

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0230

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #91825). Claimant filed a timely request for hearing. On February 15, 2017, ALJ Vaughn conducted a hearing, and on February 16, 2017, issued Hearing Decision 17-UI-77157, concluding the employer discharged claimant, but not for misconduct. On February 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument and entire hearing record in reaching this decision.

FINDINGS OF FACT: (1) Ron Tonkin Toyota Inc. employed claimant as an express service technician from September 4, 2015 through October 24, 2016.

(2) The employer assigned its express service technicians to work in two-man teams, consisting of a primary technician (a "tech A") and a secondary technician (a "tech B"), and assignments were identified by the primary technician's employee number. Audio Record ~ 16:30 to 17:00. Claimant was a tech A. The employer expected a primary technician to monitor and supervise the work performed by the secondary technician. The employer expected all of its service technicians to perform services competently and professionally. Claimant was aware of the employer's expectations.

(3) On September 7, 2016, claimant's team performed a 15,000 mile service on a Toyota Sienna in which the maintenance light was on when it came in to the employer's shop. After the service was performed and the vehicle returned to the customer, the customer complained to the employer that the maintenance light was not reset and expressed doubt about the professionalism of the repair shop. The employer was unaware if claimant or his tech B had performed the service but assessed responsibility to claimant as the tech A, without discussing the matter with him.

(4) On September 30, 2016, an express oil and filter change service was performed by claimant's team on a Toyota 4Runner. However, the wrong oil filter was installed causing the customer to lose a

significant amount of oil on her way home. The customer returned the vehicle on October 5, and again the wrong filter was installed causing the same problem. On October 7, 2016, the vehicle was returned a second time following which the correct oil filter was installed. The service manager viewed video footage of the September 30 service and observed that the filter was installed by tech B with claimant not present during the service. Claimant was not at work on October 5, when the second incorrect filter was installed, and a different tech A installed the correct filter on October 7. The employer did not discuss what occurred during the 4Runner service with claimant.

(5) On October 24, 2016, the employer discharged claimant for “too many customer issues” based on the Sienna maintenance light complaint and 4Runner oil service complaints. Audio Record ~ 13:10 to 13:25.

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 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.

The employer discharged claimant for “too many customer issues” based on the complaints of the Sienna and 4Runner customers. However, the employer chose not to discharge claimant until after it received the customer complaint regarding the 4Runner oil service, presumably because any prior complaints, up to and including the one regarding the Sienna service, did not merit discharge. To limit the inquiry to relevant matters, the initial discharge analysis is focused on the incident that was the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. Accordingly, the initial analysis of whether claimant’s discharge disqualifies him from unemployment benefits is, therefore, properly limited to the service complaint regarding the Toyota 4Runner.

There was no dispute that claimant was not present in the installation bay when the initial September 30 oil filter installation was performed by his tech B or when the subsequent oil filter installation was performed on October 5, presumably also by his tech B. Nor was there any dispute that claimant was clocked in to work on September 30 but not on October 5, when he was not even at work. Accordingly, the record shows that claimant violated the employer’s expectation that he monitor and supervise the work performed by his secondary technician on September 30 only. However, where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or indifference to, the consequences of an act, or a failure to act, where the individual

acting or failing to act is conscious of his conduct and knew or should have known his conduct would or would probably result in violation of standards the employer had the right to expect of him.

Here, before discharging claimant, the service manager who made that decision did not even ask claimant why he was not present or where he was during the initial oil filter change when the wrong filter was installed. Although claimant speculated that he may have been at lunch, as it is, the record contains insufficient evidence that claimant's failure to monitor his tech B on the date in question was either willful or tantamount to conscious indifference to the employer's expectation or interests. Accordingly, the employer failed to meet its burden to show that claimant's September 30, 2016 error was the result of disqualifying misconduct.

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-77157 is affirmed.

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

DATE of Service: March 21, 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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