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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0154

Hearing Decision 16-UI-51504 Affirmed
Hearing Decision 16-UI-51505 Affirmed

PROCEDURAL HISTORY: On October 14, 2015, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant was not available for work during the week of September 13, 2015 through September 19, 2015 (decision # 124331) and the second concluding claimant voluntarily left work without good cause (decision # 125535). Claimant filed timely requests for hearing on both decisions. On January 15, 2016, ALJ Wyatt conducted a consolidated hearing, and on January 22, 2016 issued two hearing decisions, the first affirming decision # 125535 (Hearing Decision 16-UI-51504) and the second affirming decision # 124331 (Hearing Decision 16-UI-51505). On February 10, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-51504 and 16-UI-51505. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0153 and 2016-EAB-0154).

Claimant submitted a written argument in which he sought to present information that he did not offer at the hearing. Claimant did not explain why he was unable to present this information during the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Hoovestol Inc. employed claimant as a truck driver from January 1, 2014 until September 24, 2015.

(2) The employer expected claimant to remain in regular contact so it would know if he was willing to work and could schedule him and other drivers accordingly. The employer also expected claimant to call in if he was unable to work, and not to take vacation time without the permission of the route manager. Claimant was aware of the employer's expectations as a matter of common sense.

(3) The employer contracted with the United States Postal Service (USPS) to transport shipments of mail. USPS was the employer's only client. Sometime before August 1, 2015, USPS renegotiated its contract with the employer and, beginning on August 1, 2015 reduced the number of routes on which the employer would transport mail. As a result of the change in its contract with USPS, the employer downsized from employing 35 drivers to 10 drivers. Also sometime shortly before August 1, 2015, the employer re-designed its routes to meet USPS's reduced work requirements and allowed its employees to select among the new routes based on seniority. Claimant selected a route that required him to transport mail on Fridays through Tuesdays, and to lay-over one night away from home. Before his route was changed, claimant was able to return home after work each night. Claimant's new route was scheduled to begin on August 1, 2016.

(4) On August 1, 2015, claimant drove his new route, proceeding to San Francisco, California and returning to Goshen, Oregon on August 2, 2015. Exhibit 1 at 9. After reaching Goshen, claimant returned to his home on August 2, 2015.

(5) On Monday, August 3, 2015, the employer's route manager called claimant to give him the details of the remaining parts of the new route that the employer expected him to drive on Monday and Tuesday, August 3 and 4, 2015. Claimant did not respond to the route manager's calls and did not report for work on August 3 and 4, 2015. Claimant had notified the employer that he was going to be absent from work. The route manager arranged for other drivers to perform claimant's route. Exhibit 1 at 4.

(6) On Thursday, August 6, 2015, the employer's operations supervisor sent claimant a text message inquiring whether claimant intended to drive his scheduled route beginning on its next scheduled starting date, August 7, 2015. Claimant did not respond to the operations supervisor on August 7, 8 and 9, 2015. Claimant did not report for work on those days and did not notify the employer that he was going to be absent. On August 10, 2015, claimant replied to the operations supervisor's text message of August 6, 2015. Claimant stated that he was on vacation, and would return to work after Labor Day, which was on September 7, 2015. Claimant had not received permission from the route manager to take a vacation. Claimant did not report for work and did not communicate with the employer to report his absences or for other reasons from August 11, 2015 through September 7, 2015. The route manager arranged for other drivers to perform claimant's route.

(7) On September 3, 4, 9, 10, 11, 15, 16, 17, and 18, 2015 the route manager attempted unsuccessfully to reach claimant by phone to discuss whether he intended to resume working. Exhibit 1 at 5. Sometime before September 17, 2015, claimant filed a claim for unemployment benefits. Claimant claimed benefits for the week of September 13 through 19, 2015 (week 37-15). If claimant had contacted the route manager, he would have been able to drive his route on Thursday September 17 through Saturday, September 19, 2015. On these days, the route manager arranged for other drivers to perform claimant's route.

(8) On September 21, 2015, two weeks after the Labor Day date that claimant had told the employer he was going to resume working, the employer's operations supervisor was finally able to reach claimant by phone. The operations supervisor asked claimant why he had not contacted the route manager in response to the route manager's attempts to communicate with him about working and told claimant that the route manager had not approved any vacation time for him. Claimant told the operations supervisor,

"[T]hat was in the past, and asked what routes [the employer] had for him." Exhibit 1 at 7. Despite claimant's prior acceptance of the route with the layover shortly before August 1, 2015, claimant told the operation supervisor that he did not want a run with a layover because he had animals at home and preferred a schedule that allowed him to return home every night. The operations supervisor told claimant if he was not willing to drive the route he had chosen, he should "move on." Exhibit 1 at 7. The operations supervisor told claimant someone would call him on September 22, 2015 to discuss his scheduled run. Exhibit 1 at 7.

(9) On September 22, 2015, the employer's route manager tried two times to contact claimant by phone, but was not able to reach claimant and left him a voicemail message. Exhibit 1 at 7. Claimant did not return that message.

(10) On September 24, 2015, the operations supervisor reached claimant by phone and asked claimant "what did you want to do?" since it appeared he was unwilling to drive the route with the layover that he had previously accepted. Exhibit 1 at 8. Claimant asked to be made an "unscheduled part-time" driver. Exhibit 1 at 8. The operations supervisor told claimant that, given the renegotiated contract with USPS, the employer did not have enough work to allow claimant a route in which he returned daily to his home. Claimant refused to work the route he had selected and was available to him or drive any scheduled route where he could not return to his home nightly. Exhibit 1 at 8.

(11) On September 24, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: Claimant was not available for work during the week of September 13, 2015 through September 19, 2015. The employer discharged claimant for misconduct on September 24, 2015.

Claimant's Availability From September 13, 2015 Through September 19, 2015. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to all suitable full time, part time and temporary work opportunities throughout the labor market, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

Claimant did not dispute that, had he responded to the route manager's calls to him, he could have worked during week 37-15, on September 17, 18 and 19, 2015. Transcript at 10. While claimant justified his unwillingness to work that week by asserting that the run he would have been scheduled for him was "not legal" because it required him to keep inaccurate driving records and to drive longer that eleven continuous hours, he did not rebut the employer's specific testimony that it never told him to fabricate his truck logs, and would have permitted him to stop driving if he was delayed on the route and exceeded the eleven hours of driving time he was allowed before stopping. Transcript at 10, 11, 40-41, 51, 53-55. That claimant might have felt he needed to perform the run without calling on another driver to relieve him does not mean that the employer required him to do so in violation of motor carrier standards, or would have required him to fabricate his log book to hide the fact that he was driving longer than eleven hours. Because claimant did not contend or demonstrate that the employer required

him to illegally fabricate his log books or to drive longer than eleven hours as a condition of driving that run, there is insufficient evidence to support that the work the employer offered him during week 37-15 was not suitable work because the employer would have required him to engage in illegal behavior. On this record, since claimant did not accept an offer of suitable work during week 37-15, he was not available for work during that week and is ineligible to receive benefits during that week.

The Work Separation. The Department and the ALJ concluded that claimant's work separation was a voluntary leaving. However, we conclude that the separation was a discharge based on the standards set forth in OAR 471-030-0038(2) (August 3, 2011). Those standards provide that if claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Here, both parties agreed that claimant never told any employer representative that he was quitting work, and the employer's witnesses testified that claimant told the employer on September 24, 2015 that he was willing to continue working in an on-call, "unscheduled part-time" capacity. Transcript at 18, 24, 39-40; Exhibit 1 at 8. Claimant did not refuse to work further for the employer, but wished to change his route from that which he had previously accepted or to change his status from that of a full-time driver. It was the employer who was unwilling to allow claimant to continue working in the capacity he wanted when, on September 24, 2015, it refused to permit either. Because claimant was willing to work, but the employer refused to allow him to do so, claimant's work separation was a discharge on September 24, 2015.

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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In this case, the employer's witnesses presented several grounds on which it decided to sever the employer's relationship with claimant in addition to the fact that he refused to work the route and schedule that he was assigned, including that he did not maintain contact with the employer from August 6, 2015 through September 21, 2015 and that, during this period he failed to call in to report whether or not he was going to work and he took unauthorized time off. Transcript at 23, 24, 25, 27, 32, 33, 34-35, 38-39. While claimant contended the route manager had allowed him to take two weeks' vacation, beginning apparently on August 3, 2015, claimant did not explain why he did not resume contact with the employer on approximately August 17, 2015, but remained incommunicado from August 6, 2015 until September 21, 2015. Notably, claimant did not dispute that he received the several voicemail and text messages that the route manager and operations supervisor left for him during this lengthy period, and he did not provide an explanation for his refusal to respond to the employer's inquiries. As a matter of common sense, particularly in light of the employer's concerted efforts to communicate with him, claimant was reasonably aware that the employer expected him to communicate with it. Claimant's

failure to maintain contact with the employer from August 6, 2015 until September 21, 2015 was at least a wantonly negligent violation of the employer's standards.

Claimant's principal defense to the employer's discharge of him was that to drive the route he selected, he would of necessity have had to engage in unlawful behavior, such as driving longer than the eleven continuous hours he was allowed under federal motor carrier standards and fabricating his log book. Transcript at 45-47, 49, 51-52. However, this stated belief does not explain why claimant refused to communicate with the employer for such an extended period of time when it was trying diligently to reach him. Whether or not the employer was condoning violations of federal standards is a separate matter from claimant's obligation to communicate with the employer and to remain in contact with it. Claimant's contention does not excuse his wantonly negligent failure to maintain contact with the employer during the period August 6, 2015 through September 21, 2015.

Claimant's wantonly negligent failure to communicate with the employer beginning on August 6, 2015 and continuing until September 21, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused as an "isolated instance of poor judgment" only if, among other things, it was 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). Here, claimant's failure to communicate with the employer occurred over six weeks and in the face of many, many attempts on the employer's part to contact him. Rather than being an isolated occurrence, claimant's wantonly failure to communicate with the employer was prolonged and continuing and formed a pattern of wantonly negligent behavior in violation of the employer's standards. As such, it is not excusable as an isolated instance of poor judgment.

Nor was claimant's wantonly negligent behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present any evidence showing that he thought the employer would condone his behavior in remaining incommunicado for seven weeks. As well, claimant did not contend that he did not understand that the employer wanted him to maintain contact with it, or that he did not understand that the employer expected him to communicate with it in response to the inquiries of the route manager and the operations supervisor. The excuse of good faith error does not apply to claimant's violation of the employer's standards.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits based on his work separation.

DECISION: Hearing Decisions 16-UI-51504 and 16-UI-51505 are affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: March 14, 2016

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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