

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0791

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74254). Claimant filed a timely request for hearing. On June 14, 2016, ALJ R. Frank conducted a hearing, and on June 17, 2016 issued Hearing Decision 16-UI-62044, affirming the Department's decision. On July 5, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Golden State Foods employed claimant as a driver's helper from July 14, 2010 to February 29, 2016. Claimant did not possess a commercial driver's license during his employment, and was not authorized to drive the employer's commercial vehicles.

(2) On February 13, 2016, the commercial driver claimant was accompanying became frustrated due to his inability to maneuver the employer's commercial vehicle in a client's lot. Claimant used to move commercial vehicles on a previous employer's private lot. When the commercial driver was unsuccessful in his attempts to maneuver the vehicle in the lot, claimant decided to drive the employer's commercial vehicle to see if he could successfully maneuver it in the client's lot.

(3) While driving the commercial vehicle, claimant struck a parked vehicle. Claimant did not report the collision to the employer's client. Claimant believed the commercial driver was going to report the collision to the employer, and did not report the collision to the employer. The customer later reported the collision to the employer, which prompted the employer to investigate. Claimant did not dispute that the collision had occurred or that he was driving at the time.

(4) On February 25, 2016, the employer decided to discharge claimant for driving its commercial vehicle without a license, the collision with a parked vehicle and for failing to report the collision. The employer did not notify claimant of its decision because it was waiting for the client to provide video of the collision before doing so.

(5) Claimant believed that his discharge was imminent, and, if he agreed to resign in lieu of discharge, he would not have a discharge on his employment record. He resigned effective February 29, 2016.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant for misconduct.

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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

At the time claimant resigned, the employer had, more likely than not, already decided to discharge him. Therefore, it is more likely than not that the employer would not allow claimant to continue working, and the continuing relationship between the employer and claimant had ended. Because claimant could not have continued to work for the employer for an additional period of time, the 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)(a) 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 instance of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because, after driving its commercial vehicle on a client's property without a commercial driver's license and colliding with a parked car, claimant failed to report the accident to anyone, including the employer. Claimant knew he was operating a commercial vehicle, that operating a commercial vehicle required a commercial driver's license and that he was not a commercially licensed driver. He therefore knew or should have known that all of the aforementioned activities would violate the employer's expectations as a matter of common sense. His conduct was, at a minimum, wantonly negligent.

Although claimant argued that he did not know he needed a commercial driver's license to operate the commercial vehicle on the grounds of the client's business, *any* driver is required and assumed to know the basic rules of the road, which prohibit individuals from leaving the scene of a property-damaging accident without reporting the accident. ORS 811.700(1)(b) provides, in pertinent part, that a person commits the class A misdemeanor of "failure to perform the duties of a driver when property is damaged" when he collides with an unattended vehicle and fails to "immediately stop" and "[l]ocate or notify the operator or owner of the vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle," or "[l]eave in a conspicuous place in the vehicle struck a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a

statement of the circumstances thereof." It is no defense that the collision occurred at the employer's client's business, as that law applies to "any premises open to the public." ORS 811.700(2).

Claimant's conduct cannot be excused as an isolated instance of poor judgment because it violated or was tantamount to a violation of the law, and, therefore, exceeded mere poor judgment. *See* OAR 471-030-0038(1)(d)(D). By colliding with an unattended vehicle and failing to report the collision, claimant more likely than not violated ORS 811.700 and committed a class A misdemeanor; if not an actual violation of that law, claimant's conduct was at least tantamount to a violation. Regardless, such conduct is considered to exceed mere poor judgment and cannot be excused. Claimant's conduct also cannot be excused as a good faith error. He did not sincerely believe, or have a factual basis for believing, that the employer would condone his driving a commercial vehicle without a license, colliding with an unattended car, or failing to personally report the collision as required by state law.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-62044 is affirmed.

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

DATE of Service: August 2, 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.

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.