

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0928

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 123953). The employer filed a timely request for hearing. On July 20, 2016, ALJ Hoppe conducted a hearing, and on July 21, 2016 issued Hearing Decision 16-UI-64167, affirming the Department's decision. On August 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Federal Express Corporation employed claimant as a driver and courier from June 21, 2011 until May 23, 2016.

(2) The employer expected claimant to attend work on at least 96.9 percent of his scheduled work days during a rolling 12 month period. The employer also expected claimant to avoid preventable accidents when he was driving. The employer further expected claimant not to accrue more than two warnings or performance reminders in a rolling 12 month period. Claimant was aware of the employer's expectations.

(3) On December 3, 2016, the employer issued a performance reminder to claimant for having an attendance rating of 96.4 percent for a rolling 12 month period. Exhibit 9 at 1. On January 29, 2016, the employer issued a performance reminder to claimant for having an attendance rating of 95.9 percent for a rolling 12 month period. Exhibit 4.

(4) On May 13, 2016, claimant was driving the employer's vehicle and approaching an intersection that had a traffic control light. A car travelling in the same lane as claimant and immediately in front of him was stopped because the traffic light was red. As claimant neared the intersection and the stopped car, the traffic light changed to green and claimant observed that car begin to move forward. Claimant

intended to take a right turn at the intersection and, as he prepared to enter the intersection, he briefly glanced to his left to make sure that any vehicles coming from that direction obeyed the red light controlling that side of the intersection and did not enter it. Claimant then looked ahead in preparation for making the right turn after he entered the intersection. At that time, claimant's saw that the car in front of him had for some reason came to complete stop in the middle of the intersection. Claimant's vehicle was travelling slowly since he had initially slowed down when the traffic control light was red and had not yet regained speed. Claimant immediately applied the brakes to his vehicle but was unable to stop it before it struck the rear end of the car that was stopped in the intersection. Claimant notified the employer of the accident and that same day the employer issued a notice suspending claimant while it investigated the accident.

(5) On May 23, 2016, the employer discharged claimant for accruing three warnings or performance reminders or notifications in a rolling 12 month period: the performance reminders for attendance on December 3, 2015 and January 29, 2016 and the suspension notification for the traffic accident on May 13, 2016.

CONCLUSIONS AND REASONS: 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 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. 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).

At hearing, the employer appeared to take the position that claimant's receipt of three performance notifications in a rolling 12 month period automatically established his misconduct since the employer's policies provided for discharge when that number of notifications were received in that period of time. Audio at ~44:30; Exhibit 18 at 2. However, the issue before EAB is whether claimant is disqualified from employment benefits and that inquiry is not limited solely to whether claimant violated the employer's policies. OAR 471-030-0038(1)(c) and (3)(a) define disqualifying misconduct as violations of an employer's standards or policies that result from a willful or wantonly negligent state of mind. Accordingly, while claimant might have objectively violated the employer's policies that, alone, will not establish claimant's misconduct for the purposes of this case since the employer must also show that claimant had the requisite state of mind when he violated those policies.

In Hearing Decision 16-UI-64167, the ALJ assessed claimant's behavior underlying all three performance notifications to determine if claimant was discharged for misconduct and found that since the employer was unable to demonstrate that two of the three notifications were issued due to claimant's misconduct, he was not disqualified from benefits. Hearing Decision 16-UI-64167 at 4. In its written argument, the employer contended that the ALJ erred in disregarding the final incident, the traffic

accident, and, even if the two performance warnings for attendance were not issued for behavior that constituted misconduct, claimant's behavior that led to the traffic accident was sufficient to establish claimant engaged in misconduct. EAB does not customarily employ the type of misconduct analysis that the ALJ undertook. Rather than assess all incidents that the employer asserted led to the discharge to determine if claimant was discharged for misconduct, EAB usually limits its inquiry to the incident that was the proximate cause of the discharge, or the incident without which the discharge would not have occurred, which is generally the final incident of alleged misconduct preceding the discharge.¹ EAB takes this approach even if, as here, the reason the employer discharged claimant was the number of times claimant allegedly violated the employer's policies. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point or occurrence-based policy, the last occurrence is considered the reason for the discharge). The last incident of claimant's alleged misconduct was the May 13, 2016 traffic accident and it was the notification that was issued as a result of it that precipitated claimant's discharge because it was claimant's third performance notification in a rolling year. As such, that traffic accident is the proper focus of our analysis of whether claimant engaged in misconduct. EAB therefore agrees with the employer that claimant's behavior that led to the accident may be sufficient to disqualify him from benefits, but for different reasons from those the employer set forth.

Claimant testified that he did not know exactly why the May 13, 2016 accident occurred. Audio at ~34:55. At hearing the employer's representative made inquiries to suggest claimant was not as careful as he should have been, and his failure to exercise care led to the accident. Audio at ~24:20, ~43:07. A lack of care or diligence of which a claimant was unmindful at the time of his lapse, an inadvertent accident, a mistake or other acts of simple negligence connote the absence of the consciously aware mental state needed to show a claimant's willful or wantonly negligent behavior gave rise to his violation of the employer's standards. *See* OAR 471-030-0038(1)(c). Absent evidence or circumstances showing claimant had a willful or wantonly negligent mental state at the time the traffic accident occurred, the employer has not met its burden to show claimant's misconduct caused the May 13, 2015 traffic accident. The employer offered no such evidence. Accordingly, the employer did not show by a preponderance of the evidence that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-64167 is affirmed.

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

¹ *See Appeals Board Decision* 13-AB-0341, March 28, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Appeals Board Decision* 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); *Appeals Board Decision* 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); *Appeals Board Decision* 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).

DATE of Service: September 7, 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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