

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0718

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 120022). Claimant filed a timely request for hearing. On May 24, 2017, ALJ Meerdink conducted a hearing, and on May 25, 2017 issued Hearing Decision 17-UI-84245, reversing the Department's decision. On June 12, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record. Claimant did not explain why he was unable to offer this information during the hearing and did not otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information in claimant's written argument. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) United Community Action Network employed claimant as a bus driver for its public transit system from August 7, 2006 until March 22, 2017. As a condition of employment, claimant was required to hold a commercial driver's license.

(2) The employer expected claimant to drive safely at all times, including obeying all traffic laws. The employer also expected that claimant would not actively use or check his cell phone when the bus he was driving was in motion or in gear, would not drive without both hands on the wheel, would not drive without having his seatbelt on, and would not interfere with the intended functioning of safety equipment installed in the busses, including the onboard surveillance cameras. Claimant understood the employer's expectations.

(3) On July 23, 2010, the employer issued a disciplinary warning to claimant and suspended him from work for three days. The warning was based, among other things, on claimant having removed his hands from the steering wheel five times while the bus was moving, and having used or checked his personal cell phone eleven times while the bus was moving. Exhibit 1 at 32.

(4) In November 2015 and on March 15, 2016 and April 9, 2016, the employer had mandatory safety trainings for all of its drivers, including claimant. These trainings addressed defensive driving techniques. Part of the training notified drivers that using cell phones was prohibited when the bus was in motion and checking the cell phone screen was not allowed when the bus was in motion even if they did not talk on their phones. Transcript at 13; Exhibit 1 at 14-18.

(5) On March 17, 2017, claimant felt ill and called the employer to ask if he could be relieved from his shift and go home. The employer representative with whom claimant spoke asked him to start his shift and continue driving his route until she could find another driver to replace him. At around 10:45 a.m., claimant called the employer again from his personal cell phone inquiring about a relief driver. Shortly after, another driver took over for claimant.

(6) On March 17, 2017, after claimant was relieved, the employer reviewed videos taken by the surveillance cameras on claimant's bus for the days of March 9, March 16 and March 17, 2017. The employer observed that on March 17, claimant placed what appeared to be tape over the lens of the onboard surveillance camera directed at the driver and removed the tape after approximately four and one half hours. The employer also observed claimant had similarly obscured that same surveillance camera with tape for three and one half hours on March 16, 2017. On the days reviewed, the employer also observed that claimant had picked up and checked his cell phone while he was driving, had removed both of his hands from the steering wheel while the bus was in motion at speeds up to 38 miles per hour, had removed his hands from the steering wheel and flipped through and wrote on a clipboard while the bus was in motion at speeds up to 53 miles per hour, had removed his seatbelt for long periods of time while the bus was in motion and travelling at speeds up to 55 miles per hour, and had exceeded the speed limit on one city street by 14 miles per hour. Exhibit 1 at 2-4. On March 20, 2017, the employer suspended claimant while it further investigated the manner in which claimant had been driving the bus on recent days.

(7) On March 22, 2017, the employer met with claimant to discuss what it had observed on the videos from March 9, March 16 and March 17, 2017. Claimant did not dispute what the employer had discovered from viewing the videos, but stated that he did not consider those observations to be grounds for discharge. Claimant also stated he had obscured the lens of the surveillance camera because he was irritated at a supervisor and that he had been doing so for two weeks before the employer discovered what he had been doing. At that meeting, claimant did not contend that he had not placed tape over the camera lens or that grease from his hands was accidentally transferred to the camera lens when he attempted to clean the lens or that he had deliberately wiped his greasy hands on the lens out of pique at the supervisor.

(8) On March 22, 2017, after meeting with claimant, the employer discharged him for the behavior it had observed on the videos from March 9, 16 and 17, 2017.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While claimant testified repeatedly that he did not attend many of the mandatory training sessions for drivers that occurred during the summer months, he did not contend, with respect to the employer's specific allegations, that he was unaware he should not obscure the lenses of the onboard surveillance cameras, that he should keep both hands on the steering wheel when the bus was in motion and that he should wear his seatbelt at all times when the bus was moving. Claimant justified engaging in many of the behaviors to which the employer objected by contending he "was not the only one who did that," "everyone does it once in a while," "I don't know what you're talking about," and "if I'd known I was going to get fired for that, I never would have . . . done that." Transcript at 20, 36, 37. Assuming claimant held such beliefs, none of them excuse claimant's behaviors, particularly when claimant did not contend that he mistakenly thought the employer would condone them.

With respect to the employer's allegations about claimant having placed tape on the lens of the surveillance camera on his bus, claimant contended at hearing that he did not place tape on the camera lens but that some grease on his hands was transferred to the lens. Claimant first seemed to contend that the grease was inadvertently transferred to the camera lens when he tried to clean and polish the lens. Transcript at 31. While claimant asserted that his hands became greasy because he checked the bus's oil every day, it does not make sense that an amount of oil needed to obscure the camera lens would have been deposited on his hands merely from checking the oil level. However, claimant then changed his account of how he deposited grease on the camera lens and contended that he deliberately smeared the lens with grease that was on his hands because he was irritated over a recent interaction he had with the employer's transportation services supervisor. Transcript at 34. Assuming claimant's second account was accurate, it is not at all clear why claimant would decide to express displeasure with his supervisor by wiping grease or oil on a camera lens rather than in other way. As well, it is not plausible that on two days in succession, March 16 and 17, 2017, which happened to be days that the employer viewed the videos, claimant would somehow manage to accidentally smear grease from his hands on the same camera lens. Transcript at 31, 35, 36. Furthermore, although claimant conceded that he did not mention the grease explanation to the employer when the employer interviewed him on March 22, 2017 about its observations from the videos, his explanation that he was too upset to remember that the obstruction was grease and not tape did not make sense, particularly when the employer was focused on the seriousness of an intentional lens obstruction. Transcript at 27, 30, 32-33, 36. Overall, claimant's explanations about the cause of the lens obstructions were inconsistent, not likely, self-serving and contradicted by the employer's testimony as to its observations from the videos. On this record, the preponderance of the evidence shows that claimant deliberately placed something over the lens of the onboard surveillance camera directed at the driver on March 16 and 17, 2017. Claimant's behavior in doing so was a willful violation of the employer's standards.

With respect to the employer's contentions based on its review of the videos from the onboard camera, claimant conceded that he looked at, flipped through and made entries in a clipboard while the bus was in motion. Transcript at 20. Claimant did not dispute that when he was occupied with the clipboard the speeds at which he was driving the bus were as high as 53 miles per hour, nor did he dispute that he removed one or both hands from the steering wheel while looking at and writing on the clipboard. Exhibit 1 at 8. While claimant contended that he was pressured to complete work on the clipboard when he was driving because the employer did not authorize overtime, he did offer no explanation for why he was occupied with the clipboard at such high speeds or suggest that he took any steps to minimize the hazards of such an intentional driving distraction. Transcript at 20. Claimant's explanation that he was compelled to review and make entries on the clipboard while driving was not credible, nor was his implicit contention that he was justified in doing so under the circumstances and speeds at which he was observed. With respect to the employer's observations that claimant unbuckled his seatbelt for extended periods of time while driving, claimant adamantly testified that he only removed his belt when he was approaching a bus stop in preparation for making announcements to the riders or onboarding passengers. Transcript at 20-21. However, claimant's explanation is inapplicable to the employer's observations that claimant's seatbelt was observed unbuckled when the bus was traveling at speeds up to 55 miles per hour, which presumably did not occur immediately before reaching a bus stop. Exhibit 1 at 2. On this record, claimant's behavior in riffling through and writing on the clipboard and not wearing his seatbelt for extended periods of time while driving was at least a willful or wantonly negligent violation of the employer's standards.

Claimant's behaviors in obscuring the lens of the onboard camera on March 16 and 17, 2017, removing his hands from the steering wheel to use the clipboard and driving with an unbuckled seatbelt may not be excused as isolated instances of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior may only be considered an "isolated instance of poor judgement" if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. Because claimant's behavior at issue involved four willful or wantonly negligent violations of the employer's standards over three days, it was neither a single or infrequent event. Having failed to meet the threshold, claimant's behavior may not be excused as an isolated instance of poor judgement.

Nor was claimant's behavior at issue excusable as a good faith error under OAR 471-030-0038(3)(b). At no time during his testimony did claimant contend that he engaged in the behaviors he did because he mistakenly thought the employer would approve of or condone them, nor did he credibly assert that he believed his behaviors were consistent with the standards the employer expected of him. Claimant failed to meet the threshold for excusing his behavior as an good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits,

DECISION: Hearing Decision 17-UI-84245 is affirmed.

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

DATE of Service: July 18, 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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