

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0815**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80227). Claimant filed a timely request for hearing. On June 28, 2016, ALJ Monroe conducted a hearing, and on July 6, 2016 issued Hearing Decision 16-UI-63151, concluding the employer discharged claimant, but not for misconduct. On July 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Beaverton School District #48J employed claimant as a school bus driver from November 3, 2014 to April 13, 2016.

(2) The employer expected claimant to avoid accidents and stop behind the line markers at light rail crossings. In the event of an accident, the employer expected claimant to remain at the scene, contact the employer's dispatch service and await further direction from dispatch. Claimant understood the employer's expectations from multiple trainings.

(3) On September 1, 2015, claimant hit a badge reader on the gate in the bus parking lot.

(4) On September 8, 2015, claimant hit a pillar in a parking lot, and hit another bus in the same parking lot.

(5) On September 22, 2015, claimant hit a sign with the bus's mirror.

(6) On February 5, 2016, claimant hit a parked car while driving the bus on her route. Claimant did not realize she had hit a car. A resident reported the incident. Claimant did not receive a traffic citation for the incident.

(7) On February 24, 2016, claimant hit a sign with the mirror on her bus. The employer gave claimant a "letter of concern" due to the number of accidents she was involved in.

(8) On April 7, 2016, claimant's knee hit the parking release lever, and her bus rolled into another bus.

(9) The employer warned claimant after each traffic incident to pay closer attention to her surroundings and slow down when she drove, and provided claimant additional training. Claimant continuously tried to improve her driving. Claimant had difficulty controlling the "swing" of the bus. Transcript at 18.

(10) On April 8, 2016, claimant was driving a school bus with students and a driver trainee through an intersection she had not driven before because her route had recently been changed. Claimant arrived at a TriMet light rail crossing, where she stopped the bus past the stop line marker. Claimant was distracted because students were out of their seats and fighting, there was a lot of traffic, and claimant was explaining the route to the driver trainee. Claimant did not see the stop line and continued to move the bus forward past the line marker. The light rail crossing arm lights went on and the crossing arm lowered while claimant was stopped, causing the crossing arm to lower onto the top of the bus, and to fall onto the ground. A man near the fallen crossing arm picked it up and waved at claimant. The man was dressed like a TriMet officer. Claimant did not see that the crossing arm was damaged. The train passed and claimant left the scene.

(11) Just after claimant left the accident scene, she pulled over and tried to contact dispatch, but the line was busy. Claimant returned to her route, and called dispatch again, but ended the call abruptly because she had to address a disciplinary issue with a child. Claimant called dispatch again 43 minutes after the accident occurred and reported the accident. The incident was not reported to the police, and claimant was not given a traffic citation, but TriMet reported it to the employer.

(12) On April 13, 2016, the employer discharged claimant for engaging in unsafe driving practices.

**CONCLUSIONS AND REASONS:** We agree with the ALJ, and conclude that claimant's discharge was 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. 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 instances of poor judgment or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The proximate cause of, or final incident which resulted in claimant's discharge on April 13, 2016, was the April 8, 2016 traffic incident, which makes it the initial focus for our misconduct analysis. There is no evidence to show that claimant was driving too fast or consciously engaged in behavior that caused her failure to note the white line marker or crossing arm when she approached the tracks on April 8. Claimant explained at hearing that she was paying attention to her driving, and was not driving too fast,

but did not see or realize she had passed the marker line and the crossing arm. Transcript at 25. Claimant's testimony is plausible because she was in an unfamiliar intersection during traffic, and distracted by a trainee and rowdy students on the bus. The preponderance of the evidence does not show claimant's failure to see the white line before she crossed it was due to a willful or wantonly negligent disregard of the employer's expectations, based on her training or common sense.

However, claimant violated the employer's expectations when she left the scene of the accident without first speaking with dispatch. Claimant asserted that she was unable to contact dispatch immediately because dispatch's telephone line was busy, but provided no plausible explanation for why she did not remain at the site, rather than continuing on her route, while she tried to contact dispatch again. Claimant knew from prior experience and training that the employer expected her to report the accident while at the scene, but showed she was indifferent to the expectation by leaving the scene without having contacted the employer first. Claimant's failure to comply with that expectation in the final incident was, at a minimum, wantonly negligent.

Claimant's conduct when she left the accident site on April 8 may be excused from misconduct that disqualifies her from unemployment benefits if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is 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). Behavior that exceeds "mere poor judgment" may not be excused. OAR 471-030-0038(1)(d)(D). An act exceeds mere poor judgment if it was unlawful, tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship possible. OAR 471-030-0038(1)(d)(D).

The employer asserted that claimant had multiple traffic incidents during her employment because she did not pay attention while driving, drove too fast, and was not sufficiently careful about her "tail swing" when driving a bus. Transcript at 14. Claimant testified that the employer provided her with training, and she tried her best to improve her performance, but that she "just couldn't get it." Transcript at 38. The preponderance of the evidence fails to show that claimant's prior traffic accidents were attributable to willful or wantonly negligent behavior on her part. Rather, the evidence shows they were attributable to a lack of job skills or experience, which is not misconduct. OAR 471-030-0038(3)(b). Because the record does not establish the traffic accidents before April 8 were the result of claimant's conscious indifference to the employer's expectations, the final incident where claimant left the accident scene without contacting dispatch was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. Thus, the final incident was "isolated."

Although some conduct, even if isolated, exceeds mere poor judgment, claimant's conduct did not. OAR 471-030-0038(1)(d)(D). The record does not support a conclusion that claimant's failure to contact dispatch before she left the accident scene was unlawful or tantamount to unlawful conduct. ORS 811.700(c) provides that a driver involved in an accident that damages only fixtures or property on or near the street must "take reasonable steps" to notify the owner or person in charge of the property. This record does not show that claimant failed to perform the legal duties of a driver in an accident by leaving the scene because claimant did not see that the crossing arm was damaged, believed a TriMet officer saw the accident, and notified her dispatch about the accident. Nor does the record establish that claimant's conduct created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship possible. Claimant's conduct therefore did not exceed mere

poor judgment, and claimant's conduct is excusable as an isolated instance of poor judgment. OAR 471-030-0038(3).

We conclude that the employer discharged claimant for an isolated instance of poor judgment, and not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 16-UI-63151 is affirmed.

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

**DATE of Service:** August 8, 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](http://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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