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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0955

Affirmed
Requests to Reopen Granted
No Disqualification
Ineligible Weeks 2-17 and 3-17

PROCEDURAL HISTORY: On February 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 85717). On February 21, 2017, the Department served notice of an administrative decision (# 91253) concluding that claimant did not actively search for work from January 8 through January 21, 2017 (weeks 2-17 and 3-17). Claimant filed timely requests for hearing. On May 30, 2017, the Office of Administrative Hearings issued notice of hearings scheduled for June 13, 2017. On June 13, 2017, ALJ Meerdink issued Hearing Decisions 17-UI-85614, which dismissed claimant's hearing request on decision # 91253 for failure to appear, and 17-UI-85619, which dismissed claimant's request for hearing on decision # 85717 for failure to appear. Claimant filed timely requests to reopen. On July 24, 2017, ALJ Shoemake conducted hearings; the employer did not appear at these hearings. On July 25, 2017, ALJ Shoemake issued Hearing Decision 17-UI-88819, which granted claimant's request to reopen and concluded the employer discharged claimant, but not for misconduct; and Hearing Decision 17-UI-88822, which granted claimant's request to reopen and affirmed decision # 91253. On August 7, 2017, claimant filed an application for review of Hearing Decision 17-UI-88822 with the Employment Appeals Board (EAB). On August 8, 2017, the employer filed an application for review of Hearing Decision 17-UI-88819 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-88819 and 17-UI-88822. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0955 and 2016-EAB-0966).

Employer's Request to Present New Information. With its application for review, the employer included a letter in which it explained that it is "currently constructing two different Convenient [sic] stores at two different locations. On July 24, 2017 [the employer's office manager] was out of the office all day to attend these meetings." The employer's letter is considered a request to have EAB consider new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if the party presenting the information shows that it was prevented by circumstances beyond

the party's control from presenting the information at the hearing. The employer failed to explain why the testimony of the office manager was essential at the hearing on claimant's discharge, and also failed to explain why, if the office manager's testimony was essential, the employer was unable to request a postponement of the July 24 hearing. Without these details, we have no basis for concluding that the employer's failure to appear at the hearing resulted from circumstances beyond the employer's control. The employer's request to present new information is therefore denied.

Requests to Reopen: Based on a *de novo* review of the entire records in these cases, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant demonstrated good cause for reopening his hearings are **adopted.**

FINDINGS OF FACT: (1) Ron's Oil Company employed claimant as a truck driver from July 2016 until January 13, 2017.

(2) On January 7, 2017, claimant was scheduled to deliver fuel to a gas station. When claimant arrived at the gas station, he connected the apparatus necessary to place premium fuel from a compartment in his truck into the gas station tank designated for premium fuel, and filled the tank with premium fuel. Claimant then began the process needed to put regular fuel from a compartment in his truck into the gas station tank designated for regular fuel. Claimant erred, however, and put the regular fuel into the tank designated for premium fuel. Claimant noticed the problem, corrected the error, and notified one of the employer's managers what he had done. The manager told claimant to finish his shift and go home.

(3) On January 8 and 9, 2017, claimant did not work for the employer. On January 9, claimant's supervisor called claimant and told claimant that because of the employer's concern about the error claimant made on January 7, claimant could not return to work until he had a physical examination. Claimant scheduled a physical examination for January 16.

(4) On January 10, 2017, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for weeks 2-17 and 3-17. When he claimed benefits for these weeks, claimant indicated that he was on a temporary layoff from his employer due to a lack of work.

(5) On January 13, 2017, the employer discharged claimant for the fueling error he made on January 7.

(6) During the week of 2-17, claimant performed no work seeking activities other than contacting a former employer on January 13, 2017. The employer hired claimant, but claimant was unable to begin work for the new employer during week 2-17 or 3-17 because he was awaiting the results of a drug test and completing other paperwork. Claimant also performed no work seeking activities during week 3-17 because he already had a job.

CONCLUSION AND REASONS: The employer discharged claimant, but not for misconduct. Claimant failed to actively search for work during weeks 2-17 and 3-17 and is ineligible to receive unemployment benefits for those weeks.

Discharge. 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for an error he made on January 7, 2017: while delivering fuel to a gas station, he put regular fuel into a tank designated for premium fuel. As a matter of common sense, claimant understood that the employer expected him to exercise due care in delivering fuel to a gas station. The record fails to show, however, that claimant's error on July 7 resulted from wanton negligence, as defined by OAR 471-030-0038(1)(c), and not ordinary negligence, which is not misconduct. There is no evidence in the record to demonstrate that claimant consciously put regular fuel into the premium tank or that he consciously neglected to check the equipment he used to dispense the fuel into the tank. Based on this record, we find that claimant's failure to properly dispense the fuel was the result of an inadvertent mistake and not the result of a conscious action. Nor does the record show that claimant was indifferent to the consequences of his action; as soon as he discovered his error, he corrected it and notified the employer what had happened. We therefore conclude that the employer (that did not participate in the hearing), failed to meet its burden to establish that claimant engaged in misconduct by willfully or with wanton negligence violating the employer's expectations.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

Active Search for Work. To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). For purposes of ORS 657.155(1)(c), an individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). With limited exceptions, individuals are "required to conduct at least five work seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual." *Id.* An individual who is on a temporary layoff for four weeks or less with the individual's regular employer and had, as of the layoff date, been given a date to return to work within four weeks or less, is considered to have actively sought work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the layoff occurred. OAR 471-030-0036(5)(b).

During week 2-17 (January 8 through 14, 2017), claimant was off work for two days – January 8 and 9 – and discharged by the employer on January 13. Assuming without deciding that he was laid off on January 8 and 9, he did not qualify for the temporary layoff exemption from work seeking activities under OAR 471-030-0036(5)(b)(A) because the employer did not give him a date by which he could expect to return to work. Instead, the employer told him that he could return to work after he completed a physical examination. In addition, claimant knew that he was no longer on a layoff on January 13, the date on which the employer discharged him. Claimant was therefore required to perform five work

seeking activities during week 2-17. Because he performed only one work seeking activity during that week, he is ineligible to receive benefits for week 2-17.

Claimant also did not qualify for the temporary layoff exemption from work seeking activities during week 3-17 (January 15 through 21, 2017). As noted above, he knew or should have known he was no longer on layoff on January 13. Although claimant found a job on January 13, he did not work for his new employer during week 3-17 because, among other things, he was awaiting the results of a drug test. An individual is considered "unemployed" during any week during which "the individual performs no services and with respect to which no remuneration for services is paid or payable to the individual…" ORS 657.100(1). As an "unemployed" individual during week 3-17, claimant was required to perform five work seeking activities during that week; because he failed to do so, he is ineligible to receive benefits for week 3-17.

DECISION: Hearing Decisions 17-UI-88819 and 17-UI-88822 are affirmed.

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

DATE of Service: <u>August 22, 2017</u>

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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