted the employer's director of human resources and safety and explained that he had not followed the dispatcher's instructions on July 10, 2014 because he thought that they were illegal under applicable motor carrier regulations. Transcript at 19.

(5) Sometime in January 2015, the employer issued a warning to claimant for not following the dispatcher's instructions on January 28, 2015 to take a lunch break rather than arriving earlier than scheduled to deliver a load to the customer. Claimant did not stop to take his lunch and delivered the load before the scheduled time. Transcript at 15.

(6) On July 7, 2015, claimant submitted to the dispatcher a request to take off July 9 and July 10, 2015 as vacation days. Sometime before July 9, 2015, the dispatcher informed claimant that due to the volume of deliveries scheduled he was not permitted to take July 9th off and the dispatcher did not yet know whether he would be allowed to have July 10th off. Claimant reported for work on July 9, 2015 and worked that day.

(7) On July 9, 2015, the dispatcher started trying to reach claimant beginning at approximately 5:30 p.m. to inform him that he was not going to be allowed to take a vacation day on July 10, 2015. The dispatcher tried calling claimant several time on his cell phone but claimant did not answer. When two drivers arrived at the dispatch office sometime after 5:30 p.m., the dispatcher had one of them use his cell phone to call claimant. The driver's phone was on speaker. When claimant answered the call from the driver's phone, the dispatcher immediately spoke and told claimant that he had an assigned a job beginning at 5:45 a.m. on July 10, 2015. Claimant told the dispatcher that he was not going to work on July 10th because he needed to assist his wife as she prepared to travel out of the country to visit her ill mother and that he was entitled to that day off under the federal Family Medical Leave Act (FMLA). Transcript at 21. The dispatcher told claimant that the circumstances he described did not qualify as a protected leave under FMLA and he needed to show up on July 10th at 5:45 a.m. Claimant told the dispatcher to "fuck off" and hung up his cell phone. Transcript at 22.

(8) On July 10, 2015, claimant showed up for work before 5:45 a.m. The dispatcher who was on duty told claimant that the dispatcher from July 9, 2015 had changed claimant's status to "out of service" and there was no assignment for him to perform. Transcript at 32. Claimant went home.

(9) On July 15, 2015, the employer discharged claimant for insubordinate behavior on July 9, 2015 by the manner in which he spoke to the dispatcher, by doing so in the hearing of two other drivers since the phone the dispatcher had used was on the speaker setting and by allegedly calling a third driver on July 9, 2015 and recounting his insubordinate conversation with the dispatcher.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-44918, the ALJ concluded that the employer discharged claimant for misconduct because claimant made conscious choices on July 9, 2015 not to call the dispatcher between 5:00 p.m. and 7:00 p.m., to tell the dispatcher that he was not going to work on July 10, 2015 and to treat the dispatcher in a "hostile and abusive way" when he told the dispatcher to "fuck off." Hearing Decision 15-UI-44918 at 3. The ALJ did not consider whether claimant's behavior, even if it violated the employer's expectations, was excused from constituting misconduct as an isolated instance of poor judgment under the exculpatory provisions of OAR 4571-030-0038(3)(b). We disagree with the ALJ's implicit conclusion that claimant's behavior on July 9, 2015 was not excused as an isolated instance of poor judgment.

Although the testimony of the employer's witnesses appeared to be that the employer discharged claimant because of his alleged insubordination on July 9, 2015, the ALJ found other grounds for the discharge that he concluded were misconduct. With respect to claimant's alleged failure to call the dispatcher between 5:00 p.m. and 7:00 p.m. on July 9, 2015 to learn his next day's work assignment, the employer's evidence was insufficient to demonstrate that claimant's behavior was a willful or wantonly negligent violation of the employer's standards. While the employer's witnesses testified that claimant was expected to call the dispatcher between those hours, its director of human resources also testified that "it was not out of the ordinary for dispatchers to call drivers if they did not call him," presumably within the 5:00 p.m. to 7:00 p.m. window of time. Transcript at 8. The employer did not dispute claimant's testimony that "sometimes" the dispatcher would call him directly, without disciplinary ramifications, to give him his assignments when he did not call in. Transcript at 26. From this testimony, it appears, most likely, that the employer was lenient, or at least not rigorous, in enforcing this alleged call-in requirement. Because the employer did not demonstrate that it was claimant's intention on July 9, 2015 not call in at all if the dispatcher had not reached him, the employer did not establish that claimant's failure to call the dispatcher directly between 5:00 p.m. to 7:00 p.m. was a willful or wantonly negligent violation of its expectations.

With respect to claimant's comment to the dispatcher on July 9, 2015 that he was not going to work the next day, which the employer construed as a refusal to work on July 10, 2015, its context made it, at best, an ambiguous statement. It was made before the end of the conversation, in reference to claimant's

attempt to persuade the dispatcher that he had a pressing and legitimate reason to have July 10th off that was covered by FMLA and before the dispatcher had rejected that reasoning. Absent evidence that the dispatcher clarified with claimant that he was refusing to work the next day, after the dispatcher had rejected his supposed justification for not working, the employer did not demonstrate that claimant intended his statement to constitute such a refusal. We disagree with the ALJ's conclusion that claimant's behavior in either of these instances was misconduct.

The employer also contended that claimant engaged in insubordination when he used foul language in the conversation with the dispatcher on July 9, 2015, particularly so because claimant used that language when two other drivers were able to hear him and because he allegedly later called a third driver to tell him about what he had said to the dispatcher. Transcript at 9. Claimant's statement of "fuck off" to the dispatcher, after the dispatcher had rejected his argument in favor of having July 10, 2015 off from work, was reasonably construed as an insubordinate statement and was at least a wantonly negligent violation of the employer's standards. However, that claimant made the statement within the hearing of two other drivers, was not, under the circumstances, an aggravation of that insubordination. The other drivers heard what claimant stated to the dispatcher because the phone the dispatcher was using was set to its speaker function and they happened to be present. There was no evidence that claimant was aware that he was on speaker with the dispatcher when he was addressing him or that the two drivers could hear him. On these facts the employer did not show that claimant was intentionally or consciously undermining the dispatcher's authority in the hearing of the two drivers, or that he was attempting to propagate an insubordinate attitude. In connection with claimant's alleged conversation with a third driver about the statements he made to the dispatcher, claimant denied that he had such a conversation. Transcript at 9, 54. Claimant's first-hand testimony that the alleged conversation did not occur is entitled to greater weight than the employer's hearsay evidence that it did. Transcript at 9, 52. The employer did not demonstrate that claimant's insubordination was heightened by consciously engaging in it in the presence of other employees or recounting it to a third employee. Of the events that occurred on July 9, 2015, the employer met its burden to show misconduct only in connection with the language that claimant used when addressing the dispatcher.

While claimant might have willfully or with wanton negligence violated the employer's standards by what he stated to the dispatcher on July 9, 2015, his behavior will not constitute disqualifying misconduct if it is excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). The type of behavior that may be excused for this reason is behavior that constitutes a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The behavior to be excused also must not have exceeded "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Here, the employer alleged that claimant had previously engaged in willful or wantonly negligent conduct on March 24, 2014, July 10, 2014 and January 28, 2015. That claimant became angry and hung up on the dispatcher on March 24, 2014 is insufficient to establish that he refused to follow the dispatcher's instructions or that he engaged in willful or wantonly negligent behavior since the employer provided no further detail of the interaction and there are many reasons that claimant might have become angry or hung up that would not have involved an insubordinate refusal to follow the dispatcher's instructions. Absent additional evidence, the record is insufficient to conclude that the incident on

March 24, 2014 was a prior act on claimant's part that involved a willful or wantonly negligent violation of the employer's standards.

From the description of claimant's behavior on July 10, 2014, it appears that claimant did decline to do what the dispatcher wanted him to do. However, claimant contended that the dispatcher's instructions, if followed, would have caused him to violate federal regulations. While the employer's witnesses argued that claimant could have lawfully complied with the dispatcher's instructions, it conceded that lawfulness of the dispatcher's instructions to claimant was still the subject of an ongoing federal agency investigation, and claimant had promptly complained about the dispatcher's instructions to the employer's director of human resources and safety. Transcript at 18, 24, 25, 37, 45. On this record, the employer did not rule out that claimant refused to comply with the dispatcher's instructions on July 10, 2014 because he thought they were unlawful, and therefore the employer did not demonstrate that claimant's refusal to follow them was an insubordinate attempt to defy the authority of the dispatcher. Claimant's refusal to comply with an unreasonable instruction was not misconduct. OAR 471-030-0038(1)(d)(C).

With respect to claimant's failure to take a lunch break as instructed by the dispatcher on January 28, 2015, the employer's evidence on it was scant other than its assertion that he did not and that the employer thought his failure to comply was insubordinate. "Insubordination" is generally defined to mean "defiance of authority; refusal to obey orders."[1] Absent some additional evidence about claimant's reason for failing to comply with the instruction, it is plausible that claimant's failure to comply with the dispatcher's instruction was not an act of defiance or a refusal to comply, but might instead have been based on factors like exigencies, errors or misunderstandings. Absent evidence ruling out these innocent explanations, there is insufficient evidence on which to conclude claimant's behavior on January 28, 2015 involved a willful or wantonly negligent violation of the employer's standards. The employer did not meet its burden to show that any of the three incidents of alleged prior misconduct involved willful or wantonly negligent behavior on claimant's part. As such, claimant's wantonly negligent behavior on July 9, 2015 was isolated or infrequent and meets the first prong of the test for excusable behavior.

Claimant's behavior on July 9, 2015, although involving poor judgment, did not "exceed mere poor judgment." To support its position that claimant's behavior that day was too serious and flagrant to excuse, the employer's witness relied on the fact that claimant had openly defied the authority of the dispatcher in front of two coworkers who heard him and recounted his defiance to a third coworker in a later conversation. Transcript at 52. However, for the reasons discussed above, the employer was unable to establish either that claimant knew the coworkers were listening or should reasonably have known or that claimant described his conversation with the dispatcher to another coworker. In addition to not establishing the basis for its position that claimant's behavior caused an irreparable breach of trust, the employer did not establish that the content of what claimant stated to the dispatcher, if it was not known by other employees, exceeded mere poor judgment. Viewed in context, the severity of claimant's conduct was mitigated by the circumstances under which he became frustrated and upset with the dispatcher. Specifically, it was understandable that claimant became frustrated and upset with the dispatcher when he learned that the dispatcher was not going to allow him to take July 10, 2015 off

[1] *See* https://www.google.com/search?q=insubordination&sourceid=ie7&rls=com.microsoft:en-US:IE-Address&ie=&oe=&gws_rd=ssl

when his wife needed him to assist her in preparing to travel out of the country to visit her sick mother, his mother-in-law. This is especially so because claimant had requested the time off three days earlier but would not learn if any of the days off were allowed until the night before each particular day. On these facts an objective employer would not reasonably conclude that claimant's single use of a foul expression to his supervisor when he was very frustrated signified that he could not be trusted in the future in the workplace to control his outbursts and comply with the reasonable instructions of the employer. The employer did not demonstrate that a reasonable employer would only conclude that, by his behavior on July 9, 2015, claimant had irreparably ruptured the employment relationship or made a continued employment relationship impossible. Because claimant's wantonly negligent behavior on July 9, 2015 was an isolated act that did not exceed mere poor judgment, it is excused from constituting misconduct as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 15-UI-44918 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 6, 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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