

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1290

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 22, 2016, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding that the employer suspended claimant, but not for misconduct (decision # 90058), and the second concluding that the employer discharged claimant, but not for misconduct (decision # 90013). The employer filed timely requests for hearing on both decisions. On October 25, 2016, ALJ Triana conducted a consolidated hearing, and on October 27, 2016 issued Hearing Decision 16-UI-70020, affirming decision # 90058, and Hearing Decision 16-UI-70021, affirming decision # 90013. On November 16, 2016, the employer filed applications for review of both decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-70020 and 16-UI-70021. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-1290 and 2016-EAB-1291).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Haney Truck Line, Inc. employed claimant as a truck driver from May 15, 2010 to July 22, 2016.

(2) The employer's policies required that drivers inspect their cargo and carefully read the delivery instructions on their bills of lading before departing on a trip to ensure that they had the correct cargo and were delivering it to the correct location, and contact dispatch immediately if they discovered any discrepancies. Claimant received the employer's policies. The employer dispatched claimant using oral instructions from a dispatcher and written instructions through a computer on his truck. Claimant was not always dispatched to the ultimate destination of his cargo because cargo was sometimes relayed to an intermediate destination and delivered by another driver.

(3) On June 28, 2016, a dispatcher notified claimant that he was expected to pick up cargo at a warehouse in Springfield, Oregon and deliver it to Modesto, California. Claimant proceeded to the designated location in Springfield, where warehouse employees mistakenly loaded cargo destined for Twin Falls, Idaho into his truck and gave him a bill of lading. Claimant viewed the bill of lading and noticed it said the cargo's ultimate destination was Twin Falls, Idaho. Claimant assumed that he was relaying the cargo to Modesto so another driver could pick up the load and drive it to Twin Falls, and began driving towards Modesto without contacting the dispatcher.

(4) On June 29, 2016, while claimant was in transit to Modesto, warehouse management realized that its employees had loaded the wrong cargo into claimant's truck, and notified the employer. The employer's dispatcher then contacted claimant and told him that she thought he had the wrong cargo and was going to the wrong place. She determined that he was carrying cargo intended for Twin Falls and re-routed claimant to Twin Falls to deliver the cargo to its intended destination.

(5) On July 6, 2016, the employer suspended claimant to investigate and make a decision about his employment. The employer concluded that claimant had not checked the bill of lading or cargo as expected, and, had he checked, he should have noticed the discrepancy between the bill of lading and the dispatcher's instructions, and reported the discrepancy to the dispatcher before proceeding to Modesto. The employer was also concerned with claimant's responses to the employer's attempts to verify the cargo he was carrying, and comments he made during that time.

(6) On July 22, 2016, the employer discharged claimant for failing to contact the employer about the discrepancy between the bill of lading and the dispatcher's instructions before driving the cargo toward Modesto.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant was suspended and discharged, but not for misconduct.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Suspension. The employer suspended claimant to investigate the June 28th incident and decide what to do about his employment. Transcript at 10; Exhibit 1, "Record of Discussion" dated 7/06/2016. Although the events that occurred on June 28th and June 29th triggered the suspension, it appears that at the time of the suspension the employer had not yet ascertained whether or the extent to which claimant was responsible for those events or had violated its policies, and, as noted by the individual who suspended claimant, the suspension was going to last "until a decision was made on the issue," and claimant would be contacted "after the investigation of the event was complete." Exhibit 1, "Record of

Discussion" dated 7/06/2016. Because the suspension was for the convenience of the employer, and because it appears that the employer had not yet determined at the time of the suspension that claimant had engaged in wrongdoing or the extent to which he should be disciplined for any wrongdoing, we conclude that claimant's suspension was not for misconduct attributable to claimant. Claimant is not disqualified from receiving unemployment insurance benefits because of his suspension from work.

Discharge. There is no dispute in this case that claimant was dispatched orally and in writing to Modesto, warehouse employees mistakenly loaded the wrong cargo into claimant's truck, the bill of lading indicated that the ultimate destination of the cargo mistakenly loaded into his truck was Twin Falls, the employer's policies required claimant to notify the dispatcher immediately if he noticed discrepancies between the bill of lading and dispatch instructions, claimant did not contact the dispatcher about any discrepancies, and claimant drove the cargo hundreds of miles in the wrong direction before ultimately being re-routed to Twin Falls. In so doing, claimant violated the employer's policy requiring that he immediately report any discrepancies to the dispatcher.¹ For purposes of unemployment benefits, it is not enough that claimant violated a policy. Rather, any violation on claimant's part must have been willful or wantonly negligent, and not excusable as a good faith error.

Claimant testified that he understood at the time his truck was loaded in Springfield that the ultimate destination of the cargo was Twin Falls, and also understood that he had been dispatched to Modesto. Claimant did not contact the dispatcher, however, because he did not view the difference as a discrepancy. Claimant testified, "And I thought all along that that's what I had but that they were going to relay it. That was my thinking on the thing. That's why I was headed down there because she told me to go down there. I would go – I would always go where a dispatcher told me to go with the load." Transcript at 29; *see also* Transcript at 30. Claimant did not call the dispatcher "because several times, several times, I have brought a trailer to California, say, and they would give it to another driver to continue to load and give me a different load going somewhere. That's not unusual for any trucking company, especially with this company." Transcript at 31. In other words, claimant did not see the difference between his destination and the ultimate destination as a discrepancy he needed to report.

The employer's operations manager thought that it should "have been a huge red flag" to claimant that he was driving cargo intended for Idaho to California. *See* Transcript at 33. In essence, the operations manager's argument was that Modesto, California was 548 miles south of Springfield, Oregon and Twin Falls, Idaho was 565 miles to the east of Springfield, and the fact that claimant was carrying cargo hundreds of miles in the wrong direction should have alerted claimant that he either had the wrong cargo in his truck or was driving to the wrong destination.² The operations manager indicated that, while the

¹ We recognize that the employer alleged claimant's June 28th conduct involved other components, including insubordination, but when asked for the reason claimant was suspended the employer's safety director testified it was because he failed to examine his paperwork and took his load to the wrong destination. Transcript at 7. When asked by the ALJ for the reason claimant was discharged, the safety director indicated that it was because he had been disciplined before. Transcript at 11. Based on that evidence, it appears more likely than not that the cause of the employer's decision to discharge claimant was his alleged failure to examine paperwork and driving the Twin Falls cargo toward Modesto, so it is that conduct that we examine to determine whether the discharge was for misconduct. Only if we concluded that incident was a willful or wantonly negligent violation of the employer's expectations would we then examine claimant's other and/or prior conduct.

² We take notice of the distances between Springfield, Modesto and Twin Falls, which is generally cognizable information. *See e.g.* mapquest.com. Any party that objects to our doing so must submit such objection to this office in writing, setting

employer might well have had claimant relay cargo from Springfield to Modesto that was ultimately destined for points south of Modesto, the employer would never have routed cargo Springfield to Twin Falls via Modesto “and add a thousand miles to” the trip. Transcript at 32-33.

Although the operations manager established that the employer would not have relayed cargo in the way claimant thought it had, however, there is no dispute that the employer did relay cargo to locations other than its ultimate destination, and, likewise, there is no dispute that claimant regularly drove “relayed” cargo to locations other than its ultimate destination and, in the final instance, that he was dispatched orally and via his truck’s computer to Modesto. Nor is there evidence on this record suggesting that something in the way claimant was dispatched or on the bill of lading should have alerted claimant to the fact that the cargo was not being relayed to an intermediate destination. Because it was not out of the ordinary for claimant to relay cargo to places other than the cargo's ultimate destination, it was not unreasonable for claimant to conclude that he was expected to relay the cargo in this instance. Although that conclusion was, ultimately, wrong, the error was made in good faith, and good faith errors are not misconduct.

We therefore conclude that claimant’s conduct was not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decisions 16-UI-70020 and 16-UI-70021 are affirmed.

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

DATE of Service: December 12, 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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forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.