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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1191

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92911). Claimant filed a timely request for hearing. On October 7, 2016, ALJ Frank conducted a hearing at which claimant did not appear, and on October 12, 2016 issued Hearing Decision 16-UI-69099, affirming the Department's decision. On October 25, 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) The Mattress Firm / Sleep County USA employed claimant as a driver from August 6, 2014 until June 29, 2016.

(2) Upon hire, the employer trained claimant to drive its vehicles in accordance with the Smith System and he was certified in the system. Claimant was trained in and the employer expected him to abide by the GOAL protocol of the system. That protocol required claimant to stop his truck and "get out and look" if he was operating the truck a confined space and to visually confirm he had adequate clearance on all sides to avoid a collision. Claimant was aware of the employer's expectations, the Smith System and the GOAL protocol.

(3) On August 8, 2015, claimant was driving the employer's truck down a public street with cars parted on both sides of the street. Claimant checked both of his side mirrors and thought there was adequate clearance for the truck to travel safely on the street. Claimant proceeded forward and, while doing so, grazed the driver's side mirror of a parked vehicle. Exhibit 1 at 3, 5. Claimant reported the incident to the employer. On September 2, 2015, the employer placed claimant on a performance improvement plan for "clipping" the side mirror of a parked vehicle on August 8, 2015. Exhibit 1 at 4. The

performance improvement plan required claimant to take a re-training in the Smith System. Claimant was re-certified in the Smith System.

(4) On June 19, 2016, claimant was parking his truck in the employer's yard. Claimant decided to park the truck to the side of an already parked truck and not behind it to avoid boxing in that truck. When claimant was maneuvering his truck into place he struck the brake light on the rear of the parked truck as well as its driver's side rear door. Exhibit 1 at 8. Prior to parking his truck, claimant did not exit it to check whether he had sufficient clearance to avoid striking the truck that was already parked.

(5) On June 29, 2016, the employer discharged claimant for incurring two preventable accidents, one on August 8, 2015 and one on June 19, 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 connected with work. 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 incidents of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish 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 contended it discharged claimant for having two preventable accidents, the first occurring on August 8, 2015 and the second occurring on June 19, 2016. Audio at ~7:40; *see also* Employer's Written Argument at 1. However, EAB generally limits its misconduct inquiry to the final incident of alleged misconduct preceding the discharge.[1] This is especially appropriate when, as here, the employer was aware of the prior incident when it occurred and chose not to discharge claimant for it, presumably because the employer decided the prior incident did not merit discharge. Accordingly, the evaluation of whether claimant engaged in misconduct is limited to the facts surrounding claimant's June 19, 2016 accident.

At hearing, the employer's witness described claimant's training in the Smith System and its GOAL protocol. Audio at ~ 14:58, ~16:39. Although the witness did not testify explicitly that claimant failed to exit his vehicle on June 19, 2016 to gauge whether he had adequate clearance to park his truck alongside the other truck when he attempted to do so, she did state when she reviewed videotapes of the

[1] *See Appeals Board Decision*, 2016-EAB-0974, September 19, 2016 (citing and applying prior cases); *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); and *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).

accident, she observed that claimant failed to follow the GOAL protocol that day, by which it is inferred that claimant did not exit the truck to make a visual observation. Audio at ~18:20, ~19:47. From the witness's description of the scene which claimant attempted to park his truck, it is inferable that he was operating the truck in close quarters. Based on his training in the Smith System, the experience of his accident on August 8, 2015 and his re-training and re-certification in the Smith System after the August 8, 2015 accident, it was at least wantonly negligent of claimant not to have gotten out of his truck in compliance with the GOAL protocol, when he could only have been aware he was trying to park the truck in a confined space on June 19, 2016 and there was a risk he would strike the other truck if he did not take the necessary precautions.

Although claimant's behavior on June 19, 2016 may have been wantonly negligent, it will not constitute misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior is excusable as an "isolated instance of poor judgment" if the behavior at issue was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). To qualify as an isolated instance of poor judgment, the behavior of claimant's that is at issue must not have exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(C).

Here, the single incident prior to June 19, 2016 in which the employer contended claimant violated its standards was the accident in which he was involved on August 8, 2015. While the employer contended that past accident was "preventable," preventability does not establish that claimant's behavior giving rise to it was wantonly negligent rather than merely negligent. Audio at ~7:40. While the employer's witness generally asserted that claimant did not follow the GOAL protocol in this first accident, she did not state how that protocol applied when claimant was suddenly confronted with nearby parked vehicles as he was travelling down a public street, what specifically he should have done and whether he would have had the opportunity to safely take such steps in the circumstance in which he found himself. Absent such evidence or like evidence, the employer failed to establish claimant was reasonably aware of the alternative behavior that the employer expected him to follow and, accordingly, it did not show that the manner in which he behaved behavior on August 8, 2016 accident was willful or wantonly negligent violation of the employer's standards. As such, claimant wantonly negligent violation of the employer's standards on June 19, 2016 was isolated.

The evidence in this record is also insufficient to establish that claimant's behavior on June 19, 2016 caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. The employer did not contend that it was not able to trust claimant to adequately perform his job duties as a result of his striking a parked truck on June 19, 2016. While claimant had one previous accident on August 8, 2015, that accident occurred nine months prior and under different circumstances and, as discussed above, it and the June 19, 2016 accidents were not emblematic of claimant's propensity to drive in a manner that willfully or wantonly violated the employer's standards. On this record, there is insufficient evidence to show that a reasonable employer would have concluded that as a result of the June 19, 2016 accident it could no longer trust claimant to conform his behavior to the employer's standards. Having met both prongs of the test, claimant's behavior on June 19, 2016, while it was wantonly negligent was excused from constituting disqualifying misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-69099 is affirmed.

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

DATE of Service: November 4, 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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