EO: 200
BYE: 201631

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

268
DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2015-EAB-1284

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On August 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 81940). The employer filed a timely request for hearing. On October 7, 2015, ALJ Wyatt conducted a hearing, and on October 14, 2015, issued Hearing Decision 15-UI-45898, affirming the Department's decision. On November 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider that written argument when reaching this decision.

**FINDINGS OF FACT:** (1) O'Reilly Auto Parts employed claimant as a delivery driver from October 8, 2014 to August 14, 2015.

(2) The employer expected claimant to obey traffic laws and refrain from operating an employer vehicle in a manner that endangered persons or property. In 2015, the employer received complaints that claimant drove an employer vehicle 50 miles per hour in a 40 miles per hour zone and pulled out from a side road without stopping, cutting a driver off. Following its receipt of those complaints, the employer warned claimant that it expected him to follow traffic laws and drive its vehicles in a safe manner. Claimant understood the employer's expectations.

(3) On August 13, 2015, about 3:00 p.m., claimant was assigned a delivery. He was required to make a log entry regarding his start time into his logbook. His truck was parked under an awning in the employer's parking lot, and because that made it difficult for him to see, he rolled his truck out from under the awning into the sunlight and made the required log entry. After doing so, he accelerated out of the parking lot but forgot that a pole, which was approximately the height of the hood on his truck and obscured by the hood, was several feet in front of his truck and struck it. He reported the collision to his

supervisor. On August 14, 2015, the employer discharged claimant for striking the parking lot pole on August 13, 2015.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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 standards of behavior the 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 the 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectation. Here, the employer failed to satisfy that evidentiary burden.

As a preliminary matter, the employer chose not to discharge claimant until after the August 13 parking lot collision, and to limit the inquiry to relevant matters, the discharge analysis initially is focused on the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. *See e.g. Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred when it did). Here, the initial analysis of whether claimant's discharge disqualifies him from unemployment benefits is, therefore, properly limited to claimant's behavior that resulted in the August 13 collision, which proximately caused his discharge the following day.

The employer discharged claimant for causing the collision with the pole, which substantially damaged its truck. Audio Record ~ 18:00 to 19:00. The employer had the right to expect claimant to refrain from operating its vehicle in a manner that endangered persons or property. However, at hearing, claimant asserted he "forgot" about the pole being there after he made his log entry and did not see it as it was hood height and the sun was shining. Audio Record ~ 26:40 to 28:30. On this record, claimant's testimony was plausible. Absent a basis for concluding that claimant was not a credible witness, we accept his testimony that he simply "forgot" about the pole being where it was before accelerating into it. The employer failed to prove that, more likely than not, claimant hit the pole because he was consciously disregarding a known risk of collision as he left the lot rather than because he made an inadvertent error because he forgot about the pole, was preoccupied with the log entry, and was unable

to see the pole and avoid colliding with it because of its height and glare from the sun. Accordingly, although claimant may have been negligent in his operation of the employer's truck, the employer failed to establish that claimant consciously disregarded a known risk of collision on August 13, 2015. Without willful or wanton negligence, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 15-UI-45898 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service: December 2, 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.

**Please help us improve our service by completing an online customer service survey**. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.