

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0129

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 74044). Claimant filed a timely request for hearing. On January 25, 2017, ALJ Meerdink conducted a hearing, and on January 25, 2017, issued Hearing Decision 17-UI-75507, affirming the administrative decision. On January 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From September 2, 2015 to December 6, 2016, PS Trucking employed claimant as a commercial truck driver.

(2) On March 30, 2016, claimant was making a delivery in downtown Cottage Grove, Oregon. Because claimant had difficulty maneuvering his truck, which was pulling a fully loaded trailer, into the small space in which he was expected to make his delivery, he inadvertently struck a parked vehicle. The employer gave claimant a written warning for his involvement in a preventable accident, and for violating company policy and the employer's safety rules. The warning advised claimant that any future incidents could result in disciplinary action up to and including discharge. Exhibit 3.

(3) On November 17, 2016, while driving on Oregon Route 42 in Winston, Oregon, claimant rear-ended a pickup truck, damaging the pickup's bumper and the right front corner of the employer's truck that claimant was driving. The employer suspended claimant for one day for this incident, asserting that claimant's actions violated company policies and safety rules, and constituted work of an unsatisfactory quality. The employer warned claimant that any future incidents could result in disciplinary action up to and including discharge. Exhibit 2.

(4) On December 2, 2016, the employer directed claimant to pick up the employer's trailer from a warehouse in Portland, Oregon. When claimant arrived at the warehouse, he was told that a previous driver had problems disengaging the trailer from the dock, and that the light, which indicated whether the mechanism that locked the trailer to the dock had released the trailer, was broken. Claimant photographed the broken light and sent the picture to his supervisor; the supervisor told claimant to get

the trailer out of the warehouse.¹ Audio recording at 20:20. Claimant also understood that the locking mechanism for the truck, which was somewhat unusual, was not functioning properly; the mechanism could not be repaired until the trailer was removed, however. Audio recording at 22:00. The only way that claimant could view the locking mechanism to see if it had released the trailer was by crawling under the truck, which was difficult to do. Audio recording at 21:23. Claimant decided to pull the trailer from the dock; when he did so, he discovered that the dock lock was not released. As a result, the trailer was damaged. The employer concluded that claimant's actions in removing the trailer while it was still locked to the dock violated its safety rules, and demonstrated carelessness and work of poor quality.

(5) On December 6, 2016, the employer discharged claimant because he had been involved in three preventable accidents over a one year period.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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 instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he was involved in three accidents the employer considered preventable over a one year period. The final instance that caused the employer to discharge claimant occurred on December 2, 2016, when claimant damaged the employer's trailer while picking it up from a warehouse. Claimant's conduct on that date is therefore the proximate cause of his discharge, and the initial focus of our misconduct analysis. Only if that conduct is found to be willful or wantonly negligent would we analyze claimant other accidents. The employer has the burden of proving that more likely than not, claimant's behavior on December 2 was willful or wantonly negligent. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On December 2, when claimant arrived at the warehouse to comply with the employer's directive to remove a trailer, he discovered numerous problems with the task he had been assigned. The light, which indicated whether the mechanism that locked the trailer to the warehouse dock had released the trailer,

¹ Claimant testified that he sent "Todd" a picture of the defective light, and that "Todd" directed him to "get [the truck] off the wall." Audio recording at 20:20. While the record does not establish who "Todd" was, we reasonably infer that he was one of the employer's supervisors who had authority to direct claimant's work.

was broken, and the locking mechanism itself was not functioning properly. Because of the position of the locking mechanism, it would have extremely difficult for claimant to view it to determine if it had released the trailer. In addition, the defective locking mechanism could not be fixed until the trailer was removed. When claimant sent a supervisor a picture of the defective light, the supervisor told him to get the trailer out. Based on this record, we conclude that claimant chose to proceed in removing the trailer because he believed that his supervisor had directed him to do so and because he believed that it was the appropriate way to resolve the problems posed by the defective equipment with which he was required to work. While claimant's judgment may have been faulty, and his decision to proceed in removing the trailer a mistake, his actions were motivated by a good faith desire to complete a task he had been assigned and not by a willful disregard of the employer's expectations. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant's conduct on December 2 was therefore not misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-75507 is set aside, as outlined above.

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

DATE of Service: February 17, 2017

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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