

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0968

Reversed
Disqualification

PROCEDURAL HISTORY: On July 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73640). Claimant filed a timely request for hearing. On August 11, 2016, ALJ Frank conducted a hearing, and on August 17, 2016 issued Hearing Decision 16-UI-65841, concluding the employer discharged claimant, but not for misconduct. On August 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) A and M Transport employed claimant as a commercial truck driver from April 25, 2002 until June 14, 2016.

(2) The employer expected claimant to follow the posted speed limits and all other state laws when driving the employer's trucks on public roads. Claimant understood the employer's expectations.

(3) In November 2014, while driving the employer's truck, claimant was issued a citation by law enforcement for exceeding the speed limit by 14 miles per hour. In September 2015, the employer's safety director reviewed the GPS records for the truck claimant was driving and saw that he had driven his truck at speeds that exceeded the posted speed limits for the road he was driving by 13 to 20 miles per hour. The employer issued a verbal warning to claimant instructing him not to exceed the speed limits on roads.

(4) On May 2, 2016, law enforcement issued a citation to claimant for exceeding the speed limit by 11 to 14 miles per hour when driving the employer's truck in a work zone. The employer issued a written warning to claimant for receiving this citation advising him he would be discharged if he received any further speeding citations.

(5) On June 9, 2016, claimant was stopped by law enforcement because the truck that he was driving was recorded as travelling at 65 miles per hour when the posted speed for the road was 55 miles per hour. Despite claimant's recorded speed, the law enforcement officer did not issue a citation to claimant and only gave him a verbal warning. When the employer learned of the warning issued to claimant, it

reviewed the GPS records from claimant's truck to investigate the frequency at which he drove over 65 miles per hour. For the period of June 8 to June 13, 2016, the employer determined claimant had only been driving in Oregon and California where the maximum speed limit for commercial trucks, like claimant operated, was 55 miles per hour for any road. During this six day period, claimant drove his truck sixty three times at speeds over 65 miles per hour, exceeding the speed limit by at least 10 miles per hour.

(6) On June 14, 2016, the employer discharged claimant for driving his truck at speeds that exceeded posted speed limits.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. 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).

In Hearing Decision 16-UI-65841, the ALJ concluded that the employer failed to establish that it discharged claimant for misconduct. The ALJ reasoned that since it could not be ruled out that law enforcement failed to issue a citation to claimant for speeding on June 9, 2016 "result[ing] from one of the factors beyond claimant's reasonable control, which he cited at hearing," the employer could not show, absent additional evidence, that it discharged claimant for misconduct, i.e., exceeding the posted speed limit. Hearing Decision 16-UI-65841 at 4. We disagree.

Despite arguing at hearing that the radar gun the law enforcement officer used to gauge his speed on June 9, 2016 could have actually been tracking another vehicle rather than his truck and that it was very difficult for him to look down at his speedometer to determine his speed when he needed to vigilantly look out his windows for dangers on the road, claimant admitted at hearing that thought he was travelling "62 or 63 mile per hour" when he was pulled over, which would have exceeded the maximum speed limit for trucks by 7 or 8 miles per hour. Audio at ~27:14. When explaining why he might have knowingly exceeded the speed limit on June 9, 2016, claimant first explained that he was trying to "keep up with the flow of traffic," then further explained that "normally" police officers "let you go over the speed [limit] a little bit," suggesting that he was speeding to shorten his travel time, and finally concluded with the comment, "I think I'm getting myself in hot water." Audio at ~27:14, ~28:12, ~28:44. From this sequence, it appears most likely that claimant knew the speed he was travelling on June 9, 2016, knowingly and voluntarily exceeded the speed limit rather than being required to do so by the flow of traffic, and anticipated that law enforcement would not stop him because his speed was within their zone of tolerance. While the reason law enforcement did not issue a citation to claimant for speeding on June 9, 2016 is not known, by claimant's own admission he was knowingly speeding and violating the law on June 9, 2016. By his behavior on June 9, 2016, claimant willfully violated the employer's standards.

Although claimant's behavior on June 9, 2016 was in willful disregard of the employer's expectations, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an isolated instance of poor judgment if it was, among other things, a single or infrequent occurrence rather than repeated act or pattern of willful or wantonly negligent behavior in violation of the employer's expectations. OAR 471-030-0038(1)(d)(A). A claimant's behavior may not be excused as an isolated instance of poor judgment if the behavior at issue exceeded "mere poor judgment" by being unlawful or being tantamount to unlawful behavior. OAR 471-030-0038(1)(d)(C).

Claimant did not dispute that he received two traffic citations for speeding, one during November 2014 and one on May 2, 2016. Claimant did not contend either was erroneously issued to him or that some exigent circumstances caused him to exceed the speed limit. Moreover, the employer presented unrebutted evidence that during the six days between June 8 and June 13, 2016, the GPS in claimant's truck recorded him driving his truck at speeds over 65 miles per hour sixty three times, which exceeded the maximum speed for trucks on any road in the state in which he was travelling by ten miles per hour. Claimant did not contend that the employer's truck GPS was inaccurate or that he was not aware of the speeds at which he was travelling, and it is implausible that he was unaware of his speed on all of those sixty three occasions or that exigent circumstances required him to exceed the speed limits on all of those sixty three occasions. It appears from this backdrop that during the period surrounding June 9, 2016, claimant knowingly drove at speeds that violated the law fairly frequently. Claimant's willful behavior in disregard of the employer's standards on June 9, 2016 was not a single or infrequent willful or wantonly negligent event in violation of the employer's standards. As well, the behavior for which claimant was stopped on June 9, 2016 was by claimant's own concession against the law even if the law enforcement official did not issue a traffic citation to him. As such, claimant's behavior on that day also exceeded mere poor judgment.

Claimant's behavior also may not be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend, let alone suggest, that he exceeded the posted speed limit because he mistakenly thought the employer would allow it under the circumstances or that some employer interest compelled him to do so. On this record, the excuse of good faith error is not applicable to claimant's behavior on June 9, 2016.

The employer met its burden to show it discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-65841 is set aside, as outlined above.

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

DATE of Service: September 20, 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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