

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0043

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 11328). Claimant filed a timely request for hearing. On December 31, 2015, ALJ Vincent conducted a hearing, and on January 6, 2016 issued Hearing Decision 16-UI-50531, affirming the Department's decision. On January 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although in Hearing Decision 16-UI-50531 at 1, the ALJ stated that no exhibits were offered or admitted into evidence, the ALJ, in fact, marked and admitted Exhibit 1 into evidence. Audio at ~6:40. Hearing Decision 16-UI-50531 is corrected to reflect the ALJ's admission of Exhibit 1 into the hearing record.

FINDINGS OF FACT: (1) Southern Refrigerated employed claimant as a truck driver from April 8, 2015 until November 19, 2015.

(2) Federal regulations required claimant to have a valid commercial driver's license (CDL) in order to drive the employer's truck. The employer expected claimant to maintain a valid CDL as a condition of his employment. Claimant understood the employer's expectation.

(3) Claimant and his girlfriend lived together. They were the joint owners of a motorcycle, with the title in both of their names. On January 16, 2015, claimant asked his girlfriend if she had obtained insurance for the motorcycle as she had previously agreed to do. The girlfriend told claimant she had, and showed claimant a Geico app she had downloaded to her smartphone and through which she had arranged for the insurance. Claimant looked at the app and saw that the motorcycle, with appropriate identifying and ownership information, was entered and the information had been sent to Geico. Afterward, claimant and his girlfriend rode the motorcycle and were in an accident.

(4) On January 16, 2015, after the accident, the police cited claimant for driving without proof of insurance. Shortly after, claimant contacted Geico for evidence that the motorcycle was insured at the time of the accident. Claimant learned that the Geico insurance policy for the motorcycle was not in place at the time of the accident. The insurance became effective on January 16, 2015, but sometime after the time of the accident. At the time the accident occurred, Geico had not yet processed the information sent to it and the policy was not yet in place.

(5) Sometime after January 16, 2015, state authorities learned that the motorcycle was not insured at the time of the accident. Claimant received notice that his CDL was going to be suspended beginning on April 3, 2015 for not having insurance when the January 16, 2015 accident occurred. Sometime before April 3, 2015, claimant was notified that the suspension was not going into effect.

(6) On October 22, 2015, claimant's CDL was suspended for his involvement in an uninsured accident on January 16, 2015. Claimant was away from home, on the road driving the employer's truck for several weeks, and did not have access to his mail and the notices that were sent to him about the suspension. Claimant was unaware that his CDL had been suspended.

(7) Before November 18, 2015, claimant still did not know that his CDL was suspended. On November 18, 2015, a company the employer retained to perform routine checks of the CDL status of its drivers reported to the employer that claimant's CDL had been suspended for one year beginning on October 22, 2015.

(8) On November 19, 2015, the employer discharged claimant for failing to maintain a valid CDL.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

We begin our analysis by determining the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). Here, the record is clear that the employer was unable and unwilling to permit claimant to continue working because claimant lost his CDL. Claimant's work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(c) (August 3, 2011) provides that the willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to performance of the occupation involved ins misconduct, so long as such failure is reasonable attributable to the individual. 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 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).

Claimant and his girlfriend were co-owners of a motorcycle; it can be inferred from this record that claimant's girlfriend thought she had taken all of the steps necessary to secure effective insurance before she and claimant rode the motorcycle on January 16, 2015. Nothing in the record suggests that the girlfriend was unreliable in following through on tasks she agreed to undertake and, as a co-owner, she had every incentive to ensure that the motorcycle was covered by insurance before she allowed it to be taken on the road. Furthermore, claimant was not indifferent to the consequences of driving the motorcycle without insurance since he took the additional step of confirming the existence of effective insurance when, in addition to having his girlfriend's assurance, he looked at the app and saw that the necessary information to effectuate coverage had been sent to Geico. Since there was no evidence showing or tending to show that claimant's reliance on his girlfriend and her statement that she had obtained the insurance was unreasonable, and claimant took independent steps to verify insurance coverage before driving the motorcycle on January 16, 2015, claimant's involvement in an uninsured accident on January 16, 2015 was not due to his willful or wantonly negligent behavior. While claimant was unaware that Geico needed to process the transaction before the insurance became effective, his lack of knowledge was, at best, a failure to exercise due care. There was no evidence that the mental state surrounding claimant's ignorance had any indicia of wantonly negligent behavior. We therefore conclude that the behavior that resulted in claimant's loss of his CDL was willful or wantonly negligent, or that it was disqualifying misconduct.

That claimant unknowingly drove a truck for the employer after his CDL was suspended on October 22, 2015 also was not misconduct. Claimant was not aware that his CDL was suspended, and we infer he did not know and had no reason to know that the suspension originally planned for April 3, 2015 but not imposed, would be reactivated and become effective at some later date. Absent evidence that this circumstance or some like circumstance was foreseeable, claimant's failure to take additional steps to ensure he received immediate notice of any suspension was not wantonly negligent. As a result, claimant's behavior in driving for the employer without a valid CDL was not a willful or wantonly negligent violation of the employer's standards.

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

DECISION: Hearing Decision 16-UI-50531 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 4, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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