

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0200

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83527). Claimant filed a timely request for hearing. On February 8, 2017, ALJ Wyatt conducted a hearing, and on February 10, 2017, issued Hearing Decision 17-UI-76667, concluding the employer discharged claimant, but not for misconduct. On February 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) NW Navigator LLC, a transportation company, employed claimant as a commercial driver of motor coaches and buses from October 3, 2015 to October 30, 2016.

(2) The employer expected its drivers to drive safely and carefully and to be respectful and courteous to customers. Claimant was aware of the employer's expectations.

(3) Claimant had a history of multiple, essentially minor property damage accidents with the employer, some of which were unreported and unexplained at the time they occurred because, as claimant later explained to the employer, he was not aware that physical contact between vehicles had taken place. Despite his accident history, the employer maintained claimant's employment as a driver.

(4) On or about September 12, 2016, claimant drove a pool of a major client's employees to and from an athletic event in a luxury motor coach. Sometime after that event, the employer received a complaint from the client's representative that several of its employees had reported that claimant had been rude, had driven carelessly, including driving over and dragging a traffic cone for some time after it got caught between dual wheels, and had otherwise created an uncomfortable ride for the client's employees that left some of them "scared." Audio Record ~ 8:30 to 9:00. In fact, many of the passengers in the motor coach were intoxicated, and claimant had driven over a traffic cone, but at the direction of a police officer directing traffic. As claimant drove over the cone, it did become stuck between a set of dual wheels on the vehicle, but by the time claimant became aware of that fact, he had driven onto the freeway, and was unable to pull over and remove the cone until it was safe for him to do so. After removing the cone, he brought it back on the bus to the employer's yard.

(5) On October 30, 2016, without discussing the matter with claimant, the employer discharged claimant based on the complaint it had received from its client over concern about losing its business.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectations. Here, the employer failed to satisfy that evidentiary burden.

At hearing, the employer's owner testified that, despite claimant's multiple accidents, the "final incident" that triggered its decision to discharge claimant was the complaint it received from its client concerning claimant's behavior and driving during the course of the September 12, 2016 event. Audio Record ~ 8:30 to 9:00; 23:30 to 26:00. Accordingly, that incident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to drive carefully and safely and be respectful and courteous to passengers as a matter of common sense. If our decision were based only on the report the owner received from the client's representative, claimant violated that expectation on September 12 when he drove over a traffic cone and dragged it between wheels for a distance, was reportedly rude to his passengers and otherwise drove carelessly to the extent some passengers became "scared." However, we agree with the ALJ that the owner provided only hearsay evidence at hearing in support of the client's report and that his hearsay evidence conflicted with claimant's testimony. Hearing Decision 17-UI-76667 at 3. Claimant essentially denied that he had been rude, and although he admitted he drove over the traffic cone, his explanation for doing so and what happened subsequently was plausible: "On that particular day, one of the Seattle policemen actually directed me over the cone and [when I became aware] it was stuck in the duals...I was on the freeway...and I could not stop on the freeway until it was safe to do so...I pulled over, we got the cone out...I actually brought it on to the bus and brought it back to the yard...[and] on that run... most of the passengers were intoxicated..." Audio Record ~ 32:05 to 33:00.

The employer's witness did not dispute that many of the client's passengers that day were intoxicated, and if those individuals were the ones who made the complaints to the client, their assertions probably were not reliable. Absent a basis for concluding that claimant was not a credible witness, we gave his firsthand testimony under oath more weight than the employer's hearsay evidence, and therefore found facts in accordance with his testimony on matters in dispute. Accordingly, the evidence regarding whether claimant was consciously disrespectful or rude toward his passengers or consciously drove the

employer's vehicle in an unsafe or careless manner was no more than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. The employer failed to establish that on September 12, 2016, claimant consciously violated the employer's expectations for which he was discharged, and without such conscious conduct, i.e. willful or wanton negligence, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-76667 is affirmed.

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

DATE of Service: March 15, 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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